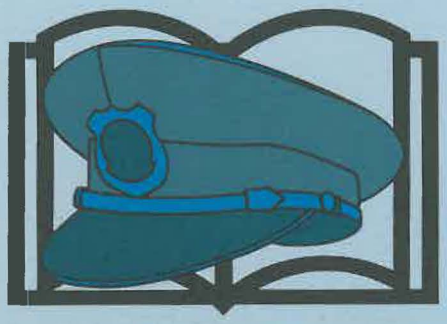

ISSUES OF INTEREST

VOLUME NO. 23

Justice Institute of British Columbia
POLICE ACADEMY
4180 West 4th Avenue, Vancouver, British Columbia, V6R 4J5

ISSUES OF INTEREST

VOLUME NO. 23

Written by John M. Post

May 1986

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RE:

ISSUES OF INTEREST
VOLUME NO. 23

Please insert this NOTE in Volume 23 before page 1.

PLEASE NOTE:

An error was made when compiling Volume No. 23.

PLEASE READ "Comment", Page 26 & 27, in conjunction with the Strachen Case, Page 2 - 6.

CORRECTION

On page 20 of Volume 22 of this publication, the names of the accused are misspelled. The correct name is Rodenbush and not Rosenbush.

CHARTER - RIGHT TO COUNSEL - EXCLUSIONARY RULE

Regina v. Strachen, B. C. Court of Appeal, Vancouver CA003192, January 1986

Four police officers executed a search warrant for the accused's apartment. The accused was served with a copy of the warrant and very shortly thereafter placed under arrest for possession of marihuana. The accused had said: "I'm going to call my lawyer". He was stopped from doing so by the officers and was promised to be given an opportunity to phone when "matters are under control". Police had explained at trial that the accused was the registered owner of restricted weapons and they suspected that other persons were in the apartment. The search (which resulted in the seizure of marihuana, scales, plastic baggies, and a huge number of bills, lasted 90 minutes. The accused was taken to the police station and was there given an opportunity to phone his lawyer.

Although there was no causal connection between the infringement of the accused's right to counsel without delay and the finding of the marihuana and the paraphernalia, the trial judge had disallowed the finding of the narcotic into evidence. He held there was a flagrant denial of a right and allowing the evidence in these circumstances would bring the administration of justice into disrepute. An acquittal followed and the Crown appealed.

Before the B. C. Court of Appeal the Crown argued that the exclusion of the evidence was an error on the part of the trial judge. There simply was no connection between the infringement of the accused's right and the finding of the evidence. After all, s. 24(2) of the Charter states that consideration for exclusion only comes into play when "... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter...".

Defence counsel argued that the Supreme Court of Canada had made it clear in their reasons for judgement in the Therens* case that where the infringement is under s. 10(b) of the Charter (to retain and instruct counsel without delay and to be informed of that right) the exclusion is automatic whether or not there is the "causal link" between the infringement and the obtaining of the evidence.

The B. C. Court of Appeal (which already responded to the Therens decision in two previous cases**) did, in this case, an elaborate

* Regina v. Therens, 18 C.C.C. (3d) 481. Page 1, Volume 21 of this publication.

** See the Rodenbush and Rodenbush and Gladstone cases on page 20 of Volume 22 of this publication.

explanation of its views of the exclusionary rule and the trend it appears to take in Canadian cases.

The Therens decision does settle a number of important issues:

1. Someone under demand to give samples of breath, is "detained";

2. S. 24(2) of the Charter is the only source of power for the judiciary to exclude evidence;

3. S. 235 of the Criminal Code is not "a limit prescribed by law" that allows an infringement of a Charter right (s. 1 of the Charter states that the rights and freedoms in the Charter are guaranteed "subject only to such reasonable limits prescribed by law...").

Some say that the Therens decision created a strict exclusionary rule, whether or not there is a causal connection between the infringement of a right and the obtaining of the evidence considered for exclusion if the infringement is one under the "right to counsel" provision in the Charter (S. 10(b) Charter). Others go even further and claim that the Therens case justifies exclusion of evidence against an accused regardless which right or freedom had been infringed. There are more theories floating around yet, but these will do to understand what the B. C. Court of Appeal was addressing.

Long before the Therens case, the B. C. Court of Appeal had addressed itself to the exclusionary rule*. Although they have now modified their views slightly, it seems to insist that those cases in principle have survived the Therens decision.

In any event the Court of Appeal responded to a number of questions about s. 24(2) of the Charter:

1. In what circumstances can it apply?

2. Where can it apply; how is it to be applied?

They found that Therens decision, in respect to the exclusionary rule, had caused "perplexity and difficulty" on account of the widespread opinions of the justices who authorized or joined in various reasons for judgement.

The Court of Appeal reasoned that the Therens case was not an appropriate one to compare with this Strachan case, although in both there was a failure to comply with the "right to counsel" clause in

* Collins, Cohen and Hamill cases - see Volumes 12 and 17 of this publication.

the Charter. Therens was by statute obliged to provide evidence within the time limits set by section 235 of the Criminal Code. Strachan was under no obligation to do anything. Therefore the Court of Appeal held there was a distinction between the application of s. 24(2) of the Charter in cases with a "special nature of the evidence" and those involving "ordinary evidence".

The Court concluded that the Therens decision by the Supreme Court of Canada had therefore "no conclusive bearing on the issues in this case".

In respect to the Crown's argument that there was no causal connection between the obtaining of the evidence and the infringement of Strachan's right, the B. C. Court of Appeal agreed with defence counsel that the relationship between the obtaining of the evidence and the infringement need not be one of causation. In other words it need not be a matter of "cause and effect" before the evidence may be considered for exclusion. However, if there is no such connection between the infringement and the obtaining of the evidence, "it will generally not be possible to find that the admission of the evidence would bring the administration of justice into disrepute". The "manner" by which the evidence is obtained (language of s. 24(2) Charter) need not be the very act that amounts to the infringement or the very means by which the evidence was obtained. In this case, the Court observed, the denial by the officers to allow Strachan to use the telephone, had no causal connection to what the search produced. Had he been allowed the call to his lawyer the search would have been conducted regardless of what the lawyer would have advised Strachan. There was a violation of the accused's right and despite the fact that it had no causal connection with the finding of the evidence, it triggered consideration for the exclusion of the evidence found by the search. The main consideration of course, would be in regards to the admission of the evidence bringing the administration of justice into disrepute. Firstly the Court held that the violation "was towards the less serious end of the scale". Secondly the B. C. Court of Appeal held that if evidence was obtained in connection with an infringement of an accused's right, then admission of that evidence does not mean that the Court condones or approves of the rights violation. The sole consideration must be the disrepute this admission may bring upon the administration of justice. Therefore the notion of condonation would bring automatic exclusion "and render meaningless the qualifying words in s. 24(2)" of the Charter. In this case the counsel for the defence argued that there had been an infringement and therefore exclusion must follow. That view the B. C. Court of Appeal rejected.

The B. C. Court of Appeal then gave, again, their opinion on the meaning of our exclusionary rule. It had already reasoned that the decision by the Supreme Court of Canada in Therens did <u>not</u> create an automatic or strict exclusionary rule. In this case it seemed to take

issue with its counterpart in Ontario which decided in 1985* that a Mr. Duguay had been arbitrarily detained and that evidence against him should therefore be excluded. The B. C. Court of Appeal said that the Duguay decision went a long way towards automatic exclusion. The B.C. Court disagreed with their Ontario brothers and saw what is happening in Canada as a "dichotomy" on the issue of the exclusionary rule. It left no doubt where it stood on the matter. The B.C. Court of Appeal summed up that many see the exclusionary rule as a means to recompense an accused for the violation of his right; to deter police from further breaches; to deprive the police of the fruits of their victory; to even up an uneven contest; to indirectly acquit a "violated" accused to vindicate him or her; etc.. If that is the view that will gain the upperhand in the current dispute over the exclusionary rule, the Charter, as well as the administration of justice will be brought into disrepute concluded the court.

The Court reminded that the general public is firmly of the belief that the Charter only protects those who violate the rights and dignity of others; that police unavoidably will be persuaded to "live down" to its new reputation resulting from constant denigration brought about by Charter arguments. It seems the B. C. Court of Appeal warns that eventually the justice system will cripple itself to the extent that it can no longer function as it is intended to. This, of course, if the system insists on an automatic and strict exclusionary rule.

The B. C. Court of Appeal used the Ontario Court of Appeal decision in Duguay as an example to demonstrate that a strict exclusionary rule is overkill and fails to be remedial.

Duguay had been fingerprinted while he was "arbitrarily" detained. The fingerprint evidence which proved him to be the perpetrator of the crime alleged against him was excluded "automatically". The Ontario Justices had taken guidance from an American case** in which a Mr. Davis, who was a black youth, had allegedly raped an 86 year old white woman. His fingerprints connected him with the crime but the evidence was excluded. He and his young friends had been unlawfully detained when the prints had been taken.

The B. C. Court of Appeal questioned the remedial applicability of following the Mississippi case or any of the other U.S. cases which preceded it in the twenties and thirties. In 1985, what did the Ontario citizen Mr. Duguay have, in terms of sociological and justice perspectives, in common with his black fellow men in the deep south some decades ago. Lynching approaches, brutality, vigilante tactics and the like were used against the black citizens at that time and the Courts had a duty to use the U.S. constitution to remedy those intollerable practices. The fact that the accused was identified as "black" in the trial judge's reasons for judgement and the victim

* R. v. Duguay 45 C.R. (3d) 140
** Davis v. Mississippi, 394 U.S. 720 (1969)

as "white", was more than a Freudian slip thought the B. C. Court of Appeal. The U.S. Supreme Court had said it would exclude the fingerprint evidence to clearly indicate that the police misconduct against the black citizens would no longer be tollerated. In other words, there was something quite serious to be remedied in Mississippi in 1969. What, in comparison, needed to be remedied in Ontario in 1985 to justify the same extreme measure? Where, in Mississippi a mountain lion needed to be destroyed, we in Ontario only had need to get rid of a bothersome mosquito. A shotgun was used in the deep south; therefore was the same type of weapon justified for the Ontario hunt, our B. C. Court of Appeal seems to wonder.

The B. C. Court of Appeal also reviewed a number of other U.S. cases including the famous Miranda ruling by the U. S. Supreme Court. The B. C. Court of Appeal concluded that in view of the distinction in Constitutions and sociological problems, applying the U. S. exclusionary rule in Canada

> "... would be akin to administering chemotherapy to a patient who complains of a lingering cold It may do nothing for the cold but is bound to make him sick enough that he will no longer care".

Furthermore, in respect to a need for our exclusionary rule being strict and automatic, the Court said:

> "Another fundamental difference between our situation and that of the U.S. is that the Charter, by language of s. 24(2) clearly intends that each case will be considered in relation to its particular circumstances. It does not require the adoption of the clumsy and draconian device of an automatic exclusionary rule...".

If we continue the current trend towards such a rule, the Court warned, we will end up with "a rigid and unbalanced situation".

Getting back to Mr. Strachan and his appeal, who claimed that his rights had been violated and that, consequently, the search police conducted of his home was unlawful, the B. C. Court of Appeal held that the search was lawful.

Crown's appeal allowed.
Acquittal set aside.
New trial ordered.

* * * * *

EFFECTING AN ARREST IN A HOME - WARRANTS - TRESPASS

The Queen and Landry, Supreme Court of Canada, February 1986

A citizen saw the accused and a companion attempting to steal a car. He phoned police, gave them the description of the duo and pointed out an apartment building they had entered. The men lived in the apartment block and police spotted them through a window. Police entered the apartment and effected an arrest for the attempt to steal the car. The accused Landry had put up a fight and was charged with assaulting a peace officer. The main issue during the ensuing trial was whether the assaulted officer was in the lawful performance of his duty.

The accused was acquitted at trial. This verdict was upheld by the Ontario Court of Appeal* and the Crown took their arguments to the Supreme Court of Canada which took nearly a year to render reasons for judgement.

The legal propriety of arresting a person in a dwelling house and the matter of trespass to effect the arrest are not new questions to law. Perhaps, before dealing with the reasons for judgement in this Landry case, it may be of assistance to briefly review the legal history of this issue.

The matter of an authority entering a home against the wishes of the dweller had already been dealt with by the author of the Bible book Deuteronomy (24:10). It was also recognized as a dictum in law in 1604 in the historical Semayne's case** when the English courts held:

> "The house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose..."

Our Courts have interpreted this dictum and applied it in many different situations and scenarios. In 1974 our Supreme Court of Canada considered an appeal where police in B.C. forced their way into a dwelling to arrest a person who they had reasonable and probable grounds to believe was harboured in that house. Quebec warrants were outstanding for him.

The occupant of the house sued police for trespass and the Supreme

* R. v. Landry, Volume 8, page 22 of this publication
** 5 Co. Rep. 19a 77 E.R. 194

Court of Canada* said about this "castle" and "fortress":

> "But there are occasions when the interest of a private individual in the security of his house must yield to the public interest in the process to be executed. The criminal is not immune from arrest in his own home nor in the home of his friends".

The Supreme Court of Canada in that case also reiterated that forced entry by police is only justified if done by judicial licence (warrants), when in fresh pursuit of a person they have the authority to arrest, or for the purpose of saving someone from death or injury. In certain cases, prevention of the destruction of evidence can justify forced entry. Although circumstances in respect to urgency may alter these prerequisites to a forced entry, the officer is compelled to firstly knock or ring the doorbell, then identify him or herself, and state the lawful reason for entry.

In 1983, the County Court of Kootenay applied this Supreme Court of Canada decision in a case** where a police officer was assaulted when he attempted to effect, in a home, the arrest of a man who two hours previously had attacked a woman and had threatened her with a knife. The occupants of the house were the man's friends and none of the requisite conditions summed up above existed. The officer did not have a warrant for the arrest of the man. This made the case distinct in circumstances from Eccles v. Bourque. Hence the Court held that the officer was not in the lawful performance of his duty and the accused were acquitted. Needless to say that this is not the only case that gave this interpretation to the Supreme Court of Canada's 1974 judgement. This case is simply a good example of how the Supreme Court of Canada's decision was interpreted and applied.

Now the very question of law raised in that Kootenay case has been put to the Supreme Court of Canada in this Landry case where two would-be thieves had simply gone home and police became aware of their whereabouts from information given by a citizen and from personal observation. Police did not have a judicial licence of any kind but relied totally on the provisions of s. 450 of the Criminal Code in that they had reasonable and probable grounds to believe that the accused had committed an indictable offence. The sole question was whether the officer when assaulted by Landry, (when he (the officer) entered the home) was in the lawful performance of his duty.

All nine justices of our nation's supreme court considered this matter and three concurring and one dissenting judgements resulted. The

* Eccles v. Bourque, 19 C.C.C. (2d) 129 (1974). Also see Volume 8, page 23 of this publication.

** R. v. Fiddler, Fiddler and King, Volume 15, page 24 of this publication.

Court said (8 to 1) that a police officer in circumstances as these is authorized to enter a home to effect an arrest without warrant. It, in essence, said: "... a police officer can make an arrest on private premises without a warrant in the execution of his duty for the purposes of s. 450(1)(a) C.C.". The common law is clear and compelling said the Court:

> "... there should be no place which gives an offender sanctuary from arrest".

The Court did not make a distinction between an arrest with a warrant or without a warrant in these circumstances. Consequently, it concluded that since there is no provision for a warrant to search for a person, a fugitive could find complete and permanent protection from the law in a private home. This, the Court held was unacceptable and it ruled that the officer who was assaulted by Landry was in the lawful performance of his duty.

The Court reasoned that if it would hold that a warrant for arrest should firstly be obtained..."valuable time and probably the offender, will be lost.

To reach the conclusion it did, the Court answered all of the following questions with "Yes":

1. Was the offence for which the officer attempted to effect the arrest, an indictable offence?;

2. (a) Had the person they wanted to arrest committed the offence; or (b) did the police have reasonable and probable grounds to believe that that person had committed or was about to commit the indictable offence?;
3. Did police have reasonable and probable grounds for believing that the person they were authorized to arrest was in the premises?; and

4. Was proper announcements made before entry?

Crown's Appeal Allowed.
Acquittal set aside.
New trial ordered.

Comment: The Supreme Court of Canada can reverse its own previous rulings. In view of the interpretation all Courts have given to the (1974) judgement in Eccles v. Bourque one is inclined to believe that that is what the Supreme Court of Canada did. However, something dispells that notion. The B. C. Court of Appeal, when it dealt with

the Eccles v. Bourque case, held that the Quebec warrants outstanding for the person Mr. Eccles was supposed to be harboring, were not endorsed by a B. C. Judge. Therefore the officers were, in essence, effecting an arrest without a warrant and did not have reasonable and probable grounds for believing that there was a warrant in force within the territorial jurisdiction in which the person they attempted to arrest was found (s. 450(1)(c) C.C.). Due to their knowledge of the warrants and their content they were authorized to arrest as it gave the officers reasonable and probable grounds to believe the man had committed an indictable offence. The Supreme Court of Canada (which found for the officers in that civil dispute) claims now that it did agree with the B. C. Court of Appeal that there were no valid warrants to be executed in B. C. The Supreme Court of Canada implies that it said then what it is saying now, that the arrest without a warrant on grounds as explained above, is within the lawful performance of a peace officer's duty. In other words all the requirements for an entry in a private home as they are summed up in this case are a reiteration of what the Court said in 1974. The Court expressed surprise that the "Courts below", had given their Eccles judgement the interpretation that a warrant to arrest has anything to do with entering private premises. Said the Court:

> "I am unable, in any event, to fathom how a warrant for arrest can be perceived as a solution to the question of police authority to trespass incidental to arrest. The warrant is a judicial authorization to arrest and contains no express power to trespass. .... There is no good reason therefore, why the presence or absence of a warrant of arrest should have any bearing on the right to make an arrest in one particular place or another".

* * * * *

ATTEMPTED BREAK AND ENTER WITH INTENT TO COMMIT INDICTABLE OFFENCE
ERRONEOUS FINDING OF FACTS - SUFFICIENCY OF EVIDENCE

Schuldt and The Queen, Supreme Court of Canada, December 1985 (17810)

A silent alarm alerted police in early morning hours, that something was amiss at a gun shop. When two patrol cars arrived at the back of the shop two men were seen running away in opposite directions. The one carrying a tire iron was never found but an iron matching the marks and paint of the shop door (which had not given way to the prying) was located along the path the fugitive was seen to have taken. The other man who ran from the back door was the accused. Besides having been positively identified, his shoes matched the prints in the snow at the door. Upon arrest the accused made "only one statement of any consequence" which was admitted in evidence at his trial. When he asked for the use of the phone, the accused explained he wanted to phone home. The officers inquired if he wanted to phone his brother perhaps. The accused had replied: "He's a faster runner".

The trial judge acquitted the accused and the Manitoba Court of Appeal quashed the acquittal and ordered a new trial. The accused appealed this Court of Appeal decision to the Supreme Court of Canada.

The trial and appeal process revealed some interesting aspects about a case like this. Some of the legal hurdles to be overcome by the Crown when it alleges "attempt" are as follows:

1. It must be proved that the evidence relied on proves more than mere preparation to commit the attempted indictable offence;

2. The evidence must show that the accused had directly forced the door or was a party to the offence according to s. 21 C.C.;

3. That what was done to the door was done with the intent to break and enter into the gun shop; and

4. That he intended to commit an indictable offence once inside.

Section 306(2)(a) C.C. states that it may be presumed that a person who has broken and entered a place, had, in the absence of evidence to the contrary, intent to commit an indictable offence while inside.

Needless to say that this presumption was of no assistance to the Crown in this case. It has to prove without the assistance of any presumption that the accused was a party to the tampering with the door, that the tampering was an attempt to gain entry, and that the accused intended to commit an indictable offence once inside. The

trial judge concluded that the Crown had proved nothing other than that the accused was and intended to be in the back alley by the door of the gun shop. This was indeed suspicious, but not proof of any of the above mentioned ingredients to the allegation against the accused.

The matter argued before the Supreme Court of Canada was whether the Crown could appeal the acquittal. The Crown can only appeal an acquittal if the grounds for the appeal involve a question of law alone*. In this case the trial judge had found as a fact that there was no evidence to prove the intent to break and enter or to commit an indictable offence once inside. The Supreme Court of Canada held that where some burden of proof is not upon the accused (which there would have been had section 306(2)(c) C.C. applied) "there is always some evidence upon which to make a finding of fact favourable to the accused, and such a finding, if in error, is an error of fact". Therefore the Crown could not appeal.

Accused's appeal allowed.
Acquittal restored.

Note: Whether there is any evidence to find a fact is a question of law; if there is sufficient evidence is a question of fact.

When at the close of the Crown's case it is submitted that there is no evidence against the accused, a question of law is raised and if the motion goes down in defeat, a defence can be presented. If such a motion is one challenging the sufficiency of evidence in regards to what was alleged, a question of fact is raised and that then is the defence. In other words the accused is then blocked from presenting evidence in his defence.

Another example of the distinction between a point of fact and one of law is demonstrated when the Court is composed of a judge and a jury. Whether evidence is capable of concluding a certain fact is a question of law and for the judge to decide. However, making that conclusion is a question of fact and a matter for the jury.

* * * * *

* Section 605(1)(a) Criminal Code of Canada

DISTINCTION BETWEEN FIRST AND SECOND DEGREE MURDER - MEANING OF "PLANNED AND DELIBERATE" AND "DELIBERATE"

Re Talbot and The Queen 21 C.C.C. (2d) 390
Ontario High Court of Justice

The woman the accused lived with had announced she was leaving him. He loved her deeply and had told her that he could not survive without her. On the morning the woman was to leave, the accused had pleaded (to no avail) with her in the bathroom while she was putting on her make-up. He left the bathroom only to return shortly after with a knife. She asked him if he intended to take her life. He had replied to have no choice as he could not live without her. "He put the point of the knife below her ribs" and for a while they stood there looking at each other. He, while kissing her and saying good-bye, had thrusted the knife in. He had then guided her to the bathtub where she died. The accused had covered the deceased up, cleaned the bathroom and went to police where he calmly told officers what happened. In his statement to police the accused had said that in relation to the action he took, he "had started to think about it last night" when they had discussed her intention to leave.

The accused had been committed to stand trial for first degree murder. The accused argued that the Crown's evidence failed to prove that the murder was "planned and deliberate" and he applied that his committal for trial be quashed. It was understood that if the accused's application was successful he would stand trial for second degree murder.

The Court relied on two similar dramatic cases for guidance in this application. One* was decided by the Saskatchewan Court of Appeal. Two hunters in a party of three, got into an argument. The third hunter, who was a witness to it all, told how both men stood with their shot-guns in hand. The one promised to put his gun down if the other would do the same. Apparently this arrangement did not come off as the defendant had blasted the deceased in the shoulder. Bleeding profusely the deceased ran away then stopped, turned around yelling and screaming at the defendant. While telling the deceased to "shut-up" he had reloaded his gun. The deceased ran again and the accused let go another two blasts from some distance. Some pellets hit the back of the deceased. The deceased sat down with his knees pulled up and his head resting on his knees. The defendant then had placed the barrel of his shotgun up against the back of the deceased's head and fired.

* R. v. Smith (1979) 51 C.C.C. (2d) 381. Saskatchewan Court of Appeal.

The Saskatchewan Court of Appeal had held that the killing was deliberate but not planned and conviction for first degree murder had been set aside.

In the second case the Ontario Court of Appeal had reviewed a case where the male accused followed his female victim for 25 miles. He continuously rammed the woman's car while each were travelling down the highway. Finally he had forced his victim into a ditch. She did escape from the car and ran a short distance with the accused right on her heels. When he caught up to her he slashed her throat causing her death. Despite the very deliberate aspects of this heinous crime, there was no evidence that the murder was planned. A conviction of second degree murder was substituted for the conviction of first degree murder.

The evidence in these cases was as consistent with the killings being planned as it was consistent with them being deliberate but not planned. The Ontario High Court of Justice in this Talbot case held, like the other Courts, that "planned" must retain its ordinary meaning.

For instance one may think about making a trip. That thinking, held the Court, is a step preceding any planning of that trip.

Committed for first degree murder quashed. Accused to stand trial for second degree murder.

* * * * *

* R. v. Rueger, 17 C.C.C. (3d) 347. Ontario Court of Appeal.

"A POLICE OFFICER ACTING IN THE COURSE OF HIS DUTIES"

Regina v. Prevost and Lepage - 22 C.C.C. (3d) 225
Ontario High Court of Justice

Two constables took their one-hour lunch break at 1:00 a.m. in a coffee shop. They were members of the O.P.P. in full uniform, who had complied with all requirements set by their employer to take the break. The Crown had also produced in evidence the collective agreement to show the officers' entitlement to the break.

The two accused walked up to the officers and from 5 feet away Prevost levelled a shotgun at one of them and fired. The officer was killed instantly.

The accused were charged with first degree murder by virtue of section 214(4)(a) C.C. which stipulates that murder is first degree murder when the victim is a police officer acting in the course of his duty. The accused who admittedly shot and killed the officer argued that the officer, at the time of the murder, was not acting in the course of his duty. The "act" the constable carried out was eating lunch, which has nothing to do with his duties. There is nothing in any statute, common law or in the constable's job description that touches on the taking of a break or eating lunch, argued defence counsel.

Crown counsel submitted that unless a police officer "abuses his legal powers or engages in a frolic of his own" he is throughout his tour of duty acting in the course of his duty. A policeman having lunch while on shift may not be executing his duty (as used in the sections dealing with obstruction and assault of a peace officer) but he is in the course of his duties said the prosecutor.

Defence counsel had argued that the word "acting" is key in the phrase "acting in the course of his dutes". "Course" is the kernel word responded the Court. A police officer on shift acts in the course of his duties as long as he acts as he is authorized to act. The Court said:

> "In other words, 'to act in the course of his duties' relates to the notion of the state of being or status of a police officer during his tour of duty or when reacting to a breach of the peace committed outside his tour of duty, rather than to the requirement to execute specific duties".

This includes being on a lunch or coffee break said the Court but not while visiting "his paramour or a bootlegger to indulge in his personal gratifications". Consequently the Court declined to direct the jury that it could not convict the accused for first degree murder.

* * * * *

REVERSED ONUS PROVISIONS AND THE CHARTER
SECTION 8 NARCOTICS CONTROL ACT

Regina v. Oakes, Supreme Court of Canada, February 1986.

The accused was found in possession of eight one-gram vials of hashish oil. He was charged with possession for the purpose of trafficking. After having proved possession, the Crown relied on s. 8 of the Narcotics Control Act for the accused to establish that he was not in possession for the purpose of trafficking. As he failed to call evidence, the provincial court judge found that the possession was for the purpose of trafficking.

The accused brought a motion to challenge the constitutional validity of s. 8 N.C.A. He argued that the provision, creating a reversed onus in that an accused person must establish his innocence in regards to a major aspect of the allegation against him, places an unreasonable limit on the guarantee of the right to be presumed innocent until proven guilty*. The presumption of innocence means that the burden of proof is on the Crown and that the accused has a right to remain silent. S. 8 N.C.A. flies in the face of both ingredients to the presumption of innocence argued the accused.

The Ontario Court of Appeal agreed with the accused and the Crown took this constitutional question to the Supreme Court of Canada which agreed with the findings of the Ontario Court of Appeal. The Court exercised its obligations under s. 52(1) of the Charter and ruled that s. 8 N.C.A., due to its unconstitutional provisions, is of no force or effect.

Comment: This ruling by the Supreme Court of Canada is not surprising. Even in pre-Charter days the validity of s. 8 N.C.A. was questioned and tested quite fequently. Of all reverse onus clauses in our statutes, this seemed the most flagrant one. Charter or not, the section would eventually have been repealed or be ruled inoperable.

What is interesting is what the Supreme Court of Canada did say and did not say about "reverse-onus" provisions. In our statutes and at common law there are provisions which allow a fact to be inferred if certain prerequisite fundamental facts have been proven. These provisions are commonly known as rebuttable presumptions. Some examples are the "care or control" presumption (s. 237(1)(a) C.C.); the presumption that goods obtained by a N.S.F. cheque are obtained by a false pretence unless the accused had reasonable grounds for believing there were sufficient funds to his credit (s. 320(4) C.C.);

* R. v. Burge, Volume 22, page 16 of this publication.

the presumption of knowledge that the possessor of a car or car parts were stolen if the serial number has been obliterated (312(2) and (3) C.C.); the presumption that a person intended to commit an indictable offence in the place he broke into; etc.. Usually, if the presumption provides for an excuse, exemption, some proviso, or qualification, then the burden of proving that such condition negating that the presumption exists, is on the accused.

Rebuttable presumptions have been attacked as being contrary to the principles of justice prior to the Charter, but since the Charter came into effect the attacks have increased. Some of these presumptions have not survived the "Charter test". For instance the provision that a person who possesses counterfeit money is guilty of that indictable offence, unless he proves some justification or excuse for that possession, was ruled to be unconstitutional by the County Court of Yale*. The Charter test is quite simple and known as the "rational connection test". The proven fundamental facts must have the presumed fact as a probable consequence. In regards to the counterfeit money, one can receive such a bill in the normal course of his business. Knowledge or criminal uttering are simply not probable consequences of possession. Needless to say that s. 410 C.C. is not a simple rebuttable presumption but a reversed-onus provision.

Those who oppose rebuttable presumptions may well claim victory on account of this Oakes ruling by the Supreme Court of Canada. However, that claim may well be premature. The Supreme Court specifically referred to provisions where an accused must disprove a presumed fact "which is an important element of the offence in question". In respect to the "rational connection test" the Supreme Court of Canada said that it does not survive the interpretation of the presumption of innocence if the rebuttable presumption is used "to justify a reversed onus provision". In other words the Court referred to rebuttable presumptions containing a reverse onus provision only.

Nearly all reversed onus clauses contain a provision to presume a fact. The Supreme Court of Canada observed that it may well be rational and probable that the presumed fact is a consequence of the basic proven fact. However, to say that the presumed fact is beyond a reasonable doubt is going too far. Therefore, "the appropriate stage for invoking the rational connection test is under s. 1 of the Charter", said the Court. That implies that the "section 1 test" includes the rational connection test".

The Court held that the onus to show that a limitation of any right or freedom (a rebuttable presumption of course is a limitation of the right to be presumed innocent until proven guilty) is reasonable and demonstrably justified is on the party seeking to uphold the limitation. That, of course, is in nearly all cases the Crown. The

* R. v. Burge, Volume 22, page 16 of this publication.

burden of proof is "a preponderance of probabilities" which must be rigorously applied emphasized the Court.

Some of the criteria to show a justification for a limitation of a right or freedom are:

1. the standard of the test must be high to ensure that the objective served by the limitation is not trivial or totally out of harmony with principles of a free and democratic society;

2. the objective of the limitation must relate to substantial and pressing social concerns;

3. the limitation must be fair, not arbitrary, achieve its objective and impair the right or freedom "as little as possible"; and

4. there must be a proportional relationship between the effects of the limitation of a right or freedom and the objective the limitation serves. In other words, the more noxious the limitation the more important the objective must be.

As to the objectives of s. 8 N.C.A., the Court held that they were in respect to a very serious and pressing social concern.

It would, in "certain cases" pass the "s. 1 test". However the Court held that s. 8 N.C.A. would fail the "rational connection test". There simply was no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking". Possession of a small quantity of narcotics does not support the inference of trafficking, said the Court.

* * * * *

SAFETY HELMETS

Regina v. Houniet, County Court of Westminster, New Westminster Registry No. X015396, November, 1985.

The accused was found riding his motorcycle without a safety helmet and was acquitted of the offence Section 218 of the B.C. Motor Vehicle Act seems to create for such an event. The Crown appealed the acquittal.

The Provincial Court judge had found that the law was so ambiguous that no one can determine with any certainty if a safety helmet complies with the regulations under the Motor Vehicle Act. Such inability violates the Charter of Rights and Freedoms.

Evidence showed that there are many safety helmets on the market. Some meet partially the standards of the five criteria set out in the schedule to the B. C. Regulations 318/80. Others do not meet the standards at all, while some comply totally. Extensive testing was required to determine this. The standards in the Regulations are, in essence, no more than a bibliography on the topic of protective head gear. These publications are not readily, if at all, available and one nearly requires to be an expert to make sure a helmet complies with all five standards referred to in the schedule. In other words, one is required to comply with a law that is simply not available. To convict anyone on the basis of law which leaves citizens unable to determine what that law is, is contrary to the "principles of fundamental justice".

Crown's appeal dismissed.
Acquittal upheld.

* * * * *

CARE AND CONTROL

Regina v. Godin, The County Court of Cariboo, Williams Lake, CC85-1496, October 1985.

The accused parked his truck, got into a friend's vehicle, and went with him to a pub where he drank for several hours. The accused's wife came to the pub and told him to make sure he phoned her for a ride when it came time to go home. When that time came, the accused arranged for his wife to meet him at his truck. Before she arrived the police spotted the truck and found the accused behind the wheel, his feet near the pedals and his torso and head on the passenger's seat. The engine was running.

In view of the Toews' decision by the Supreme Court of Canada* the Provincial Court Judge had acquitted the accused of impaired care and control. Although it had been proven beyond a reasonable doubt that the accused occupied the driver's seat, he had shown on a balance of probabilities that he had no intention to drive. He had used his car as a warm place to wait for his wife and not as a means of transportation. The Crown appealed this acquittal.

The County Court Judge summed up the law as follows:

> "A person who does not use or intend to use his motor vehicle as a motor vehicle but rather as something else such as a bedroom in Toews or a party room in Ford** cannot be convicted of having the care and control of a motor vehicle under s. 234(1) or s. 236(1) unless he uses or intends to use the motor vehicle or its fittings and equipment or his conduct in relation to the motor vehicle is such as would involve a risk of putting the vehicle in motion so that it could become dangerous".

(Emphasis is mine)

Although the accused had no intentions of using the truck as a motor vehicle he had used its fittings and equipment. That, considering the condition he was in, was dangerous in the circumstances.

Crown's appeal allowed.
Accused convicted of care and control while impaired by alcohol.

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* Volume 22 - page 24 of this publication.
** Volume 5 - page 23 of this publication.

"FLAGRANT VIOLATION OF CHARTER RIGHTS"

Regina v. Cornelius, Supreme Court of British Columbia, Victoria Registry No. 843026, September 1985

In Saskatchewan, police officers failed to inform a Mr. Therens (who was under demand to give samples of his breath) that he had a right to counsel. The Supreme Court of Canada[1] considered that to be a "flagrant" violation of Mr. Therens' Charter rights and held that the certificate of analyses was consequentially not admissible in evidence.

Considering the law in 1983 and the Supreme Court of Canada's own views on "detention and demand"[2] in pre Charter days, the word "flagrant" seemed unbefitting to describe the infringement of Therens' rights. At least two Courts of superior jurisdiction in B.C. have now searched for the reason for our highest Court calling the infringement a "flagrant" one.

The B.C. Court of Appeal in R. v. Gladstone[3] found, by reading the reasons for judgement by the Saskatchewan Court of Appeal[4] when it dealt with the Therens case, that there had been a directive from the provincial Attorney General directly after the Charter coming into effect that police were to consider a person they made a demand of for samples of breath, to be detained. The non compliance with that directive by the constable caused the Supreme Court of Canada to consider the infringement of Therens' right to be flagrant, concluded the B. C. Court of Appeal.

In British Columbia there was no directive to police on the status of a person under demand to give breath samples. This publication which is distributed in the B. C. police community did report on the rulings by the Courts on this issue. For instance a decision by a Vancouver County Court Judge [5] in March of 1983, and several other cases, are examples of the Courts then holding that a demand did not trigger detention.

In this Cornelius case, the arresting officer testified (prior to the Therens decision by the Supreme Court of Canada) that the accused had voluntarily got into the police car in response to the demand. He had occupied the passenger side of the front seat and had not been restrained in any way. The officer had not informed the accused of his right to counsel. When he was examined on this point he testified

1 R. v. Therens, Volume 21, page 1 of this publication
2 Chromiak v. The Queen 49 C.C.C. (2d) 257 or Volume 1, page 3 of this publication
3 R. v. Gladstone, Volume 22, page 22 of this publication
4 R. v. Therens, (1983) 33 C.R. (3d) 204
5 R. v. Morrison, Volume 12, page 16, of this publication

that he had read in the Justice Institute Bulletin (assumed to be this publication) that in the circumstances as they were in this case it was not necessary to make the accused aware of his rights. The trial judge, as had others in that era, held that the accused had not been detained. However, when the appeal by the accused of his conviction of "over 80 mlg." reached the B.C. Supreme Court the Therens decision by the Supreme Court of Canada had left by then no doubt that a person under demand to supply breath samples is ipso facto detained. That means that the Charter included this in "detention" from the day it came into effect (April 17, 1982).

The Crown argued that the material by the Justice Institute the officer read was totally different in nature than a directive from the Attorney General. The publication simply made the officer aware of various court rulings on the issue and indeed they seemed to support his opinion on whether he was obliged to make the accused aware of his right to counsel. All this ads up to, argued the Crown, is that the officer, though he may have infringed the accused's rights, did not do so "flagrantly".

The Supreme Court Justice expressed some surprise on how the Supreme Court of Canada came to the conclusion that the Saskatchewan officer who made the demand of Mr. Therens had infringed his rights "flagrantly". The word flagrant means: "glaring, notorious, scandalous". However, the Court held that despite the "ingenious" submissions by the Crown, they could not be accepted for the following reasons:

1. the Therens case does not say that the infringement caused the evidence to be excluded because it was "flagrantly" committed;

2. an inferrence of innocence on the part of the officer in favour of the Crown would be wrong "unless it is the only reasonable inference to be drawn from the proven facts";

3. other inferences than those by the officer, may be drawn from the articles the officer read; and

4. any doubt in this matter must be resolved in favour of the accused.

Accused acquitted.

* * * * *

ASSAULT TO MAKE GOOD AN ESCAPE FROM A LAWFUL ARREST OR FROM BEING ASSAULTED?

Regina v. Fisher, County Court of Westminster, New Westminster Registry X015794, November 1985.

The accused, a young man, was an invitee in a recreational center. He ran afoul of the life guards as he refused to obey them when they attempted to enforce the safety rules. The accused was forcibly ejected but returned to protest the treatment he received. This approach did not settle matters and the accused was about to be ejected again when he picked up a bench and pushed it through a window. A lady, an employee of the center, witnessed all of this and she blocked the exit for which the accused was headed with the life-guards in pursuit. The accused slapped the woman in the face, pushed her out of the way (which resulted in some tumbling) and jumped over her when she fell. He made good his escape but was identified and convicted of assault. The conviction was appealed as was the one for mischief in regard to the window.

The accused said that the "bench through the window" was the result of accidentally running into the bench. He said he never touched the woman, but had merely ran ahead of her to get to the exit door. Furthermore, even if he had struck the woman it was done in self defence. After all, she was blocking the exit, his only escape route to get away from two hostile life guards who were chasing him.

The defence brought to the Court's attention a case* where a father had entered the home where his runaway daughter was harboured. When he wanted to leave with the girl, the female occupant of the house tried to block his way. She was assaulted and the father made good his exit. When the father appealed his conviction for assault he was acquitted. The New Brunswick Court of Appeal held that while there is a law that empowers preventing a person to protect his or her home from trespassers, there is no law that empowers a trespasser from leaving the home. The father had committed no offence and had not breached the peace. He was declared a trespasser and in compliance he wanted to leave.

That New Brunswick case was held to be distinct from this Fisher case, where the accused had committed an indictable offence in the recreational center. The lady employee had a right if not a duty to prevent the accused's escape, held the Court.

* Shannon v. The Queen (1966) 49 C.R. 291

The accused then argued that the woman employee had consented to the assault by taking the position she did, thereby delivering him to the hostile lifeguards in pursuit.

The Court rejected this notion completely and held that though a person may defend himself with impunity from aggressors, that does not include assaulting a third party. If there was necessity to assault the woman in these circumstances to get away from the aggressors, it could only be reflected in the sentence and not the verdict.

The Court also rejected that the "bench through the window" was accidental, hence...

both appeals dismissed.
Convictions upheld.

* * * * *

CARE OR CONTROL

Regina v. Darbyson, County Court of Cariboo Prince George 1750/84, November 1985.

The accused failed to find his friends at the rendezvous for a planned fishing trip. He drove back home in the dark over a very lightly travelled road. About half way a tire on his car went flat and as he had no jack the accused could not change the tire. The accused decided to stay with the car until daylight when he hoped some other motorist would come by and lend him a jack. The accused re-entered the car and started drinking from his supply of beer he had brought for the fishing expedition.

Some time later the accused fell asleep while sitting in the driver's seat. He had slumped over the console and his upper torso was suspended over the passenger's side of the front seat. The key was in the ignition and in the accessory position, apparently so the radio would work.

Needless to say that the Toews* decision by the Supreme Court of Canada was brought to the Court's attention. The position of the ignition key was identical in Toews. The position of the accused's was different in that Toews was in a sleeping bag across the front seat. The accused was on the side of a highway while Toews was on private property (please note the offence of impaired driving and over 80 mlg. have no geographical boundaries). Another distinction is that Toews entered his truck after drinking while the accused was sober when he got in his car and presumably when he placed the ignition key in the position in which it was found.

The County Court Judge, dealing with the accused's appeal in respect to his conviction for "impaired while in care or control" held that the differences in circumstances in these two cases made this case distinct from Toews. In regards to the key, he observed that it would have taken very little for the drunken accused to accidentally start the engine and put the car in motion.

Accused's appeal dismissed.
Conviction upheld.

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* R. v. Toews, Volume 22, page 24 of this publication.

Comment: The B. C. Court of Appeal touched on an issue that should interest the police community. As time evolves so do principles, theories, and certain fundamentals. Recently Professor DeLloyd J. Guth of the U.B.C. law school and Richard Vogel, Q.C. (previous Deputy Attorney General for B.C.) authored a paper "The Canadian Constable: An Endangered Species?" They point out that a constable is not an agent of the state, or the extended arm of the executive branch of government. He or she is a surrogate citizen (quite distinct from his or her U.S. counterpart) who is a civilian constable with the prime task to prevent crime. What is in essence the duty of every citizen, is carried out by this "substitute person" who has been robed with a special task to meet this community responsibility. There are several recent cases* in which the judiciary have reiterated this fact. Possibly the Law Reform Commission paper, "Legal Status of the Police" has reminded Courts of and revived the idea that constables are citizens and civilian agents of the community and not the state. Although in certain roles it could be fairly said that a constable is an agent of the state (especially of the RCMP in certain circumstances) it cannot be said appropriately "when applied to peace officers engaged in the ordinary duties of enforcing the law in the community". The B. C. Court of Appeal reviewed the reputation of the Canadian police and pretty well concluded that all the recent tongue lashing by our judiciary since the Charter came into effect, is unjustified. Priority ought to be given to protection against law breaking instead of concerning themselves (the judiciary) with changing police behaviour, implied the Court.

Although the Court did not broach this topic, the theory that the Canadian constable is not an agent of the state, opens an interesting argument on the question: "Does the Charter apply to the constable?"

The Alberta Court of Queen's Bench** held that the Charter applies to and is binding on all of us and not only to the Governments and their agents. When law is enacted it does not apply to the immune Crown unless it specifically includes itself as being subject to that law. The Charter, in section 32, states that it applies to the senior levels of government which, of course, includes their agents. The Alberta superior court held that section 32 was to include the Crown being subject to the Charter and not to make it exclusively applicable to the governments.

If the Supreme Court of Canada agrees with the Alberta Court at some future date, then the Charter will apply to everyone. In other words

* Hayes v. Thompson and Bell (1986) 44 C.R. (3d) 316.
Dedman v. The Queen, see page 17 of Volume 22 of this publication.

** R. v. Lerke, see page 12 of Volume 19 of this publication. Also 13 C.C.C. (3d) 515.

one person could seek remedy against a fellow citizen who violated his Charter rights or freedoms. If, however, the Charter exclusively applies to the governments and their agents, then, if constables acting as peace officers are not such agent, the Charter would not apply to constables.

This, I'm sure, would not be palatable to the Courts or the community and our Court will probably reason that for the purpose of the Charter, police are embraced in the meaning of section 32.

* * * * *

REFUSING TO GIVE SECOND BREATH SAMPLE

Regina v. Hurst, County Court of Vancouver, No. CC851187, March 1986

"The accused saw the results of his first blow and was simply scared to give another one". These were, in essence, the comments of the trial judge when he convicted the accused of failure to give samples of his breath. The accused had testified that he had high blood pressure and had experienced a dizzy spell when he had given the first sample. He had simply not blown hard enough for the second sample despite the fact that 5 or 6 attempts were made after which the accused predicted to the officers that he would probably suffer a heart attack if he made any more attempts. As the accused "appeared clammy, his complexion... kind of cold ... perspiry (sic) kind of look to him" the officers had not pressed the matter any further.

The accused appealed his conviction claiming that the trial judge had failed to give evidence supporting a "reasonble excuse" inadequate consideration.

The County Court Judge declined to overturn the trial judge's findings. The matter was one of credibility of witnesses and that of the accused. Though the trial judge did, in his reasons, not explore the matter of credibility, that does not mean that he did not give that matter due consideration, said the Court.

Accused's appeal dismissed
Conviction upheld.

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B. C. POLICE ACT - CRIMINAL CODE GEOGRAPHICAL JURISDICTION OF A MUNICIPAL CONSTABLE

Regina v. Simmons, County Court of Vancouver, Registry CC850765, February 1986.

A municipal constable observed the accused driving in the municipality in which he had jurisdiction. As the driving was abnormal the constable activated the equipment on his car to stop the accused. The accused did stop, but not until he had crossed the municipal boundary into a jurisdiction policed by the R.C.M. Police. All the right things were said to the accused to make demands, warn him, and make him aware of his rights. He was then arrested and taken to the officer's municipal police station. The R.C.M. Police in the jurisdiction in which the accused was stopped were not notified.

The accused had refused to give any samples of his breath and was convicted accordingly. He appealed that conviction arguing that the municipal constable was outside his jurisdiction. To validate the demand for samples of breath, the officer should have complied with section 30(5) of the B. C. Police Act. The relevant portion of s. 30 states that a municipal constable has, "while he is on duty in the course of his employment, the jurisdiction throughout the Province of a provincial constable". However, when he exercises his jurisdiction outside his municipality he must contact the force having jurisdiction there beforehand, "but in any case promptly after exercising his jurisdiction, notify that provincial or municipal force". This the officer had not done and therefore his demand for samples of breath was invalid claimed the defence. Strict compliance with the provisions of section 30 is the only means to extend jurisdiction beyond the municipal boundaries. If the Courts do not give that section his suggested interpretation, police officers "roving amongst various municipal territories" making arbitrary arrests would result, argued defence counsel.

The Court considered s. 30 Police Act to consist of "good policy considerations" which encourages local police forces to work in co-operation with one another. By advance contact with the other force having to exercise jurisdiction outside the territory for which the constable is appointed, may be avoided. Letting them know afterwards is simply a matter of protocol and courtesy. Section 30 of the Police Act was not created to prevent roving gestapo or arbitrary arrests. The Criminal and Common Law do not tolerate the chaos defence counsel describes, held the Court. The validity of any arrest will have to withstand the test of s. 450 of the Criminal Code, regardless where or by what constable it is made. The arrest made in this case withstood that test.

The Court added that in the circumstances leading up to the arrest, it is clear that not only did the officer effect a proper and lawful arrest, but in addition he was authorized by the common law provision known as fresh pursuit. The accused had been pursued by the constable from well within his jurisdictional territory into a neighbouring one.

Accused's appeal dismissed.
Conviction upheld.

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DISMISSAL OF A MUNICIPAL CONSTABLE IN BRITISH COLUMBIA

Michael Carpenter and Vancouver Police Board, Supreme Court of B.C., Vancouver Registry A831134, December 1985.

Investigation revealed that the petitioner (Carpenter) was involved in the movement of stolen goods. In November of 1981, being a municipal constable at the time, he was suspended without pay and four days later the petitioner was called before the Chief Constable and was informed of the results of the investigation. At that time his 14 years of service ended as his Chief considered his conduct so serious that it did constitute a fundamental breach and repudiation of the petitioner's contract of employment as a police officer. Consequently the petitioner's service with the Police Force was terminated. In 1983 the petitioner challenged the dismissal under the Judicial Review Procedure Act claiming that such termination of office could only be affected by procedures under the Police Act and its regulation. The Police Board claimed the Supreme Court of the province had no jurisdiction to review the dismissal. The Supreme Court held it did and the Board took the matter to the B. C. Court of Appeal which upheld the Supreme Court decision in respect to jurisdiction. The Board was denied leave to appeal to the Supreme Court of Canada and hence the B. C. Supreme Court dealt in the fall of 1985 with the petitioner pleading for a declaration:

(a) that the only powers to dismiss a municipal constable for matters constituting a disciplinary default are contained in the Police Act and appended Regulations;

(b) that he should be reinstated with full pay and benefits retroactive to the date that he was fired by the Chief Constable; and

(c) that the period since the firing was a period of suspension which entitles him to pay and benefits back to the date of his dismissal.

The petitioner had, on the very day of his dismissal, also been charged criminally with breach of trust and possession of stolen property. In response to the firing the Chief was asked why, in view of the presumption of innocence, the suspension could not be extended until the Courts had decided on the matter of guilt or innocence. The Chief was also requested to say by what authority he was purporting to act, why the particulars of the complaint against the petitioner were not divulged, and why he was not given the opportunity to be confronted by his accusers. The Chief Constable had declined to respond to these questions.

The bargaining unit of the Police Force grieved the petitioner's dismissal. Correspondence dated December 1981 between that Unit and the Chief Constable indicate that the latter agreed to a stay of proceedings in respect to the determination of the grievance. Thirteen months later, January 1983, the petitioner was tried for the aforementioned criminal allegations before a judge and jury and was acquitted. The Crown did not appeal and three months after the acquittal, the petition in question was filed. This petition was subject to the reviews and appeals outlined above, and now nearly four years later, the way was clear for the Supreme Court of the province to deal with the merits of the petition.

The Supreme Court Justice found as a fact that the Chief Constable, the petitioner, and the Union had all viewed the dismissal for (reasons amounting to a disciplinary default) as something within the ambit of the collective agreement. This was clear from statements, correspondence, and affidavits. The petition clearly indicated that Carpenter (the petitioner) had changed his mind on this. He claimed that the Collective Agreement does not govern this matter but the Police Act and its Regulations. This view was found to be correct when the Police Board challenged the jurisdiction of the Court to deal with the petition. Hence this Supreme Court Justice held that since the dismissal of the petitioner had not been in compliance with the Police Act Regulations, he had been deprived of his rights under those Regulations and was entitled to the relief he sought.

Having so determined, the Court had a discretion what relief to grant the petitioner. In pursuading the Justice not to grant anything, the Police Board submitted that the petitioner's delay in filing the petition (17 months after his dismissal) had resulted in a prejudice to the Board (the respondent). Cases show a precedent that:

> "Delay, coupled with prejudice to a respondent, may increase the disinclination to grant such discretionary relief".

Furthermore, argued the Police Board, considering the questions the petitioner and his counsel put to the Chief Constable at the time the former was fired, clearly indicated awareness on the part of the petitioner that there was a non-compliance with the Police Act Regulations. They specifically asked the Chief why he had not followed the procedures set out in those Regulations. Instead of immediately filing this petition, they went the route of grievance. In other words, if the petitioner is of the opinion that this judicial review is the appropriate process, he should have gone that route immediately. Now the Police Board would have to pay the petitioner for all the time he (and not the Police Board) had wasted should the Court grant the relief he asked for. The relief was available to him then as "it is now" and the Court agreed that there were no compelling reasons for "the long delay in instituting these proceedings".

In reviewing the matter of prejudice to the Board, the Justice observed that the Chief Constable had included in his reasons for dismissal of the petitioner that he had "been involved in a relationship with certain people in this city whose behaviour is of a criminal nature...". The Court reasoned that the criminal charges alleged against the petitioner did not include that relationship which the Court considered to amount to a disciplinary default. Therefore, it had been open to the Chief to allege the criminal behaviour and the criminal association against the petitioner. Then when the alleged criminal behaviour was pursued in the criminal courts, the disciplinary proceedings could have been adjourned sine die (undetermined date). The acquittal would have prevented continuation of the criminal behaviour as a disciplinary default (s. 10(3) Police (Discipline) Regulations) but the disciplinary proceedings could have continued with the criminal association allegation*.

Had the petitioner proceeded in a timely manner after his dismissal, then the Chief Constable could have commenced disciplinary proceedings before the limitation of action clause in the Regulations prevented this. Therefore, the Board was prejudiced by the petitioner's delay.

Then, the Supreme Court considered the dictum that the extraordinary remedy the petitioner sought, is in jeopardy when there is failure to follow and take advantage of an ordinary remedy available to him. Did Carpenter, the petitioner, have such an ordinary remedy available to him when he was summarily dismissed?

The Court examined section 38 of the Discipline Regulations and found that one of the grounds for an appeal to the Police Board is deprivation of a fair trial in accordance with principles set out in the Police Act. Section 36 of the Regulations says that where the presiding officer is a Chief Constable there is a right to appeal to the Board and following that appeal, if still aggrieved, there is a right for further appeal to the Police Commission. The petitioner indicated immediately upon his dismissal, by means of the questions he had put to the Chief Constable that he had been deprived of a fair trial. This caused the Supreme Court Justice to say:

> "I conclude that under the Regulations there was an alternative remedy available to the petitioner to pursue. He failed to do so... In views of the petitioner's delay in filing this petition and in view of there being an adequate alternative remedy available to the petitioner which he failed to pursue, I exercise my discretion and refuse to grant the relief sought herein".

Carpenter's petition was dismissed.

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* The Court seems to refer to discreditable conduct.

"RECENT COMPLAINT"

Regina v. George, 23 C.C.C. 3d) 42
British Columbia Court of Appeal.

The accused, a 17 year old man, lived with his relatives who had a 14 year old daughter, a cousin to the accused. She was described by the Court as a shy, naive, docile child who had been protected by her parents from the world and things like television. One night the family had been out and all returned home in one car. The accused had his arm around the girl's shoulders and he had run his hand up her legs without any resistance. After everyone had gone to bed the accused went to his cousin's bedroom. He took off her panties and had sexual as well as anal intercourse with her. The girl had not consented but had submitted to the accused's advances for fear of being ridiculed by the family if she created a disturbance. When the accused later in the morning came back for seconds, she told him to leave and he did.

On her way to school that day the girl called in on her life's confidante, her grandmother. She did not get much of a chance to tell anything as her grandmother was not feeling well. On the complainant's way home her grandmother listened and the girl told what had happened between her and her cousin, the accused. This resulted in the parents and the grandmother confronting the accused. He confessed and apologized. Subsequent medical examination of the girl confirmed intercourse and also that she had been a virgin up until this incident. When the police were called the accused went to a friend's house to seek haven. A priest advised the accused to go to the police and confess. The accused complied with that advice and was convicted of sexual assault and appealed.

One of the grounds for appeal was that the Crown had adduced evidence from the grandmother, the parents, and the doctor of what had happened the night before. This is hearsay evidence which used to be an exemption to the hearsay rule, known as "recent complaint". Since s. 246.5 C.C. came into effect this exemption is abrogated*. Prior to the abrogation "recent complaint" evidence was always looked for and in some cases, nearly an essential part of the Crown's case. For those who are unfamiliar with this evidence rule a brief explanation may be of assistance to understand the position taken by the defence in this case. "Recent complaint" stems from the belief that a person

* Bill C-127, Proclaimed January 4, 1983.

(mostly women) who claimed to have been attacked and who did not at the first possible opportunity raise a "hue and cry", had perhaps consented to it or had fabricated all or parts of her version of the incident. The indignation, it was reasoned, should have led to an irresistable urge to let it be known to confidants what had happened. That "first complaint" (which had to be recent in relation to the incident) was admissible in evidence as an exception to the hearsay rule to show a consistency of conduct on the part of the complainant and to probe that such a complaint was made. (Note that the evidence of the complaint was not proof of the truth of its content, but only served to prove that it was made). The absence of a "recent complaint" compelled judges to instruct juries that such absence had to be considered in determining the complainant's credibility. In other words the "recent complaint" rule was a result of a defense ploy to attack the credibility of a complainant if there was no such complaint. Actually section 246.5 C.C. does not seem to prevent either party to the criminal dispute to ask the question of the complainant if she complained to anyone without adducing the content of the complaint. In this case it seems that the complainant had "blurted" out evidence of the complaints she lodged to her confidant and it went from there.

This case is perhaps a prime example how we will fare in cases of sexual assaults without "recent complaint". Defence counsel did like his professional forefathers had done. He suggested that the girl had consented, but changed her mind and had therefore complained to her grandmother (this was the "blurted" evidence). Then to rebut this allegation of fabrication all of it had come out, which seems improper in view of s. 246.5 C.C. However, there was another complication. The accused had made a confession to the family before the police were involved. What he was confronted with is what the family had learned from the "recent complaint" by the girl. The confession would be incomplete and of no value unless it was known what the defendant was accused of. Without that it would be like only reading the utterances of one party to a dialogue.

To complicate matters further, the girl's father had said to the accused: "Martin did you force yourself on Crystal sexually"? The accused's answer was in the affirmative. The trial judge had instructed the jury (presumably as this question was derived from a recent complaint) that they were not to consider the answer as evidence to prove the truth of its content.

Needing Solomon's wisdom to get out of this, the B. C. Court of Appeal applied the provision of s. 613(1)(b)(iii) C.C. which states that where an appeal court finds that an error has been made, but that the error had not caused an injustice or altered an appropriate verdict, then it can uphold that verdict despite the error.

The Court of Appeal arrived at this conclusion as there was no reasonable doubt that the girl had not consented and that the accused did not have an honest mistaken belief that she was consenting. Also, the accused's testimony had been like a confession. He clearly admitted to know there was no consent and he knew that at the time of the sexual assault.

Appeal dismissed.
Conviction upheld.

Comment: The transcripts of Senate Committee hearings on Bill C-127 are revealing in regards to the quantum changes that Bill made to our criminal law in 1983. However, I have not found any explanation why "recent complaint" was abrogated. Unless we also abrogate the defence right to raise the issue of credibility due to lack of "hue and cry" or a change of heart on the part of the complainant since the sexual encounter, the one-sided prohibition will create unnatural trial scenarios. One could argue that s. 246.5 C.C. applies equally to both parties in a criminal dispute. However, it seems doubtful that since consent and honest mistaken belief in respect to consent are so closely related to issues touching on "recent complaint" that this prohibition clause can be complied with without causing an unfair imbalance at the detriment of either party.

Another interesting point is that s. 246.5 only abrogates the recent complaint rule in respect to sexual assaults. At one time it was assumed to apply to rape (as it then was) and female victims only. Later it was extended to all persons and in regards to any offence that could or did cause hysteria to a victim. Evidence of "recent complaint" was admitted in cases of unlawful confinement, kidnapping and indecent assault on a male person*. In view of the specific wording of s. 246.5 C.C. there seems nothing to prevent application of this old common law rule of evidence in cases other than sexual assault.

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* See Regina v. Fromme 31 C.C.C. (2d) 332.

SEARCH WARRANT TO CATCH TWO BIRDS WITH ONE STONE

Regina v. Hart et. al., Supreme Court of British Columbia, Victoria, B.C. No. 36411, C., November 1985.

A Justice of the Peace issued a search warrant under s. 10 of the Narcotic Control Act for a home. "There was a proper purpose for the issuance of this warrant" said the Supreme Court Justice who entertained the motion by the defence that the warrant be quashed. However, the warrant was granted for an eight day period. This was to accommodate the apprehension of a suspect who was expected to be in "the area of the premises" within that period. The second reason, of course, was not contained in the information although the Justice of the Peace had been made aware of it. This all had surfaced during a preliminary hearing.

Defence counsel submitted that all this amounted to the search warrant to be granted for two reasons, one of which was only lawful.

The Supreme Court Justice agreed. He held that the home had been exposed to search for 8 days while the reason for this extended period had nothing to do with the grounds on which the warrant may be granted. Also the reasons were unconnected with the occupant of the home. That was in the circumstances unreasonable. Therefore the warrant was issued on grounds contrary to the "unreasonable search" provision contained in the Charter.

Search Warrant ordered quashed.

Note: The justice deliberately did not order what had to happen to the material seized by means of the warrant. (These items were illegal to possess). He said that that should be decided under the Charter provision to exclude evidence when and if a trial is held. He also emphasized that issuing a warrant extended over a longer period of time is not improper if done for a legitimate reason. In this case however, there were other legal means for police to attain their second objective (the apprehension of a wanted person).

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CONCOCTED EVIDENCE BY THE ACCUSED

Regina v. Webster, B. C. Court of Appeal, CA 004232, January 1986

The accused had been convicted of breaking into a suite next door to his residence and having committed theft therein. The evidence was circumstantial and showed that the accused was familiar with the suite as he had been a visitor there. The accused also knew the occupant worked nightshift. Furthermore a jar of coins was among the stolen property and a trail of coins from beneath the window through which the perpetrator entered and made his exit led right to the accused's back door. A fingerprint of the accused was found on the window in a position consistent with where one would have to put his hands to open the window from the outside.

When the accused was questioned by police the following day he denied the offence and said the only time he was on the property next door was when he played with his dog.

At his trial the accused testified how he and a friend had been shooting a pellet gun on the day before the offence. One pellet had ricocheted and he (the accused) had climbed up on the window ledge to examine the glass for possible damage. In the process he had touched the window. His friend also testified in support of the accused's testimony. However, there had been a number of direct inconsistencies between the testimony of the two. The trial judge had concluded that the accused's evidence was concocted. He further held that the concocted evidence was an item of circumstantial evidence and took this into account when he considered the verdict. The concocted explanation by the accused demonstrated a consciousness of guilt, the judge had said.

The accused's counsel argued before the Court of Appeal that when evidence has been rejected as being untruthful, it should be treated as if it had not been given. Consequently the accused's testimony was without weight and should not have received any consideration adverse to his interest.

The Court of Appeal, summing up the law on this point, said that simply not believing testimony by an accused, is distinct from evidence of fabrication. On the other hand clear "fabrication of evidence by an accused in support of his case is a circumstance from which consciousness of guilt may be inferred, although it is not conclusive evidence of guilt".

Legal history shows this particularly in the area of alibis. If an accused fails to prove the specific fact of alibi that does not mean that that is evidence against him. However, if it is found that that failure is due to proven perjurous testimony, then it is evidence against the accused. Mere disbelief is not proof of fabrication,

warns "Wigmore on Evidence"*.

In this case the trial judge had not merely disbelieved the accused's testimony, he had found it to have been concocted. This left one thing to be decided which is an exception to this rule. If an accused concocts evidence out of fear or panic then it may not be treated as evidence against him.

The trial judge had considered the accused's opportunity to give his "pellet gun" explanation to the police when questioned. He had held that it had not been withheld at that time because of "youthful embarrassment, fear of adult authority, or reasonable apprehension of difficulty with authorities". If he had no such fears when questioned he must be assumed not to have had them when he voluntarily testified.

Then the accused argued that to find that disbelieved evidence is concocted requires support in evidence. If there is no such basis for finding that evidence is concocted, then it simply amounts to jumping to a conclusion. Consciousness of guilt must never be assumed just because the accused is not believed. The Court agreed but reminded that determining concoction is finding a fact. A fact may be found on direct evidence, circumstantial evidence, or a combination of the two. The contradiction in the accused's own evidence and the inconsistencies between his testimony and that of his friend was all evidence that supported the finding of concoction.

"All those matters smacked of deliberate fabrication" said the Court of Appeal.

The total evidence was sufficient to convict the accused.

Accused's appeal dismissed.
Conviction upheld.

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* 3rd ed. (1940) Vol. 2, p. 126.

KIDNAPPING - MULTIPLE CONVICTIONS ARISING FROM ONE DELICT

Regina v. Hillis, County Court of Prince Rupert, Terrace Registry 7817-C, November 1985.

The accused and one "Derrick" hailed a taxi late at night. The driver, a woman, was ordered to take them to an outlying area. While on their way, the accused, from the back seat, grabbed the driver's hair, held a formidable knife to her neck, and ordered her to drive to a remote area.

After reaching their destination and while threatened by the knife the woman was ordered to take her pants down and was then raped, first by the accused, then by Derick. While the latter was committing the act, the accused turned the taxi around. All this done the woman reminded them: "I thought you weren't going to kill me". The response was: "We lied". The woman then screamed and when the accused walked towards her with the knife she said: "I am pregnant, don't hurt my baby". The accused seemed unimpressed and attempted to stab her in the stomach. The woman struggled, ran about 20 yards and then fell. The accused then inflicted at least four serious stab wounds to her stomach area. The twosome then dragged the woman to the side of the road and placed her shoulders on a tree branch so that her head was hanging backwards. The accused then slashed the woman's throat twice. As her eyes remained open he stabbed her in the neck. The woman then played dead by closing her eyes. The two then took off in the taxi obviously leaving her for dead. One and one-half hours later the woman was found close to death. She however survived. The two men were apprehended in the taxi some hours later.

These events resulted in a nine count indictment which included allegations of attempted murder, kidnapping, aggrevated assault, robbery and possession of stolen property (the taxi). They did plead guilty to aggrevated sexual assault, robbery, aggrevated sexual assault and using a weapon in committing the offence.

In respect to the attempted murder charge, the defence claimed a lack of proof of the specific intent to cause death at the time the wounds were inflicted. The Court found:

> "... that those acts are not consistent with any intent other than the intent to kill. These are not the acts of a person acting in panic or reacting to her attempt to flight. They were deliberate acts of violence calculated to cause death... The accused had a motive to kill. He had just committed two serious crimes; sexual assault and robbery.... She was the only witness apart from Derrick and her death would silence her."

The accused was convicted of attempted murder.

In regard to the kidnapping the Court found that although the victim did the driving, she was in the accused's control, confined and transported by him. This was leading up to and separate from the attempted murder. Therefore the dictum of no multiple convictions arising from one delict did not apply and accordingly the accused was convicted of this offence as well.

The accused's arguments about multiple convictions became more valid when he argued the charge of possession of stolen property. He had already pleaded guilty to robbery. When one commits a robbery one is inevitably in possession of stolen property. At common law possession is an included offence to theft due to the fact that the latter is an act of necessity to the former. However, the judge convicted the accused without reference to the "included offence" concept.

The same approach was taken to the charges of possession of a weapon dangerous to the public peace and forcibly seizing the taxi driver. Again one could argue the Kienapple* decision by the Supreme Court of Canada in the former and the included offence principle in the latter charge. Without any reference to either, the accused was convicted of these charges as well.

Comment: Perhaps it shows between the lines that I am surprised at some of the convictions. This strictly from a legal viewpoint. Based on the facts found by the Court I have no sympathy for the accused.

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* Kienapple v. The Queen (1974) 15 C.C.C. (2d) 524.

WHO TO BELIEVE - THE CREDIBLE VICTIM OR THE EQUALLY CREDIBLE ACCUSED

Regina v. Brinley, Vancouver County Court, C.C. 850728, February 1986.

If the female complainant is to be believed, the accused committed an indecent act with her as the victim. She had been a good witness and had withstood the tests in cross-examination very well. The trial judge had been impressed and had believed her and convicted the accused. His demeanor had also been excellent and he had withstood the test of cross-examination very well. The accused's evidence contradicted the complainant's evidence completely. He simply denied that the indecent act ever took place. The accused was convicted and had received a conditional discharge. The accused appealed claiming that his equally believable testimony should have raised a reasonable doubt. Such doubt should have affected the verdict and not the sentence. The latter as the accused probably implied that his discharge was a judicial pacifier. (The underlined is my perception of the limited referral to this aspect).

One portion of the trial judge's reasons for judgement seems to sum up his dilemma:

> "Having considered the matter and heard submissions, I reject the evidence of Mr. Brinley (the accused) as being untruthful, and I accept the accuracy and the account of Miss Atkinson (complainant). I am satisfied beyond a reasonable doubt that the accused did the act that he is accused of doing".

The trial judge had started his lengthy reasons for judgement by remarking that the whole case hinged on choosing between two different sets of evidence. There, according to the County Court Judge deciding the accused's appeal, is where he made a mistake. Quoting the Ontario Court of Appeal* and applying its view, the County Court pointed out:

> "It is a reversible error for a trial judge to choose between the evidence of the complainant and that of the accused without considering the question whether the prosecutor has proved guilt beyond a reasonable doubt".

The way the case was reasoned to reach a verdict, the County Court Judge felt that it was best to order a new trial. He rejected the application by the accused to have a verdict of acquittal entered.

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* R. v. P.M., 31 C.R. (3d) 311 (1983)

SEARCH - POSSESSION OF PROHIBITED WEAPON
STORING A FIREARM IN A CARELESS MANNER

Regina v. Boyer, County Court of Westminster,
New Westminster Registry X015408

Police had reason to believe the accused was growing marihuana in his home. Conversations with a neighbour confirmed their beliefs. The constable who had talked to the neighbour went into the accused's backyard and what he saw in the greenhouse changed his reasons for believing into knowledge that the narcotic was cultivated on the premises.

The constable then went to the back door which was open. There was a radio playing inside but no one answered his knocking and calling. He then entered the house and the Court added immediately in summing up the facts: "This was an unlawful entry".

The constable found more inculpatory evidence once inside such as vials containing hashish, marihuana, handguns, etc.. By this time other officers had joined the constable inside the house. When they saw what they had, one of them phoned the police station from inside the house and arranged for a search warrant to be obtained under s. 10 of the Narcotics Control Act. As a result of that warrant several handguns (nearly all of them loaded) were seized as well as a sawed off rifle found hidden under a blanket (a prohibited weapon). Consequently the accused was convicted in Provincial Court with the possession of a prohibited weapon and secondly with careless storing of a firearm and ammunition. Representing himself, the accused appealed these convictions and argued that the evidence was obtained by means of an unreasonable search and hence inadmissible in evidence. He had not raised this argument before the trial judge.

The County Court Judge, who heard this appeal, found without hesitation that the officers had flagrantly violated the rights of the accused. They could have done everything legally by means of a search warrant after the conversation with the neighbour or even the questionable peek in the greenhouse. The Judge was very attracted to follow the letter of the "Therens* decision by the Supreme Court of Canada. The violation was flagrant and admitting the evidence would convey to police that such infringements could be committed with impunity. However, the B. C. Court of Appeal's interpretation of the Therens judgement in the Gladstone case, was binding on him. He was

* See page 1 of Solume 21 of this publication. Also 18 C.C.C. (3d) 481.

** See page 22 of Volume 22 of this publication.

compelled to consider circumstances, the gravity of the offence, and whether admission of the evidence would bring the administration of justice into disrepute.

The Judge held that the charge in respect to the prohibited weapon was one of considerable gravity. Weapons like that are used for unlawful purposes such as armed robberies, he reasoned. Despite the fact that the Charter had been breached flagrantly by police, the serious offence the accused committed cannot be ignored. Therefore, following the instructions to the B. C. Judiciary in the Gladstone decision, the Judge held that the administration of justice would not be brought into disrepute by admitting the evidence.

Accused's appeal dismissed.
Convictions upheld.

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LEGAL TIDBITS

Typographical Error in Certificate of Analysis

To prove the accused's blood alcohol content the Crown adduced in evidence a certificate that showed that the two samples of breath police analyzed were taken precisely one year and twenty minutes apart. This was due to a typographical error in regards to the date of the first sample. It said 1984 while it should have been 1985. The defence, of course, argued that the certificate did not comply with the provisions of the Criminal Code and could therefore not serve to prove the alcohol level at the time of driving. This is not the first time that something like this has happened and one provincial court of appeal concluded that the error was amendable while another held it was not. Our B. C. Court of Appeal held in 1983 that if a certificate is admissible then the defect can be corrected by oral evidence. For a certificate to be admissible it must record all requirements summed up in s. 237(1)(f) C.C. This certificate was in compliance with those requirements and therefore admissible. The error had been corrected by the oral evidence of the police officer and therefore the Crown had proved the blood alcohol level of the accused within two hours of him driving his car. The Vancouver County Court Judge did dismiss the accused's appeal and upheld his conviction of "over 80 mlg.".

Regina v. Dagg, No. CC851480 Vancouver, January 1986.

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When Does A Motorist Have to Stop for Police

Police attempted to stop the accused for a traffic violation. When lights and siren were activated a high speed chase started which lasted over one-half hour. Over forty kilometers from where it all started, the accused semi-rolled his car off the road. Consequently he was convicted of dangerous driving and failing "to come to a safe stop" when a peace officer pursued him in order to require him to stop (s. 92.1(1) M.V.A.). The conviction for the latter conviction was appealed. The accused argued that the section compels him to come to a stop but does not say "promptly" or "immediately". In other words it does not say when he was supposed to stop. He had stopped... after 40 km. later.

The County Court of Prince Rupert did not buy the accused's argument. It held that the trial judge's manner of interpretation of the section "best harmonizes with the context... which promotes the fullest manner the policy and objects of the legislators". Needless to say that a safe stop at whatever point in time after having been signalled to stop would render the section meaningless.

Regina v. Morris, Smithers Registry 4998, January 1986

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The Charter and Road Blocks

We learned from the Dedman case* (decided by the Supreme Court of Canada) that a random road block by police to ferret out drinking drivers is within the common law ambit of police and does not offend the Charter.

In Manitoba, two officers stopped all cars near a border crossing to prevent "after hours border crossings and to apprehend impaired drivers". The accused who was convicted of "over 80 mlg." after getting caught in that road block, argued that his rights to be secure against unreasonable search and seizure and arbitrary detention were infringed. Consequently the certificate of analysis must be excluded, he claimed. The Manitoba Court of Appeal agreed and acquitted him. Two of the three Manitoba Justices said that in Dedman's case the roadblock was part of a well advertised community program. In this case there was no such program or announcement. That made the case distinct from the Dedman case said the Manitoba Court of Appeal. It concluded:

> "Much as one deplores the incidence of impaired driving, it is not acceptable to permit law enforcement officers to make routine spot checks unannounced and at will".

Regina v. Neufeld 22 C.C.C. (3d) 65, September 1985.

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Self Crimination

Here are some interesting interpretations by the Supreme Court of Canada of s. 13 of the Charter which reads:

> "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings except in a prosecution for perjury or for the giving of contradictory evidence."

1. This section applies to all witnesses, voluntary (accused) and involuntary ones;

2. A retrial is included in the meaning of "any other proceedings"; and

3. In the case of a retrial (new trial ordered upon appeal) and the accused testified at the first trial, his evidence may no longer be read into the record at his second trial, even if the first trial was held in pre-Charter days;

4. All evidence (including exculpatory evidence) the Crown tenders in support of its allegation is incriminating evidence.

Dubois and The Queen, November 1985.

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* R. v. Dedman, page 17, Volume 22 of this publication. Also 20 C.C.C.(3d) 97.

Indecent Exposure from Front Porch of Home

The applicable portions of s. 169 C.C. reads:

> "Everyone who wilfully does an indecent act
> (a) in a public place in the presence of one or more persons or
> (b) in any place, with intent thereby to insult or offend any person, is guilty of an offence punishable on summary conviction."

The accused stood on his open front porch and exposed himself indecently to members of the public on the street in front of his home. Consequently the accused was charged under subsection (a). The Crown argued that since what the accused did was visible from a public place the act was done in a public place. Not so, said the Manitoba Court of Appeal, the law specifically creates for an offence in a "public place" and "any place". Parliament provided that in circumstances such as these that there is no offence unless there is an intent to insult or offend someone.

Regina v. Buhay, 23 C.C.C. (3d) 8.

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Is Erroneous Legal Advice a Reasonable Excuse?

The accused appealed his conviction of refusing to blow. The matter of a "reasonable excuse" by reason of professional legal advice was explored. Some interesting cases were reviewed by the Vancouver County Court Judge. For instance in Ontario a newspaper had published a report on how the local provincial court judge had declared the breathalyzer laws (particularly the part where a citizen is compelled to give samples of his breath) unconstitutional. A Mr. MacIntyre who read the article had on the basis of the knowledge he gleaned from the article refused to blow. He nearly had defied the law for patriotic reasons. The provincial court judge was overruled and the Ontario Court of Appeal held that Mr. MacIntyre had no reasonable excuse to fail to blow.

In another case (like in this one) the suspected impaired driver was advised by his lawyer not to give a sample of his breath. Mr. Giroux of Quebec took that matter to the Superior Court of that province. The Justice of that Court reiterated the lawyers' role in these matters, which results in the dictum that erroneous legal advice cannot serve as a defence. Lawyers are not "law declaring officials"; it is not their function to authoritatively interpret the law. If this was not so, the advice one would receive from professional legal counsel would supercede the Courts' interpretation of the law. It would simply mean that the Court's function could be usurped by giving erroneous advice.

R. v. Baldwin, CC851721, February 1986

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