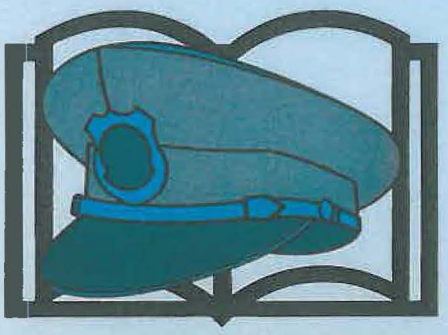

ISSUES OF INTEREST

VOLUME NO. 32

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

CORRECTION NOTICE

Issues of Interest Volume 31. "RIGHT TO COUNSEL - IMPAIRED DRIVING AND REFUSAL BY PERSON VERY FAMILIAR WITH PROCESS". ***Regina v. LAYNE*** - County Court of Vancouver - CC870406 - Vancouver Registry - March 1988. Page 43.

Please note the following correction:

Appeals were Dismissed.
Convictions for Impaired Driving and
Refusal to Supply a Breath Sample were Upheld.

ISSUES OF INTEREST

VOLUME NO. 32

Written by John M. Post

October 1988

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REASONABLENESS OF SEARCH
ACTING ON INFORMATION FROM A COLLEAGUE

Regina v. PEEBLES - County Court of Vancouver - No. CC 861468 - June 1988.

A police officer worked with a reliable informer. The reliability was based on his information being accurate. The officer would sometimes pass the information on to colleagues who also found it to be reliable. In this case, the officer received information that the accused, (who was known to the police) would at a certain time meet someone at a specific location to sell heroin. The officer gave this information to the drug squad and officers who had acted before on information from this source caught the accused in the act. It took place as the officers were informed it would by their colleague. Even the car used had been described by the informer in detail.

The arrest was made as the accused and another party approached the described parked car. The alleged buyer discarded a paper bag containing $5,550.00 cash and a search of the car resulted in finding a cache of heroin. The accused denied any knowledge of the heroin or the transaction.

The reasonableness of the search and whether the arrest had been arbitrary became subject to a *voir dire*. The arresting and searching officers admitted to having no knowledge of the informer's reliability other than that their colleague's information had a favorable ratio in paying off.

The search the officers conducted was warrantless. Consequently the Crown had to show that it was reasonable in compliance with s. 8 of the Charter.* (In situations other than the right to be secure against unreasonable search the party alleging the infringement of a right must show the infringement on the balance of probabilities).

The Supreme Court of Canada had held that a warrantless search is *ipso facto* unreasonable unless the Crown demonstrates that it is not. In this case, the Crown relied on the common law that this search, authorized by statute (s.10 (1) (c) N.C.A.), was reasonable. Case law does not only say that information supplied by a reliable informer may provide grounds necessary for a search warrant to be issued, but, "It would seem entirely logical and reasonable that such information can also provide the necessary reasonable grounds to justify a warrantless search, where a warrantless search is authorized by law.** A mere statement by an informer that some unlawful activity will take place "would not constitute reasonable grounds for conducting a warrantless search or for making an arrest without warrant." Whether an informer's tip is more than mere gossip or rumour may depend on such things as details which are indicative of knowledge and the means by which the personal knowledge was

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*See *HUNTER v. SOUTHAM INC.*, Volume 18, page 12 of this publication.

**R. v. *DEBOT* 30 C.C.C. (3a) 207 - Ontario Court of Appeal.

acquired. These issues are relevant to the reliability of the information. After all, information must be reliable before it can be considered for grounds leading to the beliefs prerequisite to police action. The standard to be met to say that there is such belief is one of "reasonable probability."

Was the aggregate of the information the officers had sufficient to say that there was sincere belief of a reasonable probability of illegal transaction?

Secondly, the officers who conducted the search and effected the arrest had no personal knowledge of the reliability of the information. What they were told was double hearsay, so-to-speak.

In relation to the latter the precedent judgement relied upon says, that it is unrealistic and incompatible with effective law enforcement and crime prevention that a police officer when acting on request of a fellow officer must firstly obtain from that officer information of the underlying facts to enable him to act independently in terms of prerequisite grounds.

The totality of the circumstances (the detail of information; the past experience with the same source of information; acting on the knowledge of an experienced colleague) had given the officers who arrested and searched the ground to act as they did. They had corporate knowledge in the circumstances and what they had found at the scene prior to acting had corroborated the information given to them. Furthermore the search of the car was authorized under s. 10 (1) (a) N.C.A.

The County Court Judge concluded that even if he was wrong in terms of the reasonableness and lawfulness of the arrest and search, admitting the evidence of the narcotics and money, would not bring the administration of justice into disrepute.

Evidence was admitted

* * * * *

DOES THE CHOKE-HOLD RENDER A SEARCH UNREASONABLE?

Regina v. WEBER - County Court of Vancouver - No. CC861483, February 1988

Police officers received what they considered reliable information that the accused was trafficking in heroin and was on the night of his arrest storing his stock in his mouth ready for swallowing in case of apprehension. Consequently he was approached from behind and a choke-hold was applied. He was simultaneously told that his assailant was a police officer and that he was to open his mouth. The accused put up a struggle and tried to get away. He was successful but was immediately put in the same hold by another officer until he was obviously in distress. The hold was then released and a couple of slaps on the back resulted in two balloons containing the heroin. The accused was charged accordingly but acquitted in provincial court. The trial judge ruled that the choke-hold rendered the search unreasonable contrary to s. 8 of the Charter and that admitting the evidence could bring the administration of justice into disrepute. The accused had called a physician to testify what could happen as a result of the choke hold, such as choking, restriction of blood circulation causing the heart to stop, suffocation etc. This had been the main reason for holding that the search was unreasonable.

The County Court Judge dealing with the Crown's appeal was not too impressed with the doctor shedding light on something that was already illuminated. He held that the trial judge had given inadequate consideration to the officers having all the grounds prerequisite to a legal search and that the accused could have avoided all the unpleasant consequences of the choke-hold had he opened his mouth as he was told. The Supreme Court of Canada held* that a search is not necessarily unreasonable because a choke-hold is used. (Needless to say if it is applied on mere suspicion then it may be unreasonable.) Reading the Supreme Court of Canada's reasons for judgement one reaches the inevitable conclusion that the hold, if used upon reasonable and probable grounds that contraband is secreted in the mouth, does not by itself render a search unreasonable. Noting the careful wording by Canada's highest court the County Court Judge held that the search in this Weber case had been reasonable.

Crown's appeal allowed
New trial ordered

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**COLLINS v. The Queen* - See Volume 27 page 1 of this publication.

THE CURIOUS "JOHN"

Regina v. SAPIEHA - County Court of Vancouver
No. CC 861570, February 1988

The accused had a conversation with a policewoman who posed as a prostitute The gist of the conversation was the services to be provided and the price. During his trial he testified to the effect that the purpose of the conversation was not to receive any sexual services but simply to satisfy his curiosity what sexual acts prostitutes were willing to provide and for what price. The trial judge rejected this defence and held that conducting the conversation in a public place was sufficient to prove the allegation under s. 195.1 (1)(c) C.C.

The accused appealed his conviction.

The County Court Judge held that the provincial court judge's view was erroneous in law. The purpose of "stopping or impeding" of any person must be for the purpose of "obtaining sexual services of a prostitute". If there is a doubt in relation to that purpose then the accused person must reap the benefit of the doubt. For instance conducting a sociological survey on the subject of price and services is not an offence under the section. What the accused claimed to be his object for engaging in the conversation makes the act an innocent one in terms of law. If the trial judge does not believe the accused then, of course, the defence is impotent. But if such a defence is believed or creates a reasonable doubt no conviction is possible. The trial judge had said that the accused's version of his intent was unreasonable in the circumstances. This was inadequate to deal with the accused's defence Considering the lack of sufficient consideration,....

The accused's appeal was allowed and a new trial was ordered.

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ADMISSABILITY OF A STATEMENT MADE TO UNDERCOVER OFFICER IN CELL-BLOCK

Regina v. HEBERT - BC Court of Appeal -
No. YU0063 Vancouver, July 1988

A desk clerk of an inn was robbed by a man wearing a ski-mask. During several months of investigation police received confidential information that the accused was the person who committed the robbery. The accused was arrested and given an opportunity to consult with a lawyer who advised him regarding his right to refuse to give a statement. Consequently no statement was given. An undercover officer acting as a suspect under police investigation engaged the accused in a conversation in the cell-block. The accused made an incriminating statement to him.

At trial it was conceded that police knew of the advice the accused received from his counsel. The trial judge held that consequently the action of the police amounted to "a fraudulent subversion of the solicitor - client relationship". This relationship is one guaranteed by the Charter of Rights and Freedom he held. He ruled the statement inadmissable in evidence. The Crown did not adduce any further evidence and an acquittal resulted.

The Crown appealed this decision as the issue is crucial to a police practice that has been approved by common law. The grounds of the appeal were strictly based on the constitutional arguments related to "right to counsel" and "the principles of fundamental justice". It should be noted that the issue of voluntariness in these circumstances is separate and was not argued. In other words, for now, this decision does not affect the subjective test to determine if an agent provocateur is a person in authority. Voluntariness is only an issue if the person to whom the statement was made was a person in authority and that the suspect knew that he was such a person.

The B.C. Court of Appeal dealt firstly with the right to counsel argument and what lawyer/client relations are involved. It reviewed pre and post Charter cases where casual conversations with persons in authority had become a contentious matter in terms of propriety and inclusion in the Crown's case. Pre-Charter cases establish that obtaining a statement by subterfuge and deception is acceptable and it seems from the post-Charter cases that this is left unchanged. However, distinction is made between trickery in the official interrogation setting and surreptitious settings such as using an agent provocateur.

In some cases the impropriety had been in the interview method where, for instance, a suspect was tricked or psychologically manipulated to respond to questions and/or suggestions after he clearly indicated to want to remain silent. The casual conversation a police driver (who ferried a suspect to the courthouse) had with the suspect that was calculated to be a continuation of an unsuccessful questioning of the suspect, was a means of circumventing ethics as well as the right to counsel.

Said one superior court justice

> ".. ...once an accused person has retained counsel to the knowledge of the police or other person in authority, the latter ought not to endeavour to interview and question that accused person without first seeking and obtaining the concurrence of his solicitor."

Another superior court held in a case where legal advice had been obtained and a firm refusal to give a statement was indicated:

> ".....the officer deliberately went behind the back of counsel to obtain that admission and I hold that this is an interference with the right to counsel guaranteed by the Charter of Rights and Freedoms. If police officers having sole control of prisoners, can solicit admissions from those at a time that they are isolated from legal advise, the so-called right to counsel is impaired if not meaningless."

The Supreme Court of Canada said in the trend setting Manninen* decision very much the same things although at the time Manninen made his utterances he had not received legal advice but had clearly stated he wanted to exercise his right to remain silent.

The B.C. Court of Appeal held that this Hebert case is distinct from these precedents in that the deceptive practice used here was not in the interrogation setting. The conversation the agent provocateur had with the accused was not a continuation of the interrogation. Said the Court:

> "It cannot be logically contended that merely to engage an accused person in conversation at a time and place completely isolated from the interrogation process is to subvert the solicitor/client relationship."

The B.C. Court of Appeal held that the precedents referred to above, should not be applied in non-interrogation settings where there is a complete absence of coercion or pressure. A perfectly voluntary and reliable statement should not be rejected. Lawyer/client relations and privileges in criminal law, do not have the kind of reach that if their warnings and advice are not followed, the evidence obtained by their clients not adhering to that advice in settings isolated from the interrogation process, would have to be excluded. If an undercover police agent engages a suspect in conversation, and if the agent's questions or utterance are not the repeat of what happened in the interrogation and are not a continuation or in tenor or otherwise connected to the interrogation, then there is no reason to consider such police action a breach of the suspect's right to counsel.

In relation to the undercover operation being a breach of the right to the principles of fundamental justice, the B.C. Court of Appeal did not see things

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*See Volume 28, page 1 of this publication.

in the defence counsel's light. Quoting from a U.S. judgement on the point the court ruled that judges are not to use the exclusionary rule to govern police conduct even if they find the conduct unfortunate, distasteful or inappropriate. The only time police practices in these circumstances are within their purview for exclusion is when the conduct is so inappropriate or repulsive that the community would be shocked; and this would only be the case if there is a clear connection between that conduct and the obtaining of the statement.

Defence counsel had apparently argued that these views were contrary to the precedent set by the Supreme Court of Canada.* However, the court reiterated in conclusion that these cases deal with the regular interrogation process and do not purport to deal with the issues and circumstances as they are in this case.

Crown's appeal allowed
New trial ordered

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*R. v. *CLARKSON* - Volume 24 - Page 36 of this publication
R. v. *MANNINEN* - Volume 28 - Page 1 of this publication

ARBITRARY DETENTION AND ARREST
DISTINCTION BETWEEN ARREST BEFORE AND AFTER DEMAND

Regina v. KEELING - BC Court of Appeal - June 1988

The B.C. Court of Appeal has since 1984 rejected submissions that all arrests for impaired driving are arbitrary where the Crown did not show that any of the conditions included in the public interest [section 450 (2)(d) C.C.] were in issue.*

The accused Keeling, was involved in an accident. By personal policy the officer who demanded breath samples from the accused, arrested him, immediately following that demand, for the offence of impaired driving. The accused was convicted and appealed the conviction to the County Court. The County Court Judge who heard the appeal had ruled in March of 1987** that arresting all suspected impaired drivers by policy contravened the Charter as such practice amounts to arbitrary detention. Needless to say the appellant Keeling reminded the County Court Judge of this ruling and strongly urged a similar consideration. However the Judge declined to do so and reasoned that the previous case was distinct from this Keeling case. In the former case the officer had firstly arrested the suspected impaired driver and had then made his demand. In this Keeling case the sequence of events was reversed. This meant that when the officer effected the arrest the accused was already detained by means of a demand made on reasonable and probable grounds. The County Court Judge reasoned:

> "....the appellant was already detained as a consequence of the demand that he take a test when he was told that he was "arrested" for impaired driving. The imposition of this "arrest" superimposed upon him after his initial detention is inconsequential, regardless of the policy of the officer, <u>for as soon as the tests were finished he was released upon the condition of his promise to appear</u>. Thus at all times he was lawfully detained for a legitimate reason and at no time could it be said that his detention was arbitrary."

Mr. Keeling took this decision to the B.C. Court of Appeal which did not mince too many words and held that based on the findings by the County Court Judge the arrest of Mr. Keeling was not arbitrary.

Accused's appeal was dismissed

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*See Volume 29, page 20 of this publication.

***R. v. LABINE* - County Court of Westminster - No. X017908, Volume 28, page 36 of this publication.

NOTE: The issues surrounding policy arrests in the case previously dealt with by the B.C. Court of Appeal were distinct from the issue in this Keeling case.

* * * * *

ARMED ROBBERY - FAIRNESS OF LINE-UP
DOCTRINE OF RECENT POSSESSIONS

Regina v. VAN BEEST - BC Court of Appeal - CA006060 - April 1988

Two men, armed with a shotgun and wearing coveralls, walked up to a bank, put bandannas on, on the sidewalk in front of the bank, went in and robbed bank personnel. The take was $29,000.00 including some US dollars and bait money.

Crown witness M. was watching all this from behind the wheel of his car which was parked at the curb in front of the bank. He followed the men and saw them switch cars in an alley. The car they transferred to was a U-drive rented by the mother of one of the two men who were eventually charged with this offence, the Appellant Van Beest, being one of them. M. Also followed the U-drive and alerted police to the house the two men were seen to enter. The house was staked out and four and one half hours later the appellant Van Beest was seen to leave on foot. A short distance from the house he was arrested. He had $1520.00 on him, most of it in brand new one hundred dollar bills. When asked where he got the money he facetiously explained to have found it on the street he just walked on. He had not been seen to pick up anything. He was under observation at the time he claims to have found the money. A search warrant was executed and the house the two men had entered was found to contain a large portion of the money taken from the bank (bait money was included). Van Beest was convicted by a jury of armed robbery. The party who lived in the house was acquitted. Van Beest appealed his conviction.

Several eight men line-ups were conducted. Each time the participants would wear the same disguises worn during the bank robbery and were asked to remove them. In one line-up (which like some others resulted in the appellant Van Beest being identified) only Van Beest and a bearded participant were asked to remove their disguises. Van Beest did not have a beard and the men seen by Crown witness M. were not bearded either. This the defence claimed made this line-up unfair and invalidated the identification, the major, if not the only issue in this circumstantial case. Unfairness was also claimed on the basis of the line-up participants wearing disguises which typify crimes like robbery. The practice implies that eight criminals are on display and it compels the witness to identify someone.

The B.C. Court of Appeal held that the practice was unusual but did not render the evidence resulting from the line-up without probative value as most of the witnesses had only seen the culprits in disguise.

The jury had <u>all</u> of the evidence (including the defence theory on this issue and exhaustive and accurate instructions from the Trial Judge) to conclude if the identification was sufficient. Furthermore the conviction was not on identification alone but was supported by circumstantial evidence, for instance Van Beest coming from the place where the proceeds of the robbery were kept and having part of them on his person.

Another interesting aspect of the case is the application of the doctrine of recent possession. Before any weight should be put on the accused's possession of proceeds of the robbery, knowledge on the part of Van Beest that it were such proceeds is essential. For this the Trial Judge explained the doctrine of recent possession to the jury. He in essence said that if the jury believed beyond a reasonable doubt that the money was part of the take in the robbery and if on the same test of proof they did not believe the explanation Van Beest gave about the money then there was no explanation. He then outlined how an inference of guilt may be drawn where a person possesses the proceeds of an indictable offence at a time recent to the commission of the crime and fails to give an explanation that may reasonably be true.

This dictum hails from the doctrine that despite the presumption of innocence which includes the right to remain silent, there comes a time that someone is so surrounded by incriminating circumstances that he either explains or stands condemned.

Many have predicted that this common law doctrine offends s. 11 (d) of the Charter (presumption of innocence) and would become a thing of the past. The Trial Judge told the jury that the doctrine was not one of law but of fact The inference they were allowed to draw was one of common sense.

Defence counsel did not attack the application of the doctrine and the B.C Court of Appeal approved of all the instructions left with the jury.

It seems not unreasonable to conclude that the B.C. Court of Appeal considers the doctrine of recent possession to be alive and well in this province as did it's Manitoba counter part in 1986 *

Accused's appeal dismissed
Conviction for armed robbery
upheld

Comment: Another aspect of the doctrine of recent possession that is spoiling for a Charter challenge is that the explanation capable of rebutting the inference must be made at the time the person is found to be in possession or in the witness stand. This compounds the argument that the doctrine flies in the face of the right to remain silent. It simply forces an accused person to testify or suffer the consequences of the doctrine's application.

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*_Regina v. KOWLYK_ 27 C.C.C. (3d) 61 Also see Volume 25 page 28 of this publication

Perhaps the Courts can now hold that the issues are not distinct from those in *HOLMES v. The Queen* (see page 46 of this volume). If the doctrine is not a reverse onus clause or presumption perhaps the position can be taken that it simply includes the defence of innocent purpose. In other words that part of the doctrine that seems to compel an explanation is then a shield instead of a sword

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ADMISSABILITY OF A CONFESSION
RIGHT TO COUNSEL - VOLUNTARINESS

Regina **v.** ***SISMEY*** - Supreme Court of British Columbia - March 1988.

A number of youths had been bugging a man who appears to have been their target on a regular basis. This time one of the youths threw a rock at the unfortunate fellow. The projectile hit the man's head and killed him. The accused, who had turned eighteen years old a couple of weeks before was detained as a suspect and was questioned in the early morning hours, a few hours after the fatal incident.

At first, right from the time he was apprehended, the accused acted as though he was puzzled about the reason for his detention. He even inquired about the identity of the man he was to have assaulted. He also said, "I want to phone my mother." The response to all of this was, "We'll straighten things out at the office."

At the office the accused's clothes were taken away from him and he was told of his right to remain silent and counsel. In terms of the latter he was in no way discouraged from using the phone that was available in the room in which he was interviewed, neither was he encouraged or invited to do so.

In terms of his right to remain silent, the accused indicated that he "should not say anymore" after his exculpatory statement. It was obvious to the officer at this point that the accused was fighting to hold back his tears. The officer encouraged the accused to cry and to tell him the truth. He reminded him that sometimes "things do no always end up the way they start" and that this was not a dream that is over when you wake up. "Things do happen and I want to know why and how....tell me." Despite the accused's, "I don't think I should give you a statement....my lawyer told me not to....I've had problems in the past.", the officer insisted to hear more than, "I didn't mean to hurt him" which had followed the outright denial of any involvement.

The accused then asked if he could phone his mother. The officer dialed and was present when the accused tells his mother, "I killed someone." After this the officer explains the situation to the mother and arranges for a visit later in the morning. The accused then tells all. His blood/alcohol level is determined after the statement is taken and found to be 70 milligrams per 100 millililters.

Needless to say that defence counsel did everything possible to keep the confession from the jury in this second degree murder trial. During the *voir dire* to determine the admissibility of the statement the defence claimed that the accused's right to counsel had been denied him and that the circumstances surrounding the confession could not withstand the stringent test of voluntariness. A synopsis of the argument is as follows

> The accused's call to his mother was equivalent to a call to counsel; there should have been an overt invitation or urging for the accused to call a lawyer for advice. By simply not placing such phone call in these serious circumstances the accused had not waived his right to counsel. An atmosphere of oppression had dominated the milieu during the accused's meeting with the police interrogator. A boy, barely eighteen years old, was in custody for the most serious charge and interviewed by a person in authority in the bowels of the night. He was intoxicated and emotionally distraught. His personal belongings, even his clothing were taken away from him and after clearly indicating that he wished to remain silent he was emotionally intimidated to confess. All of this surely rendered the statement inadmissable in evidence, argued defence counsel.

The Supreme Court trial Judge recognized that there are at least two cases decided by the Supreme Court of Canada that seem to support the defence's submissions.

The one case is about Mrs. Clarkson* who was accused of having murdered her husband. She, in an advanced state of intoxication had insisted that there was no point in having a lawyer involved during her interview. She seemed to insist on confessing and the police did not do anymore than inform her of her right to counsel and did not prevent her from using the phone if she wanted to. In addition to this Mrs. Clarkson was accompanied by her aunt who strongly advised her niece to first get legal advice and the police to postpone the interview. The Supreme Court of Canada concluded that in view of the entrenched right to counsel since 1982 (Charter) the test if a right had been waived is no longer an "operating mind" on the part of the person who waived it, but also that that mind has an understanding of the consequences This the Supreme Court of Canada said was judicial fairness. (It did not elaborate too much on the depth of that understanding which could go from knowing that it will be used as evidence to being able to assess the evidential weight it will have, its contribution towards being convicted and the penalty this may result in).

Then the Supreme Court of Canada decided the Manninen case** in 1987. It in essence, held that mere informing a detainee of his rights may not suffice to meet the authority's obligation in respect to the right of a detained person.

When Manninen said he wanted advice from a lawyer no one obstructed him to use the available telephone, but the questioning simply continued and some very inculpatory obscenities were uttered by him. Police should have made an overt gesture for the suspect to avail himself of the phone to seek the advice he indicated to want. Failure to do so had amounted to an infringement

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* *CLARKSON v. The Queen* (1986) 50 C.R. (3) 289. Also Volume 24, page 38 of this publication.

** *R. v. MANNINEN* (1987) 58 C.C C. (3d)97. Also Volume 28, page 1 of this publication.

of Manninen's right to counsel.

In this case, the accused Sismey, had indicated that he should exercise his right to remain silent but the questioning continued. He wanted to phone his mother from the time he was apprehended but was not overtly assisted or given an opportunity to do so until he broke down after his first (exculpatory) statement and subsequent conceding he was responsible for the death.

Defence Counsel argued that the Clarke and Manninen cases were indistinguishable from this case. Sismey indicated he wanted to remain silent and the questioning continued; he wanted to phone his mother and was not overtly accommodated or assisted until he in essence confessed. Phoning mother is in these circumstances not distinct from seeking counsel and was therefore part of his constitutional right to counsel.

The B.C. Supreme Court trial judge did not agree with the defence theory. The Justice placed considerable weight on the advanced state of intoxication of Mrs. Clarke which disabled her to consciously waive her right to counsel or to have any appreciation for the possible gravity of the consequences of a confession. Sismey, who had by his own admission been in trouble before and had received advice from counsel on those occasions understood his rights sufficiently to know the obligations they place on the authorities. Furthermore, Sismey's state of intoxication (70 mlg) was not anywhere near that of Mrs. Clarke. Sismey had even said, "If I say anything I'll hang myself." This corroborated that he understood and was aware adequately for the purpose of judicial fairness.

In relation to his right to counsel, the trial judge ruled that Sismey was fully aware but chose not to assert that right. The phone call to his mother and his desire to place this call from the outset was in this case not the equivalent in law to contacting a lawyer. The tenor of the conversation with the officer and with his mother was not one that would cause inference of seeking legal counsel either directly or indirectly. It was clearly a parent/son matter. Therefore the Manninen case was of no consequence here.

In terms of voluntariness the Supreme Court of Canada held in the Hobbins case* that the absence of hope of advantage or fear of prejudice alone will not necessarily assure the admission of a statement into evidence. The general atmosphere surrounding the making of the statement must be free of oppression. Timidity or a subjective fear of the police "will not avail to avoid the admissibility of a statement" unless there are external circumstances brought about by police that cause doubts on the voluntariness In other words, doing everything right in an oppressive milieu that may, for instance, be caused by the demeanour or deportment of police officers may be casting doubts about voluntariness which must be resolved in favour of the accused person.

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*_HOBBINS v. The Queen_ 66 C.C.C. (2d) 292.

In this case the officer was persistent and had some persuasive methods of questioning. However, the aggregate of the entire elements had not created the oppressive atmosphere that casts doubts on voluntariness

The confession was admitted in evidence.

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GOOD FAITH - ADMISSIBILITY OF EVIDENCE

Regina v. PINSKE - BC Court of Appeal - July 1988 CA 007803

The accused was involved in a major motor vehicle accident in which his passenger lost his life.

The accused was injured and police demanded a blood sample from him under the provisions of the B.C. Motor Vehicle Act as they then were in 1985. Analysis showed that the blood/alcohol level was 90 milligrams per 100 milliliters. An expert certified that this level was 130 milligrams at the time of driving. This and his driving at the time of the accident caused the Crown to allege that the accused caused the death of his passenger by being criminally negligent.

By the time the accused was tried the provisions under the Motor Vehicle Act by means of which the blood sample was taken, had been declared without force of effect due to excessiveness of that legislation in light of our constitution. Consequently the trial judge would not allow the evidence of the blood analysis in evidence. The accused was acquitted.

The Crown appealed and submitted that the police had acted in good faith as the law they relied on and complied with to demand the blood sample was sincerely believed to be valid. The officer had no reason to think otherwise. Due to good faith on the part of police the administration of justice could not have been brought into disrepute if the evidence of analysis had been admitted.

The parties to the proceedings both relied on cases decided by the B.C. Court of Appeal and the Supreme Court of Canada. The defence relied on *R. v. THERENS* and the Crown on the Sieben , Collins and Gladstone cases.*

In Therens the Supreme Court of Canada held that the infringement of the right to counsel was a flagrant violation on the part of police and had to result, without any further consideration to circumstances, in exclusion of all subsequent evidence. This despite the fact that police had acted in compliance with what at the time was an accepted practice. Yet in the Sieben case, where police used a writ of assistance to search, the Supreme Court of Canada held that the evidence resulting from the search was admissible due to

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*_Regina v. THERENS_ - 18 C.C.C. (3d) 481 - Volume 21, page 1 of this publication

Regina v. GLADSTONE - Volume 22, page 22 of this publication

COLLINS v. The Queen - Volume 27 page 1 of this publication

Regina v. SIEBEN (1987), S.C.R. 295

the fact that at the time of the search the officers had no reason to believe that the writ and its enabling legislation offended the Charter and was invalid. That was not judicially decided until after the search. Consequently they had acted in good faith and admission of the evidence would not bring disrepute on the administration of justice.

In the Gladstone case the B.C. Court of Appeal ruled similarly in regard to an accepted investigation practice which subsequently was ruled to offend the Charter. Again good faith on the part of police, caused the evidence to be admissible.

The Supreme Court of Canada in the Collins case elaborates on the exclusionary rule and observes that real evidence that has been obtained in a manner that violates the Charter would rarely operate unfairly and should only be excluded if it renders the trial unfair. The Court also seemed to explain the Therens decision by saying that where a person is "conscripted" (the breathalyzer laws compelling the giving of samples of breath for instance) to supply evidence that an infringement of a Charter right will render a trial unfair if that evidence is admitted. However, even then, there is no automatic exclusion of evidence as it is still subject to consideration of other factors.

On the surface it seems that this case is indistinguishable from the precedent in Therens. The accused was compelled under the law as it then was to allow a sample of blood to be taken from him. However, the B.C. Court of Appeal has indicated in previous cases, that it is of the view that the "flagrant" violation of the Charter in Therens, was due to a lack of good faith. There was a directive from the Saskatchewan A.G. to consider all persons under demand to supply breath samples, to be detained. The officers had not complied with the directive and hence the infringement of the right to counsel was "flagrant". This has also been reasoned by other courts to explain why good faith was not considered in Therens.

In any event the B.C. Court of Appeal held that due to the good faith on the part of the officer in this Pinske case it is distinct from the Therens decision. Reiterated the Court:

> "....conduct of officers is to be judged in relation to what they knew or ought to have known in respect of Charter rights at the time the search took place." (*R. v. GLADSTONE*).

The evidence of blood/alcohol content is relevant to criminal negligent driving. Consideration must be given to the principle of good faith which is capable of rendering the evidence admissible in the circumstances as they were in this case. For this and other reasons

The Crown's appeal was allowed and a new trial was ordered.

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THEFT OF CONFIDENTIAL INFORMATION

STEWART v. *The Queen* - Supreme Court of Canada - May 1988

A union organizer was in need of the names and addresses of all personnel at a hotel. He offered a security guard money to obtain this information for him The guard went to management and reported to have been counselled to steal this information. Consequently the organizer was charged with counselling a theft. At trial he was acquitted but the Court of Appeal allowed the Crown's appeal and substituted a conviction. The accused appealed this to the Supreme Court of Canada.

For the purpose of this case the parties to the trial agreed that the security guard did not have authorization to access the personnel files and that no physical object was counselled to be taken. The information was simply confidential in the circumstances and had no direct monetary value (although it could be the key to objectives that may be valuable in the future). In other words, even if the list was surreptitiously photocopied and the original replaced, then what was taken was purely intangible and of no value, as such, other than the sheets of paper the information was copied on and the cost of copying.

Defence counsel argued that if what was counselled to be taken was not anything tangible or physical, it could not have amounted to a theft. According to the definition of such a crime one has to take "anything"

The Supreme Court of Canada responded that "anything" refers to anything of proprietary right.

There was no intention to deprive the hotel (employer) of anything. The Supreme Court said that confidential information is not property as intended by Parliament in section 283 C.C. (definition of theft). If Parliament intends to create an offence for the protection of confidential and private information it must do so by means of specific legislation.

The Court reasoned that if a person looked at confidential information not meant for his eyes and memorizes it, he does not remove anything and does not convert anything physical to his own use. What he does is deprive someone of the confidentiality of the information. The court did not say that such a deed is not serious and an inappropriate invasion of privacy. However, it does not amount to theft as defined in the Criminal Code and at common law.

The Supreme Court of Canada also explored the possibility of the act amounting to fraud. Again the Crown would have to show a dishonest deprivation that would prejudice the economic interests of the victim (although actual financial loss is not essential). To say that if the employees organized wages may rise is not the jeopardy or loss the Court appeared to be talking about. If the hotel had intended to deal with the information in a

commercial way and their opportunity had been jeopardized then counselling to commit fraud would have been an appropriate charge to allege

Accused's appeal allowed
Acquittal restored

See also Volume 24, page 6 of this publication (*R. v. OFFLEY*) Alberta Court of Appeal.

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PROOF OF KNOWLEDGE WHEN USING JARGON

Regina v. *REED* - County Court of Westminster - X018506 - January 1988

An undercover officer went to an apartment accompanied by a female friend for the purpose of purchasing cocaine. There were several persons in the apartment and there was an obvious reluctance to let the officer in. His female companion was apparently welcome and entered the inner sanctum while the officer remained just inside the entrance door. A woman approached the officer with a plastic bag, she said it contained "good coke, in the bottom of the bag". She claimed there was also some "crack" in it. The officer opened the bag examined the content and said he would buy it. The accused who had been in the vicinity during all this piped up and said, "Where is the cash?" The officer gave the accused $475.00, who counted and pocketed the money.

The successful defence is somewhat unbelievable. In view of the slang, jargon or street language used in identifying the substance contained in the bag, the accused received payment for, did he (the accused) know it was cocaine? He had not used the language or in anyway indicated what the substance was. He only knew it was worth $475.00. Had the charge been against the woman who had made the sales pitch, the defence of lack of knowledge would have been unsuccessful. The trial judge held he could not take judicial notice that the slang terms meant cocaine for the accused. Hence there was a doubt in respect to the requisite knowledge which had to be resolved in favour of the accused.

Accused acquitted.

Comments: There is a body of case law that seems to support that specific knowledge of the substance possessed or trafficked is not necessary. All that is required that there is no doubt the accused person knew that he trafficked or possessed a restricted or prohibited substance. Seems that irresistible inference can be drawn in this case.

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"CONSEQUENCES OF THE 'BONOGOFSKI' CASE ROADSIDE SOBRIETY TEST CONSTITUTING DETENTION"

In November of 1987* the B.C. Court of Appeal held that a person who's ability to drive is suspected to be impaired, is detained from the moment he is stopped and his condition is observed. A subsequent sobriety test is a possible means of gaining additional evidence from the accused. Consequently, if the suspect was not made aware of his right to counsel his right is infringed and the evidence subject to suppression under the Charter's enforcement section [24(2)].

Apparently some practicing police personnel are unaware of this precedent as too many drinking/driving allegations bite the dust on this issue. Many of these cases had a date of offence subsequent to this Bonogofski decision.

It is also of interest that the Ontario Court of Appeal have since the Bonogofski decision held that a roadside sobriety test does in the absence of an arrest beforehand, not constitute detention. Needless to say this contradiction in judicial views needs to be settled by the Supreme Court of Canada. In the meantime B.C. police personnel beware.

At the B.C. Provincial Court level another issue has arisen in relation to the roadside sobriety test. There are now two cases where the evidence obtained by means of a roadside test was suppressed as the suspects had not been advised that they did not need to perform the test. The only Charter provision that may have been brought into the picture is that contained in s. 7 which stipulates no deprivation except in accordance with the principles of fundamental justice. If this is correct the reasoning comes close to the U.S. "Miranda" principle, and will, considering the current trend in our courts of superior jurisdiction, not likely be sustained. Although it is a suspect's right not to provide authorities with evidence against himself (except when the law requires him to do so) it is not his right to be made aware of this. If this was not so, a warning would have to be given in numerous other circumstances.

In practice the warning of voluntariness (if one can call it that) is customary when a suspect is invited to explain. This warning is not to meet the right of the accused to remain silent nor is it mandatory. It is strictly a means of enhancing the requisite proof to admissibility i.e. that the statement was made voluntarily where the suspect knowingly speaks to a person in authority--someone who he believes can effect the path of prosecution.

Furthermore the issues appear distinct from one another where a statement is involved or in circumstances not different from a roadside sobriety test. Where a police officer directly observes the results of the test he can vouch for the truth of his testimony. Where he relates what a suspect told him he

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*See Volume 29, page 1 of this publication.

can only vouch for what is said but not for the truth of the content of the statement. Consequently, if the Crown adduces the statement to prove the truth of its content, it is hearsay and only admissible in evidence as an exception to the hearsay rule. Absence of inducement or hope of advancement (voluntariness) is requisite to that admissibility only as statements made involuntarily cannot be relied upon to be true. Therefore to compare the roadside sobriety test with statements in terms of admissibility of evidence, seems incorrect.

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EXECUTION OF SEARCH WARRANT
DETENTION OF OCCUPANTS

Regina v. CARSWELL - County Court of Vancouver Island
Victoria 44079, January 1988

Armed with an appropriate search warrant police officers announced their presence and purpose at the accused's residence. The door was answered by three other occupants of the house. The accused was in the bathroom. Police took control over these four occupants by herding them into the living room and requesting them to stay there until the search was completed. In one of the bedrooms a quantity of marihuana was found along with baggies and scales. When asked who's bedroom this was, the accused identified himself as being the occupant. He was taken into the room and arrested for possession for the purpose of trafficking and then for the first time, informed of his right to counsel and asked if he wants to avail himself of a lawyer's services. He responded, "No, not at this time" or words to that effect. He is then shown what was found in the room and despite having been aware of his right to remain silent he admits the narcotics and paraphernalia are his. He adds in the same breath however, that he cannot be had "for the purpose" as the scales don't function. He declined to identify the dried substance that was found but conceded that it was for his own use.

At his Trial a *voir dire* was conducted to determine the admissibility of this substance, the conversation and exhibits.

Without relating all of the reasoning on the part of the Trial Judge it was predictable that he found that all the persons being controlled in the living room were detained from the time that control was assumed. This meant that the detention was continuous from that time on.

For the accused the only thing that changed when his arrest was effected was that detention was confirmed, he was informed of the charge against him and he was made aware of his right to remain silent and to counsel In essence then, there were two stages to his detention in terms of the Charter requirements, separated from one another by the point in time when he was made aware of his right to counsel - before and after so-to-speak. During the "before" period his right to counsel had been infringed and consideration whether to suppress the evidence obtained from the accused had to be given. What he conceded to and evidence obtained "after" also needed to be scrutinized for the purpose of admissibility in terms of voluntariness of statements and whether the "no, not at this time" was in fact a waiver of his right to counsel.

In regards to voluntariness there was little to review. There were no improprieties such as threats or inducements. In as far as the waiver to rights, the person must be an informed individual. He had demonstrated to be aware of the purposes of the police and was also quite conversant about the essentials needed to prove the offence for which he was arrested. The comments and answers showed a full appreciation of the nature of the police questions and what was involved. His declining to consult counsel was therefore an appropriate waiver of his right to counsel.

Although there was a "before" and "after" period as explained above the detention of the accused had been continuous. Therefore the whole period was contaminated with the Charter infringement that occurred in the "before" period. This means that all of the evidence obtained was subject to consideration for suppression under s. 24 (2) Charter. With the statements being voluntary and the waiver to right to counsel being a genuine one the only consideration left was whether admission could bring the administration of justice into disrepute. The Trial Judge concluded that the evidence obtained from the accused during the "before" period had to be excluded. Whatever came during the "after" period was admissible

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UNREASONABLE SEARCH RESULTING IN SEIZURE OF ONE MARIHUANA CIGARETTE - ADMISSIBILITY

Regina v. FOLK - County Court of Westminster - X018502 - March 1988.

A police officer was in a parking lot near an arcade, notorious for young people trading drugs. Not only did police officers know about its reputation but so did the Trial Judge from presiding over charges arising from trafficking at that location.

The officer observed the accused wandering away from the side of an occupied car after he obviously saw the officer. The officer called him back, asked for permission to search and then did so while the accused, of his own volition, held his hands above his head. One marihuana cigarette was found and he was charged with that possession. If the officer had reasonable grounds for doing so, the search, of course, was lawful. Other than the location being known for drug trade and the officer's belief that the accused wandered away because of his presence, there was nothing in addition to substantiate the officer's position that he searched lawfully. Wandering on a public parking lot did fall short of being grounds prerequisite to a lawful search and consequently the search was unreasonable. However, the Trial Judge held that admitting the evidence would not affect the reputation of the administration of justice. A conviction followed as did an appeal by the accused.

The County Court Judge agreed that the accused's right to be secure against unreasonable search had been infringed and gave consideration to the defence argument that the offence was a minor one. He reviewed cases on the point that where the offence is less serious there is greater vulnerability to the reputation of the administration of justice if, despite the infringement of a right, evidence against an accused is admitted. In other words the lesser the offence the more likely evidence obtained in "a manner that infringed or denied any rights or freedoms guaranteed by the Charter" will be excluded.* One marihuana cigarette is not serious argued defence counsel and since the cigarette was obtained by means of an unreasonable search the precedents indicate that the evidence must be suppressed.

The County Court Judge disagreed and reasoned that the gravity of the offence must not be measured by the quantity of a narcotic Must one cigarette be excluded and two be admitted? What about three or four cigarettes? "The correct way to determine the seriousness is to consider the entire circumstances" responded the appeal Judge. In different circumstances one cigarette may be classified as a minor violation. Here we had a location where narcotics and drugs are trafficked among young people. The place is notorious and is problematic causing anxiety and concern in the community. By equating the quantity of contraband to the gravity of the offence in these

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*See also *R. v. Collins, Volume 27, page 1 of this publication.*

circumstances is inadequate to meet the onus on the accused to show that admission of the cigarette in evidence could bring the administration of justice into disrepute

Accused's appeal dismissed
Conviction upheld

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BEWARE OF RELYING ON EXTRACTS UNDER M.V. ACT TO PROVE PREVIOUS RECORD IN CRIMINAL PROCEEDINGS

Regina v. HALA - Supreme Court of BC - Chilliwack 13900
March 1988

The accused had been convicted of impaired driving. The Crown had served notice on him that by virtue of previous convictions it was seeking a greater penalty. The accused did not acknowledge the previous convictions and the burden of proof fell on the Crown to prove them. It did so by means of an extract certified by the Superintendent of Motor Vehicles under section 75 M.V. Act. The Trial Judge accepted the extract as proof. The accused appealed the sentence that was consequently imposed.

The Supreme Court Justice, bound by precedence,* reminded that where there is a dispute in regard to the previous conviction the certified extract is mere hearsay evidence. It may be proof of its content for purposes under the M.V Act but in this case provisions under the Criminal Code had to be adhered to [s. 500 (4) and 594 (1) (a) C.C.].

The Justice then asked the Crown if it wanted an adjournment to produce the necessary proof. When this resulted in an application for an adjournment the appellant objected and submitted that the Crown knew or ought to have known how to prove a previous conviction. It failed to do so. Considering the strict application of procedure required in criminal cases and the fact that the appellant's liberty is at stake, no adjournment was granted.

Sentence appeal allowed

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**ALBRIGHT v. The Queen* - Supreme Court of Canada - 1987, W.W.R. 577

"ARBITRARILY CONTINUING CUSTODY"
"CHARTER REMEDY FOR SUCH INFRINGEMENT"

Regina v. *ROY* - BC Court of Appeal - Vancouver CA000840 - April 1988

Everything was done right by the police officer who arrested the appellant ROY for impaired driving. All evidence supporting the impairment was secured by observing the accused. When they arrived at the police station the accused refused to comply with the demand for breath samples. He was placed in cells for four hours before he was released. Apparently this sustained detention could not be justified by any of the provisions in section 450 C.C. and was considered to be arbitrary detention contrary to s. 9 of the Charter.

The Trial Judge had reasoned that all the evidence for impaired driving had been secured before the accused's right was infringed and that no remedy was required in relation to that charge. However, the refusal was during and possibly as a result of the detention. Consequently the evidence of refusal was excluded under s. 24 (2) of the Charter. This resulted in a conviction for impaired driving and an acquittal for the refusal.

The accused appealed arguing that the appropriate remedy was a judicial stay of proceedings under s. 24 (1) of the Charter in relation to both charges. The Court of Appeal simply responded that the Trial Judge s conclusion was the appropriate course in the circumstances

Accused's appéal dismissed

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USE OF BODYPACK - UNREASONABLE SEARCH
INTERCEPTING PRIVATE COMMUNICATIONS

Regina v. WIGGENS[*] - B.C. Court of Appeal - CA 007885 - June 1988

The accused invited someone to invest in a ship he had recently purchased in England. He promised a five to one return on the money. The prospective investor went to police as the business the accused intended to do with the ship was to transport, import and deal in narcotics. From thereon-in every meeting regarding the deal was recorded by means of a bodypack. The accused had not been secretive with the details of his operation and an allegation of conspiracy with three other persons was successfully prosecuted by actually proving the substantive offence of importing narcotics. The accused appealed his conviction on several grounds, the most interesting of which is the argument that the evidence of the recorded conversations should not have been admitted into evidence as the surreptitious methods used amounted to an unreasonable search contrary to s.8 of the Charter. This kind of a search should not be free of "judicial supervision". Defence counsel conceded that a person is not violating the privacy provisions of the Criminal Code if he or she records his or her own conversation with another party. He contended that where police use this method to collect evidence, the practice does offend the Charter right to be secure against unreasonable searches by authorities. Furthermore, the conversations were not simply recorded but simultaneously transmitted to police. This caused interception and brought the matter within the Privacy Act.

Like the Trial Judge,[**] the B.C. Court of Appeal rejected the accused's arguments. When a person becomes party to a communication that is meant to be private, any participant to it can give up his or her claim to privacy. Taping simply assures accuracy, and is no different in law, to a person making notes and relying on them to testify. In practice the former manner is far more reliable. There is simply no reasonable expectation of privacy where one party to it consents to divulging its content or to have it intercepted.

Accused's appeal dismissed.

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[*] See *Regina v. WIGGENS* - Volume 30 page 17 of this publication.

[**] Ibid, Vol. 30 page 17.

POSSESSION OF A WEAPON DANGEROUS TO THE PUBLIC PEACE
RELATIONSHIP BETWEEN POSSESSION - INTENT AND USE

Regina v. DAVIS - County Court of Kootenay -
C.C. 130389 - December 1987.

The accused spotted his ex-wife and two men in a pub. On his way to the washroom he engaged in an insulting and shameful conversation with them. He referred to his wife sleeping around and strongly recommended that she and her companions should be going home for that purpose. He then produced a buck knife and proposed to slit the throat of the ex-wife's new boyfriend. He also waved the knife in front of his ex-spouse so she had to move backwards.

The accused testified that he had the knife as a tool for use in his work When he saw his ex-wife and while engaging in the conversation he, on the sudden and impulsively used it as the Crown witnesses claimed.

The County Court Judge in deciding whether the accused was in possession of a weapon dangerous to the public peace, reiterated the law surrounding this offence.*

> "The formation of the unlawful purpose which may be inferred from circumstances in which the weapon is used, must precede its use. The interval of time between the formation of the purpose and the use of the weapon need not be long. It may in some cases be very short, but the gap must be significant." (*R. v. FLACK*)

The County Court applied this test to the evidence and was not satisfied beyond a reasonable doubt that there was proof of a sufficient gap in terms of time between the forming of the purpose and the use of the weapon.

Accused acquitted

NOTE: Considering the evidence it seems that a charge of assault of the ex-spouse may have fared better. Surprisingly no reference was made to decisions** at the court of appeal level on the very issues involved in this case

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* *R. v. BACKMAN* - Volume 21 page 32 of this publication

** *R. v. FLACK* 1968 4 CRNS - 121
R. v. PROVERBS 9 C.C.C. (3D) 249

SEIZURE OF ITEMS BELIEVED TO BE THE PROCEEDS OF AN INDICTABLE OFFENCE BUT NOT MENTIONED IN THE SEARCH WARRANT

Regina v. OPPEN - County Court of Caribou - Quesnel CCR 2196 - January 1988.

Police officers searched the accused's home looking for specific items mentioned in the search warrant. They came upon a video recorder with the serial number removed. An identical recorder was stolen from the post-secondary educational institution where the accused worked as a janitor. Without having the warrant amended or a new one issued, police seized the recorder. The Trial Judge dismissed the charge of possession of stolen property as the seizure was unreasonable and taken as the result of a warrantless search. Although the Crown conceded inclusion of the recorder in the warrant would have been simple (as it could have been accomplished by a telephone call), it appealed the acquittal, relying on s.445 C.C. to show that the seizure was for all intents and purposes done by authorization through the search warrant.

Section 445 C.C. provides that things in addition to those mentioned in a search warrant, may be seized if there are reasonable grounds to believe that they were obtained by, used or to be used in the commission of an indictable offence. The defence (to summarize its submissions) in essence argued that this provision is now overshadowed by the Charter right to be secure of unreasonable search and that a warrantless search is on the surface unreasonable.

The County Court Judge held that the provisions of s. 445 C.C. are valid without prerequisite conditions other than those contained in the section itself. The fact that it was quite easy and practical for the officers to have the recorder included in the warrant did not result in the section not applying in these circumstances. The justification for the invasion of the accused's privacy had already been considered when the warrant was issued. The officers had therefore not infringed the accused's right by not including the recording in the warrant. The finding of the recorder was a windfall issue and s. 445 C.C. applied

Crown's Appeal allowed
New trial ordered

NOTE: The court in essence held that the search was not warrantless and that the seizure was by virtue of s.445 C.C. lawful

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UNLAWFUL ARREST RESULTING IN FINDING PROCEEDS OF UNRELATED CRIME EVIDENCE NOT EMANATING FROM ACCUSED PERSON - ADMISSIBILITY OF EVIDENCE

Regina v. HANLEY and PEARCE - County Court of Vancouver - No. CC871135 - December 1987.

Police officers entered a dwelling without knocking or announcing themselves to prevent the accused from avoiding arrest for possession of a stolen motor vehicle. While inside they observed proceeds from a break-in. A search warrant was obtained and those proceeds were seized. Defence counsel argued that these proceeds should not be admitted into evidence. The evidence to justify the warrant was unlawfully obtained and admission of evidence resulting from that warrant would bring the administration of justice into disrepute.

The County Court Judge acknowledged the defence position but did nonetheless admit the evidence. The evidence had not been of the kind that emanated from the accused persons after some Charter right was infringed. Said the Court:

> "I simply say that a reasonable man on the street would think it was indeed a very strange state of affairs that our system had fallen into if evidence such as this should be excluded in the circumstances of this case. I think they would wonder and certainly would be most likely to consider that we have changed our legal system in a way which a reasonable man would not approve."

Evidence admitted.

STATEMENT - VOLUNTARINESS - RIGHT TO COUNSEL

Regina v. DA SILVA - Supreme Court of British Columbia - Vernon, BC, NO17240 - November 1987

The accused was allegedly involved in clubbing someone to death with a baseball bat. He was very skillfully interviewed for several hours. This interview was taped without the accused's knowledge and was transcribed for presentation in Court. At trial the Crown sought to have the statement admitted into evidence. To prevent this, defence counsel claimed that there were inducements: that the accused's right to counsel had been infringed; and that taping the conversation without his knowledge was an impropriety.

The officer's exceptional skill in interviewing a suspect had in this case, not affected the voluntariness of the statement.* In response to a submission that the accused was no match for the officer, the Court acknowledge that the latter is an adroit interrogator, but added:

> "There is nothing wrong with that. Indeed excellence in police investigations should be applauded, not condemned."

It was also suggested that the encouragements for the accused to speak were in fact inducements. The accused was asked to tell the truth and it was suggested to him that lack of intent to kill the victim could result in a lesser charge. The Court held that an encouragement to tell the truth without any suggestion that the system will be more generous in return is not an inducement. The simple statement that lack of intent to kill is capable of reducing murder to manslaughter was an accurate statement of law and that did not effect the voluntariness of the statement made by the accused.

Suppressing his personal views of taping an interview without the knowledge of the interviewee, the Supreme Court Justice held that it was a perfectly legal practice that does not abuse the process of the Court. For all these reasons the statement was voluntary and admissible.

Then defence counsel submitted that the statement should be excluded under s. 24 (2) Charter as the accused's right to counsel had been infringed.

At the outset of the interview the accused was told of and understood his right to counsel. He was also told that the interview was in relation to a certain murder. The Court was satisfied that there was no further obligation on police to explain the Charter right.

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*Supreme Court of Canada - Intellectual superiority affecting voluntariness - See Volume 7, page 22 - 3 W.W.R. [1979] 1.

At the outset of the interview the accused was told of and understood his right to counsel He was also told that the interview was in relation to a certain murder. The Court was satisfied that there was no further obligation on police to explain the Charter right.

Well into the interview the accused, in answer to "How did it happen?", answered, "....don't you think I should have a lawyer for this? Man, this is fuckin heavy shit, man." In reaction to this the officer reminded the accused of his rights, but did nothing more.

The Court found that the accused had not requested a lawyer but had only asked if he should have one.

Shortly after the accused said, "Wanna get to talk to a lawyer, man" Again he was assured he could do this anytime he wanted and was asked if he did not remember what he was told at the outset of the interview. He responded, "Yeah, but you dragged me in here. Fuckin two hours ago, whatever it was. With barely fuckin....I should have just stayed there, man. Fuck around!"

The officer then repeated his last question and the interview continued.

The Court considering the context of these utterances by the accused concluded that they amounted to a request for counsel that was abandoned as he considered it to be of no value anymore considering what he had already told police.

The Court concluded that the accused had failed to show that his right to counsel had been infringed.

Statement admitted

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POLICE OPINION EVIDENCE THAT ACCUSED BELONG TO ASIAN YOUTH GANG

Regina v. CHU and SHUM and WILSON - County Court of Vancouver - CC871893 - May 1988

The accused were being tried for assault causing bodily harm. The Crown called on a police witness purported to be an expert on Asian youth gangs He testified that in his opinion the accused belonged to such a gang known as "Lotus".

Needless to say defence counsel objected to this evidence going in. The defence claimed that membership was irrelevant as the charge was assault and not that the accused were members. Secondly they argued that the policeman's evidence was based on hearsay and content of inadmissable statements. Thirdly they submitted that it would be so prejudicial to the accused that it overshadowed whatever probative value if any, the evidence might have.

A *voir dire* was held as a consequence. The Trial Judge reminded defence counsel that the nature and known activities of organizations a person belong to may be relevant to identification. For instance, proof that a person is a member of a mafia family may help to show motive for committing acts or offences that are common to such members. In addition to other evidence of identification of an accused, evidence of such membership may be relevant and have weight to identify him as the person who committed the crime. In other words, motive is relevant to identity. Furthermore membership is capable to rebut a defence of innocent intent as certain activities are within the behaviour pattern of the organization.

In regards to one of the accused the police witness had personal knowledge that he was a Lotus gang member. The others he concluded were members--also based on information he received from reliable sources. Held the Court:

> ".....Police officers are entitled to rely on hearsay evidence as a basis for forming an opinion that a given fact exists....."*

The police officer's opinion evidence on membership, activities and organization of Asian gangs was admissible.

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*COLLINS v. *The Queen* (1987) 33 C.C C (3)1...Volume 27, page 1 of this publication

INJURED DRIVER IN HOSPITAL - DEMAND FOR BLOOD TEST
IS THERE CUSTODY? - REFUSAL BASED ON FEAR FOR AIDES

Regina **v.** ***HARDER*** - County Court of Yale - Kamloops
31178, June 1988

The accused was involved in an accident and was injured. The investigating constable formed the opinion from observation and talking to him that his ability to drive was impaired. No sobriety test was asked for and no right to counsel warning was given. The accused went to the hospital via ambulance and was placed in the care of the medical staff. Approximately 45 minutes later the officer arrived at the hospital and made a demand for a sample of the accused's blood. The officer was refused as was the doctor prior to the officer's arrival at the hospital. The accused told each of them that he was afraid of getting Aids from hospital needles. At no time was the accused given his rights to counsel. Nevertheless he was convicted of refusing to provide the blood sample. He appealed that conviction.

At trial the officer explained that he would have informed the accused of his right to counsel had he thought him to be detained. He was not detained by the officer at all, agreed the Trial Judge, but was simply an injured person being cared for in a hospital. No sobriety tests were performed or asked for and even the transport was done by medical people. A demand by itself does not constitute detention <u>in these circumstances</u>. The demand, or the refusal for that matter, did not change anything in regards to the accused's freedom or ability to move at will or to the restraint placed upon him by his medical condition. Compliance with the demand would not have affected that restraint either. And, "Even if I am wrong about this detention matter, admitting evidence of the refusal could not bring disrepute on the administration of justice" the trial judge had said

Defence counsel argued that the option of complying with the demand or facing a criminal charge entitled the accused to his right under s. 10 of the Charter. Also, it was argued that despite the hospital staff not having any authority to control a person to the extent that he is detained, the majority of people will not remove themselves without specific permission.

The County Court Judge bought the latter argument and held that the accused was detained when the demand was made. However, the officer had acted in good faith which permits the evidence of refusal to be admitted.

Accused's appeal dismissed
Conviction of refusing upheld

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LACK OF DETAINEE'S DILIGENCE IN EXERCISING RIGHT TO COUNSEL - ADMISSIBILITY OF STATEMENTS

Regina v. SMITH - BC Court of Appeal - CA007697 Vancouver - July 1988

Five months after pub staff were robbed, the accused was arrested during the night for his alleged part in the robbery. He was told of his rights and the reason for his arrest He was asked not to discuss the reason for the arrest in the police car but to wait until they were at the police station. After an hour in cells the accused indicated that he wanted to contact his lawyer. However, the only number listed was the lawyer's office. Despite the officer's urgings for him to dial the office number, which might by means of recording tell him where to contact the counsellor, the accused declined saying he'd phone in the morning.

An hour later the accused was brought into an interview room and was asked about his role in the robbery. The accused said he wanted his lawyer present Replied the officer, "No problem, but with your lawyer you won't say anything I need to hear from you...." The questioning continued and the accused persisted that he did not want to say anything unless his lawyer was present When asked why he wanted his lawyer there the accused said he wanted to explain to him first what had happened. The officers then observed that the lawyer would only advise him not to say anything to them. The accused indicated that he also assumed that to be so.

The dialogue continued and the accused then agreed to tell the officers about the robbery, "off the record". This changed to him agreeing to make a written statement but, "I won't go to Court and testify." He then put in writing his participation in the robbery. The Trial Judge admitted the statement into evidence as a voluntary statement. He also held that the accused's right to counsel had not been infringed. The accused appealed only the latter decision to the B.C. Court of Appeal.

Defence counsel argued that there was no urgency to the interview. The offence had occurred over 5 months ago and the officers were very much aware that the accused intended to consult counsel the following morning. He had indicated several times that he did not want to say anything until he received legal advice and despite this the questioning continued. Defence counsel compared the case with one decided by the Supreme Court of Canada last year. In that case a Manninen* (also suspected of armed robbery) responded to being accused by police with: "Prove it. I ain't saying anything until I see my lawyer." Despite this assertion police asked about the knife used in the robbery. This resulted in an answer that denied the use of a knife but admitted the robbery. The Supreme Court of Canada held that Manninen's right to counsel had been infringed. The only distinction in this and the Manninen's case is that the accused Smith had been given an opportunity to use a phone to reach his lawyer, Manninen had not been afforded that

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**Regina v. MANNINEN - Volume 28, page 1 of this publication*

opportunity. Besides having to make a detained suspect aware of his right to counsel, authorities are obliged to provide him a reasonable opportunity to accommodate the carrying out of that right and must in circumstances such as in Manninen, cease their questioning or in any way solicit evidence from the detainee.

It seemed that the accused had a binding precedent completely on his side and the admissibility of the statement to police seemed doomed for exclusion.

Of the three justices of the B.C. Court of Appeal, one saw no difference in this and the Manninen case, however, his two colleagues did. The majority of the court held that the decision of the Supreme Court of Canada in the 1987 Trembley* case (which came subsequent to the Manninen decision) had to be considered. Trembley, a suspected impaired driver procrastinated in consulting counsel. He had phoned people other than a lawyer and no further time had been allowed him. The Supreme Court of Canada held that a detainee "not being reasonably diligent in the exercise of his right" could not thereby stifle continuation of police investigation. Defence counsel in this Smith case argued that the belligerent Trembley had to blow within two hours and that there was consequently an urgency to the matter. Furthermore his maneuvers were obviously to waste time and to sabotage the police investigation. In his client's situation there was a different attitude, there was no urgency and his reluctance to contact his counsel that evening was a matter of courtesy and in no way a lack of diligence to exercise his right.

The B.C. Court of Appeal held by majority:

1. Police had fulfilled their duty to make the accused aware of his right to counsel;

2. Police had provided the accused with ample opportunity to exercise his right to counsel;

3. When the accused failed in his efforts to contact counsel they had urged him to keep on trying; and

4. The accused knowing that police wanted to interview him failed to make further attempts to reach counsel in the hour he had between his first attempt and the interview.

These circumstances caused the Court to hold that the accused had not been diligent in exercising his right. Police had not committed any improprieties and were not unfair to the accused. When the accused failed to continue his efforts to exercise his right the police investigation was not thereby suspended.

Accused's appeal dismissed. Statements by accused could not be excluded for infringement of his right to counsel.

R. v. TREMBLEY (1987) 2 S C R. 435, Volume 29, page 8 of this publication

MUST DEPONENT OF APPLICATION TO SEARCH WARRANT HAVE PERSONAL KNOWLEDGE OF THE REQUISITE GROUNDS? DOES LACK OF SUCH KNOWLEDGE RENDER SEARCH UNREASONABLE?

Regina* v. *DIAMOND and CARDINAL - County Court of Yale - Kamloops #1391 - January 1988

Police officer #1 investigating a traffic offence, received information from his suspect that narcotics were kept by the two accused at a certain address from where it was sold. The informer also told Officer #1 why a previous search of the premises had failed to produce any evidence. Officer #1 relayed the information to Officer #2 who worked in the drug squad. Officer #1 learned that what the informer had told him about this address and the previous search was accurate.

One day, Officer #1 received information from the same source that a quantity of narcotics were now kept at that address for retail. Officer #2 was notified at home. Officer #1 did not make any notes about the information he received; he did not tell Officer #2 that his source was the same as the one who had given the accurate information before. Officer #2 attended the police station and related the information to Officer #3. That is, that there were narcotics kept for the purpose of trafficking at the address. He did not tell #3 anything of the background of this information. Officer #3 prepared an application for a search warrant and he then swore before a Justice of the Peace that he had reasonable and probable grounds for believing and did believe that a narcotic was kept for the purpose of trafficking at the address. The application did explain how Officer #1 knew from a reliable source (who had been on the premises and knew first hand of the presence of the narcotic) that a narcotic was kept for retailing at the target address. Defence counsel for the two accused applied to have the warrant quashed in that it was issued to Officer #2 and #3 contrary to law and that consequently, the search was unreasonable. The two officers had been negligent and had mislead the Justice of the Peace by deposing that they had first hand reasonable and probable grounds, and had not been taking any steps to ensure that the source of the information was reliable. They, the three officers, had simply trusted each other as being reliable and responsible. The Crown is entitled to protect its source of information conceded the defence, but this should not be compounded by officers swearing to facts they have no personal knowledge of. Officer #1 should have sworn to the information to the warrant. In the circumstances he and only he could attest to the reliability of the source.

Relying on a decision by the B.C. Court of Appeal in September of 1987* the County Court Judge held that the relaying of information from one officer to the next was not fatal to the warrant at all, despite the fact that Officer #3 had been careless in assuming that Officer #1's informer was reliable. He should have made far greater efforts to ensure that his deposition was based

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*_Regina_ v. _R.J. WILLIAMS_

on as much personal knowledge as he in the circumstances could obtain. However, there was no flagrant disregard, for the truth "approaching fraudulent behaviour". Officer #3 had simply made an assumption based on the judgement of a colleague. The practice was not endorsed by this court and was found to be one where too much liberty was taken. "Corporate knowledge" where one peace officer who has grounds to act can give a colleague the same grounds for so acting by simply telling him that he has such grounds, may not quite cover the liberal approach taken by Officer #3. Nonetheless, the Court declined to quash the warrant or declare the search unreasonable.

Evidence ruled admissible

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MEANING OF "WHILE COMMITTING" IN CONSTRUCTIVE MURDER PROVISIONS IN CRIMINAL LAW

Regina v. PARE - 38 C.C.C. (3d) 97 -
Supreme Court of Canada

The 17 year old accused had sexually assaulted a 7 year old boy. The victim said he was going to tell his mother as soon as he got home. To prevent this the accused firstly hung on to the victim for about 10 minutes trying to persuade him to keep quiet. When he realized that this was to no avail he strangled the boy and hit him over the head with an oil filter that happened to be lying about. He then tied a shoe lace around the boy's neck until he was dead. The indecent assault had amounted to undressing the boy and lying on top of him until he ejaculated beside the victim's penis. At the time of the offence the indecent assault section was still in effect and it was included in the crimes listed in the then s.214(5)(b) C.C. which caused a murder to be first degree murder if death was caused "while committing" that crime.

The accused committed second degree murder and only the provisions mentioned above, made it first degree murder <u>if</u> the murder was committed while he committed the indecent assault. The indecent assault was over with when the accused took the boy's life and yet the jury returned a verdict of first degree murder. The Trial Judge had been exhaustive in explaining the meaning of this provision by substituting it for other known phrases: "committed on the occasion of", "committed at the time of", "on the same occasion", "in the same circumstances", etc. He clarified the words of the section by saying that they need not find that the accused was committing the indecent act with one part of his body while another part was used to take that person's life. In other words the acts need not occur simultaneously.

The Quebec Court of Appeal reduced the conviction to second degree murder as "while committing" contrasts "after having committed". Then the Crown took this matter to the Supreme Court of Canada.

The Supreme Court of Canada explained that section 214 C.C. does not create an offence but simply classifies murders by telling us when, what otherwise would be second degree murder is due to the circumstances in which it was committed included in first degree murder. The argument by defence counsel is based on the literal meaning of the words used in the section, but does not take into account the tenor of the murder provisions in the Criminal Code in their entirety. Defence counsel wants to isolate the words in issue from the entire context and the law makers' obvious intent. In other words defence counsel urged the Court to take a contextual approach to interpreting this provision. However, the Court agreed with the defence that it would be erroneous to consider the actions of the accused as "facilitating his flight after he completed the indecent assault" [s. 213 (a) (ii) C.C.].

It may be of interest to note that courts of superior jurisdiction in Canada have taken opposing views on this issue. One person raped (as is then was)

and then tied up his victim. She got loose and he killed her. He was convicted of second degree murder as the taking of her life had not occurred simultaneously with the rape.*

Subsequent to that case, a man who took the life of his victim after raping her was convicted of first degree murder as the court considered that "while committing" does not require an exact coincidence of the rape and the murder but "a close temporal and causative link between the two."**

The Supreme Court of Canada held that the narrow interpretation which calls for a simultaneous occurring of the offence and the causing of the death is contrary to common sense and the intent of Parliament.

The court said that if the act that causes death and the acts constituting the offences mentioned in s. 213 C.C. "form part of one continuous sequence of events, forming a single transaction" then the death was caused while committing the underlying offence.

Crown's appeal was allowed
Conviction of first degree
murder was restored

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*R. v. *KJELDSEN* (1980) 53 C C C (2d) 55.

**R. v. *STEVENS* (1984) 11 C.C.C. (3d) 518

SEARCHING SUSPECT 18 HOURS AFTER ARREST
SEARCH WARRANT - COMMON LAW AUTHORITY

Regina v. MILLER - 38 C.C.C. (3d) 252 -
Ontario Court of Appeal

The accused was arrested for breaking into a place. Blood was found at the scene and the accused wore a blood stained bandage. The accused was remanded in custody and the officer did not realized until some 18 hours after the arrest the importance of the bandage. Not only that the accused was injured and perhaps had a cut consistent with what was found at scene but also to see if the blood at the scene and that of the accused matched. He applied for and was issued a search warrant for the bandage. The accused did not object and it was removed by a nurse at the hospital. The blood matched and the evidence of analyses was admitted. The accused was convicted and appealed.

A warrant may only be issued for a building, receptacle or place (s. 443 C.C.) and the Crown conceded on appeal that the search was invalid. The Ontario Court of Appeal agreed and held that the Criminal Code does not provide for a warrant in these circumstances and that the taking of the bandage was done warrantless. However the search was not unreasonable. Despite the fact that the arrest had taken place some eighteen hours ago and the status of the custody had changed due to the accused's appearance before a Justice of the Peace, the officer had nonetheless the common law authority to search the accused and take from him anything he reasonably believed was connected with the charge or may be used as evidence.

The search, and the seizure were lawful and reasonable.

Accused's appeal dismissed
Conviction upheld

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LEGAL TID BITS

CROSS-EXAMINATION OF ACCUSED PERSON RE: CRIMINAL RECORD

The accused was charged with the murder of one of his partners in the drug trade. Many of the Crown witnesses were hardened criminals and there was an inevitable credibility problem that favored the accused. The accused did testify himself and to place his credibility squarely before the jury the Crown asked him about his previous convictions for armed robbery, murder and a number of other convictions. Defence counsel moved that these questions not be allowed and that s. 12 of the Canada Evidence Act did in this case not apply as due to the gravity of the previous offences the accused would be deprived of a fair trial (s. 11 Charter). Not so, said the Supreme Court of Canada. Concealing the criminal record of an accused who testifies would deprive a jury from properly dealing with the issue of credibility. At the end of the day the jury would have a misleading and distorted picture in terms of who to believe.

CORBETT v The Queen - Supreme Court of Canada - May 1988

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VALIDITY OF "HOUSE-BREAKING INSTRUMENTS" OFFENCE

The accused attacked the validity of s. 309 (1) C.C. which prohibits possession of house-breaking instruments without having a lawful excuse To prove such an excuse "lies upon" the possessor. The accused claimed that this section violates the presumption of innocence [s. 11(d) Charter]. By majority judgement the Supreme Court of Canada disagreed with the accused. It held that this was not a reverse onus or a presumption against the accused. The wording of the section does not force the accused to prove his innocence, rather it assures that the defence of innocent purpose is available to him. After all since 1972 the possession must be for a specific purpose before it amounts to an offence. This converted the section from one where the accused had to prove his innocence to one where the Crown has to prove guilt beyond a reasonable doubt, with the defence of "innocent purpose" built-in.

HOLMES v. The Queen - Supreme Court of Canada - May 1988

VICARIOUS LIABILITY PROVISION IN B.C.'s M.V. ACT

A corporate entity was charged with hit and run under the B.C. Motor Vehicle Act. It was liable by virtue of s. 76 of that Act which attaches responsibility for offences under the Act to the car owner. Two provincial court judges have now declared s. 76 M.V. Act inconsistent with the Charter as the section does not provide for a "Due diligence" defence. This despite the B.C. Supreme Court finding no fault with the section in 1982, shortly after the constitution came into effect. The provincial court judges held that this precedent was not binding on them as the Supreme Court Justice had not had the benefit of recent cases decided by the Supreme Court of Canada. What also influenced their decision was this vicarious liability section being coercive in that the innocent owner must either divulge the name of the driver or be prosecuted himself. The Crown appealed to the County Court of Vancouver Island which gave a brief response to the appeal. The Judge could find no reason for the provincial court judges not to follow the precedent binding on them. Acquittal was set aside and a conviction was recorded.

Regina v. ROLD Enterprises Ltd. - Campbell River 13602 - May 1988

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GROUNDS FOR DEMAND PRECEDING FLAWED ROADSIDE SOBRIETY TEST

A police officer testified that he formed the opinion that the ability of the driver of a car was impaired by alcohol before he asked him to perform some sobriety tests. This test was followed by a demand for breath samples and advice of Charter Rights. Defence counsel argued that the accused was detained when asked to perform the sobriety test. Lack of Charter advice at that point of investigation constituted a Charter infringement that called for the exclusion of the certificate of analysis. That document was a result of the demand made upon grounds obtained by means of the sobriety test.* The Trial Judge held that the results of the Charter flawed sobriety test should be excluded from evidence. However, since the officer had grounds to make the demand prior to the sobriety test, the demand was lawful and legal and the certificate evidence was not obtained by a means that offended the Charter. The accused appealed his conviction that resulted from this reasoning. The County Court Judge who heard the appeal found no fault in the Trial Judge's logic. Accused's appeal was dismissed and conviction was upheld.

Regina v. LINTOTT - County Court of Cariboo - Prince George CC13218, April 1988

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* *REGINA v. BONOGOFSKI* - Volume 29, page 1 of this publication.

CONTEMPT IN THE FACE OF THE COURT - RIGHT TO COUNSEL

During the arraignment of an accused person, someone in the audience laughed out loud. The Court Officer was ordered to bring the person forward. This was done with the youth laughing all the way. The Judge said, "I'm citing you for contempt of court" and he ordered the youth to be locked up until he would call him back later for sentencing. This was done and resulted in a 90 day prison term. The youth appealed and claimed the judge should have informed him of his right to counsel so he could have prepared for a defence or answer. The Nova Scotia Court of Appeal agreed and remedied the situation under s. 24 (1) Charter by setting aside the contempt conviction.

Regina v. S.M. - 40 C.C.C. (3d) 242

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STATUTORY RAPE - DISCRIMINATION

Two male persons were charged with having sexual intercourse with a female person under the age of fourteen years. The Trial Judge had stayed the proceedings as section 146 (1) C.C. is in his opinion inconsistent with s. 15 of the Charter in that the Parliament failed to create the same offence for female persons who have sexual intercourse with a male person under the age of fourteen years. The Ontario Court of Appeal disagreed and ordered new trials. Considering the purpose and effect of the section and the graver consequences to young female persons and society it is neither unfair or irrational to consider it a crime against a male person to have sexual intercourse with a girl under fourteen.

Regina v. BOYLE - ***Regina v. HESS*** - 40 C.C.C. (3d) 193

ARBITRARY DETENTION AFTER INVESTIGATION IS COMPLETE

The accused was processed as a suspected impaired driver. After he gave his samples of breath he was for reasons unknown detained for another 12 hours. The Trial Judge considered this detention to be arbitrary and stayed the proceedings as a remedy for this infringement. The Alberta Court of Appeal in reviewing the case held in essence that the arbitrary detention came at the conclusion of the investigation. No evidence was obtained by or during that detention neither was anything altered on account for it. Actually the detention was separate from the charge before the trial court. Section 24(2) of the Charter only deals with exclusion of evidence obtained by means of a Charter infringement. Subsection (1) only permits a remedy to be imposed. The stay of proceedings did not remedy the alleged arbitrary detention as it was irrelevant to the charge. If the accused sought a remedy in these circumstances he would have to do it separately from his criminal trial.

Regina v. *CUTFORTH* - 40 C.C.C. (3d) 253

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MEANING OF "ACCIDENT" IN HIT & RUN

The accused had an altercation and a fight with a Mr. W. When the accused left the bar in which all this took place he used his car to push W's automobile in to the wall of the bar doing considerable damage to the vehicle and building. Needless to say the accused did not stay around. Consequently he was charged with hit and run in addition to mischief. This caused a conflict as for hit and run the incident is to be "an accident" while for the mischief charge it has to be a deliberate act. Upon appeal the Supreme Court of Newfoundland held that there was no accident within the meaning of that noun as used in s. 233 (2) C.C. The offence was mischief only.

Regina v. *O'BRIEN* - 39 C.C.C. (3d) 528

POLICE OFFICER ENTERING A HOME TO CHECK ON PERSON IMPAIRED IN AN ACCIDENT

A police officer received information from road workers that the accused had rolled his van. The workers had assisted the accused and had wanted to take him to a nearby hospital as he had some head injuries. However upon his insistence they had taken him to his cabin and left him there after administering first aid. When the officer arrived at the cabin the door was found ajar and knocking nor calling resulted in any response. The officer entered and found the accused sitting on a raised hearth. Questions were answered and an arrest for impaired driving resulted. The accused successfully argued for suppression of all the evidence. He claimed the officer trespassed, infringed his right to privacy and had conducted an unreasonable search. The Crown appealed and the District Court of Ontario reversed the Trial Judge's findings. He held considering the officer's mandate to protect and preserve life as well as the preservation of peace coupled with the information he had, it was his duty in the circumstances to enter the cabin. The entry did not infringe any of the accused's right or freedoms.

Regina v. DEMERS - 39 C.C.C. (3d) 535

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ENTERING PRIVATE RESIDENCE TO EFFECT ARREST

The accused was involved with police during a disturbance. The accused then went to the home of an acquaintance. When police arrived to effect an arrest they properly announced their presence and purpose. The accused struck the arresting officer over the head with a whiskey bottle and caused him bodily harm. The Supreme Court of Canada rejected the accused's claim that he was legally assisting the home owners in preventing a trespasser from entering. Police were legally on the premises and were entitled to enter for the sole purpose of the arrest. Furthermore, even if the officers had been trespassers the force used would have been excessive. Appeal dismissed and conviction for assault peace officer causing bodily harm was upheld.

Regina v. MILLER - Supreme Court of Canada - 39 C.C.C. (3d) 288