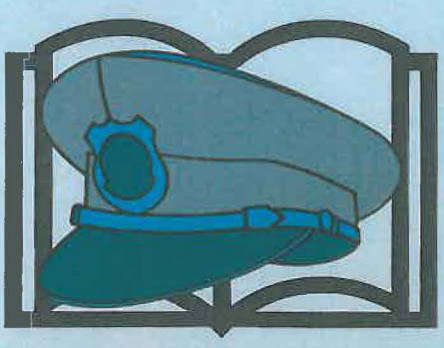

ISSUES OF INTEREST

VOLUME NO. 33

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

Main entry under title:
Issues of Interest. -- Vol. no.1 (Mar. 1981)-

Issued 4 times a year, v. no. 10 (Jan. 1983)-
Written by John M. Post.
ISSN 0840-8254

1. Police - Legal status, laws, etc. - Canada - Cases. I. Post, John M. II. Justice Institute of British Columbia. Police Academy.

KE5006.A45I87 344.7105

ISSUES OF INTEREST

VOLUME NO. 33

Written by John M. Post

January 1989

TABLE OF CONTENTS

LEGAL TID BITS

UNLAWFUL ARREST RESULTING IN INCRIMINATING STATEMENT - ADMISSIBILITY OF CONFESSION

Regina* v. *SPENCE - Manitoba Court of Appeal
41 CCC (3d) 354

Four off-shift police officers were out on the town. Shortly after leaving a bar a bottle was thrown at their car. The driver stopped and gave chase followed by his fellow officers. They ended up in a hostile crowd among which were members of a youth gang. The officers received a beating from about 30 persons. The police department made an effort to round up the assailants and pictures of suspects were shown to patrol officers. Two officers spotted the accused and a male companion in the area where the assaults took place. They resembled those in the pictures and the accused wore a leather jacket similar to those worn by the youth gang members. The young men were approached and asked for identification. The accused's companion had a departmental badge in his possession and both were on that basis arrested for possession of stolen property and given the usual warnings.

After 2 1/2 hours of custody the accused's companion told police that Spence (the accused) was involved in the assault on the officers. The accused was then re-arrested for aggravated assault and again given his rights. When told what his friend had said the accused confessed that he had been involved but had "only hit the guy a couple of times". This was the evidence the Crown had against the accused.

The trial judge held that the original arrest was unlawful as the officers had no reasonable and probable grounds that the accused was in possession of the badge his friend had on his person. His arrest was an arbitrary one. Despite this Charter right infringement the confession was admitted as it would not bring disrepute on the administration of justice to do so. A conviction followed and the accused appealed to the Manitoba Court of Appeal.

The trial judge as well as the Court of Appeal did not debate or spend too much time on the issue of voluntariness. What was alluded to was the common law rule about a statement that came as the consequence of an inducement or threat and a subsequent statement made while the inducement or threat leading up to the first one had not been removed. Needless to say both statements would be involuntary. The Court of Appeal compared the connection between the improprieties and the second statement to the link between an infringement of a right and a statement subsequently made. The Court of Appeal pointed out that even when there is no link between a Charter right infringement and the obtaining of evidence, the evidence may be excluded. Where there is a link it is simply more likely that admitting the evidence would bring disrepute on the administration of justice.

The trial judge and one of the three Court of Appeal Justices felt that the statement should be admitted despite the unlawful arrest and the arbitrary detention. The arrest and detention had not been used to elicit the confession. Furthermore, the incident and the charge were serious. The remedy of exclusion is totally disproportioned with the gravity of the charge

and is more likely to bring disrepute on the administration of justice than admitting the evidence despite the infringement, said the dissenting Justice of the Court of Appeal.

However, the majority judgement was that any substantial arbitrary detention is too long. There was absolutely no foundation to the first arrest and it was a flagrant improper exercise of police power which resulted in a 2 1/2 hour detention before there was a proper and well founded second arrest. The confession was inevitably affected by the detention. The accused's willingness to incriminate himself when he was finally properly arrested, was linked to the infringement of his rights not to be so detained. Admitting the confession, (the only evidence against the accused), would indeed bring disrepute on the administration of justice held the Court of Appeal.

Accused's appeal allowed
Acquittal to substitute conviction

* * * * *

CABINET SOLIDARITY - CABINET - POLITICS AND PROSECUTORIAL SERVICES

Re: The Queen and ROYAL COMMISSION INTO THE DONALD MARSHALL JR. PROSECUTION
Re: MARSHALL and HICKMAN et al. 42 CCC (3d) 129.

Donald Marshall was convicted of murder in Nova Scotia. It was later found that Marshall was not guilty and it became apparent that improprieties had influenced the investigating and prosecutorial stages of this case. The executive branch (the cabinet) of the province ordered a public inquiry. However, when the Commission appointed for this purpose subpoenaed the serving and previous Attorneys General to question them on the consideration given to public prosecutions, they claimed executive immunity.

The Cabinet, the Privy Council, or by whatever name you want to call the premier and his ministers of the Crown, have since time immemorial enjoyed the privilege of executive solidarity. They are always "apparently" unanimous; no one, other than at his/her political peril, can break ranks. Their discussions are for the public good, not to be disclosed.

When the present and past Attorneys General were questioned by the Commission they claimed executive privilege. The Commission made them aware that it was the Cabinet that established the inquiry, and it must therefore be assumed that it, within reason, waived the immunity. By means of extra ordinary remedies, this issue was taken to the Nova Scotia's Queen's Bench. Two applications were heard simultaneously. Cabinet applied that no questions be allowed of the subpoenaed ministers on the views of and discussions with other ministers during Cabinet meetings. Marshall applied for the Court to remove the restrictions the commission had placed on his scope of examining the ministers. The commission had not allowed questions that would reveal the identity of ministers or their contributions to discussions in Cabinet meetings. In answer to the Cabinet's position the commission had reasoned that if the privilege of cabinet not to disclose even its general discussions, is for the public interest, then it is not absolute as the public interest is paramount in the inquiry. Where it is in the public interest to reveal those discussions or documents the immunity cannot be afforded.

One cabinet minister testified how meetings are conducted. No minutes are kept and it is not recorded who is present. The decisions are Orders in Council and are public documents. The meetings are in camera to ensure that there can be a frank and open discussion without fear of expressed views being misinterpreted. When a decision is reached by majority, even those who dissented, support it publicly. This and other aspects of the privilege of immunity is known as the doctrine of "Joint Cabinet Responsibility."

It has also been recognized by the same conventions and common law, that two executive council positions are somewhat aloof of the political turmoil. Their functions are separated from that of the council as a whole. These are the Attorney General (Minister of Justice) and the Speaker of the House. Many aspects of their specific office are semi judicial and their personal responsibility. For instance should the Attorney General personally have to

decide whether or not someone is to be prosecuted he/she makes that decision as part of the office rather than as a member of the Executive Council. After all, a politically motivated prosecution is hardly desireable and a contradiction of the apparent objectives of politics and justice.

One previous Attorney General who is now the Chief Judge of the Provincial Court, appeared before the Commission. He clearly indicated that in terms of providing prosecutorial services, he did not consider himself to be part of the Cabinet and not subject to Cabinet directions or solidarity. Should his Cabinet colleagues decide to discuss a prosecution, he would have left the meeting.

In view of the fact that both parties proceed by means of an extraordinary remedy, the Queen's Bench was acting in a supervisory capacity rather than to review judicial decisions (appeal) by the Commission. In other words it had to decide whether in law it was right for the commission to restrict the questioning to discovery of "what" decision the Cabinet made rather than "why" it did so decide. The Justice of Queen's Bench quoted that non-disclosure in these circumstances is not a "Crown privilege" but a "public interest immunity". Not all discussions are worthy of that immunity and it also expires with time.

In view of the Commission's mandate to develop meaningful recommendations to ensure an appropriate role of the Attorney General and an equitable Justice system to ensure that "the unfortunate events surrounding Mr. Marshall" will not be repeated it (the Commission) had not committed an error in law. With that the Attorney General's application was dismissed.

In relation to Mr. Marshall's application the Court observed that there was no evidence that any discussion had taken place in Cabinet about Marshall's prosecution. The Attorney General of that day denied to ever having discussed any prosecution matter in Cabinet. Therefore Mr. marshall's application could not be considered as the issue was one of conjecture.

* * * * *

MURDER - RIGHT TO COUNCIL - ADMISSIBILITY OF STATEMENT
VALIDITY OF AUTHORIZATION TO INTERCEPT - OPENING "JACKET"

Regina v. PLAYFORD - 40 CCC (3d) 142
Ontario Court of Appeal

The Crown adduced evidence before a jury that the accused had been involved in credit card fraud together with a W. The accused had anticipated a 5 year jail sentence should he be convicted. W. confessed to the fraud and was expected to testify for the Crown. The accused then told W. that he knew of a buried drug cache and agreed to help dig it up and sell the drugs. W. dug the hole that became his grave. The accused allegedly killed him during the digging. W.'s body was never found.

The accused related this sordid event to a police informer. This resulted in police obtaining judicial authorization to intercept the accused's communications. Bugs were placed in his car and home and the informer had the accused repeat the circumstances of W.'s murder. The enticement to get the accused to talk about the murder was concocted between the informer (who by now was actually an agent) and police. He proposed a scheme of offering to sell drugs to undercover agents. Instead of making the sale they would attend at the rendez-vous, murder the agents and take the funds they would have on them to complete the transaction. It was thought that this proposal would make the accused talk of his experience in killing W. This was successful. To prove its case, the Crown relied on evidence of W's family that he had disappeared; on the informer evidence of the accused relating to him the details of the killing; the intercepted communications which corroborated this; and the accused's inculpatory utterance to the officer in charge of the investigation. All of this resulted in a conviction of first degree murder which the accused appealed.

Some of the issues which became grounds of appeal centered on the interceptions and the admissibility of the incriminating statement the accused had made.

The accused had been arrested on a Sunday evening at 7:30. He was properly informed of the reason for the arrest (the murder of W.), was told of his right to counsel and the right to remain silent. Upon request he had been given the use of a telephone. Instead of a lawyer he had phoned a friend. A policeman was within earshot and made notes of the accused's part of the conversation. At 9:30 on Monday morning he again was given a telephone to use upon his request. He, unbeknown to the officer within hearing, spoke with the lawyer's secretary. He promised her not to say anything until he had spoken to the lawyer. The officer made notes of this conversation. After this call he was put back in cells where the Inspector in charge of the detective division approached the accused and asked him to do something decent for W.'s family by telling where the body was, so they could at least give him a proper burial. The accused had in response made an attempt to bargain and more than implied that if they reduced the murder charge to one of second degree, he would do as the Inspector requested. The officer countered, "No way. Maybe we won't do you for habitual." This, of course, was inculpatory

and leads one to infer that the accused knew where the body could be found. The infringement of the accused's right to counsel should have resulted in the exclusion of this evidence at trial argued the defence.

The defence summed up from law and precedents that a detained person:

1. ...must be made aware of his rights to counsel...
2. ...must understand that right...
3. ...must be given a reasonable opportunity to exercise that right...
4. ...must not be questioned or be asked to supply evidence until he has been given the opportunity to consult counsel...
5. ...must (included in 3 and 4 above) be given privacy to so consult counsel...
6. ...cannot be considered to have waived that right to counsel by silence on that point or by not opposing answering questions but only by means of expressly waiving it.

It was submitted that only 1, 2 and 3 were complied with by the investigators and that all the other requisites had been ignored. The defence relied on the Manninen[1] case decided in 1987 by the Supreme Court of Canada. The trial judge had rejected the defence arguments on the following grounds:

1. Manninen had indicated (with explicit obscenities) that he did not want to say anything; the accused in this case did not.

2. Manninen had not been supplied with a telephone; the accused was on two occasions.

3. Just before making his statement to the Inspector the accused was advised by the lawyer's secretary not to say anything until he had consulted a lawyer, and as such, had received legal advice which Maninnen did not;

4. In regards to privacy, the accused should have complained that he had no privacy when he made his second call - the first call to the friend had nothing to do with obtaining counsel.

The Ontario Court of Appeal observed that all cases on this point indicate that privacy is inherent in the right to counsel and a request for privacy by the accused is not essential. The trial judge had also been wrong about the first call to the friend not being one that should receive the same consideration as the call to the lawyer. The Court concluded that the accused's right to counsel had been infringed and in the absence of the accused having waived his right to counsel this infringement could cause the statement to be inadmissible. The Crown argued that by reacting to the Inspector's question the accused had waived that right and only voluntariness needed to be considered for admission of the evidence.

---

[1] R. v. MANNINEN 34 C.C.C. (3d) 385. See Volume 28, page 1 of this publication

The Ontario Court of Appeal observed that the question of waiver only arises when a detained person has not had a reasonable opportunity to consult counsel. When that opportunity has been afforded:

> "....the police are entitled to question an accused without asking for his consent...."

In this case no such opportunity was afforded the accused and the Court found that the Crown had failed to show that the accused had waived his right. This meant that the exclusion of the statement hinged on whether admission could bring the administration of justice into disrepute.

Assessing the law and circumstances surrounding the statement the Court of Appeal observed the following:[2]

1. The Inspector had put a baiting and accusatory question to the accused; a trial question.

2. The question was in relation to the most serious charge in the Criminal Code of Canada.

3. The question was not one of urgency and did not directly produce <u>real</u> evidence.

4. The answer the accused gave was one of considerable probative value in that it could lead to the inference not only that W. was murdered but that the accused committed the murder. The answer was one no innocent person would have reason to give.

The Court concluded that admitting the answer the accused gave to the Inspector's question would render the trial unfair and bring the administration of justice into disrepute. Consequently it was inadmissible.

The exclusion of this statement was not necessarily fatal to the Crown's case. However, if the intercepted communication would also be excluded all the Crown would have left is the informer's evidence of what the accused told him and evidence of a man (W.) who disappeared some seven years ago. Hardly sufficient to support a conviction.

It seems that if the Police would have, for instance, put a body-pack on the informer and had intercepted the communications that way no judicial authorization would have been needed.[3] The consent of the informer to intercept would have sufficed. However, instead police planted bugs in the

---

[2] See COLLINS v. The Queen - Volume 27, page 1 of this publication.

[3] See Regina v. WIGGINS - Volume 30, page 15 of the publication

home and places the accused resorted to. This required breaking into those places and without the authorization police had no power to do so.[4] Defence counsel alleged that the authorization was invalid and reasoned that consequently the interception of the communication in the places where police had to break in to plant the bugs were inadmissible. In addition, the manner in which the place was bugged caused use of electrical power belonging to the telephone company. Regardless how "infinitesimal" the value (eleven cents) it was unlawful and not implicitly included in the authorization.

To challenge the validity of the authorization the defence had requested the trial judge "to look behind" it. He suggested opening the packet, alleging that the applicant had not revealed that bugs had already been installed other than in the home and that the informer had already given his consent to the interceptions. Neither was there any mention that firearms were involved in the scheme, claimed the defence. The trial judge had ruled that the defence must make out a prima facie case of fraud, nondisclosure and or deliberate misleading of the authorizing judge before the packet can be opened. However, the trial judge did allow the affiant to be cross-examined to see if there was such a case. Despite a hazy memory on the part of the affiant the trial judge held that there was no intent to mislead and no substantial nondisclosure on the part of the police. He held the authorization was valid and the evidence admissible.

The Ontario Court of Appeal also disagreed with that ruling. It held that when an investigation is completed, then to determine if the search for and seizure of evidence resulting from intercepted private communications is not an infringement of the right not to be subjected to unreasonable search or seizure, an accused person is entitled to know the content of the affidavit/application (except, of course, the identity of informers). A cross-examination of an affiant without having the content of the document the content of which is the very subject of that examination is farcical. Not disclosing the content is a deprivation of the principles of fundamental justice resulting in an unfair trial.

Accused's appeal allowed
New trial ordered

Note: In British Columbia the courts, by precedent, use the same approach as the Ontario trial judge did, to determine justification for opening the packet. See Volume 28 page 4 of this publication.

* * * * *

---

[4] Constitutional reference to Supreme Court of Canada - Volume 20, page 13 of this publication

ARBITRARY DETENTION BY MEANS OF POLICY ARREST
FOR SEXUAL ASSAULT - EXCLUSION OF VOLUNTARY STATEMENT

Regina v. CHARBONNEAU - County Court of Prince Rupert - Smithers, BC 6844 - April 1988.

Police investigated a sexual assault complaint and had reasonable and probable grounds to believe that the accused was the perpetrator. An arrest was effected as a matter of policy and in furtherance of the investigation so that there would be the opportunity to interrogate the accused. Not until the investigating officer had completed his investigation did he deal with the matter of the accused's release from custody. The predominant aspect of the investigation during the period of detention was the taking of a statement and the admissibility of that evidence became subject to a *voir dire*. Defence counsel moved that the statement which was ruled to be voluntarily given, be suppressed under S. 24(2) of the Charter as it was obtained in a manner that infringed the accused's right not to be arbitrarily arrested and detained. The offence of sexual assault is hybrid, as it is an indictable offence that may be also prosecuted by means of summary conviction. It does consequently belong to the category of offences where a peace officer shall not effect an arrest unless he believes on reasonable and probably grounds that the public interest justifies the arrest (s. 495(2) 1989 CC).

The County Court trial judge held that an arrest can be arbitrary if effected to accommodate further investigation. He also concluded that a lawful arrest is capable of being arbitrary. This as the section quoted above, stipulates that where a peace officer does effect an arrest on reasonable and probable grounds that a person has committed an indictable offence where he should not have done so due to the "public interest" being satisfied, the arrest is still lawful in any proceedings under the Criminal Code or other federal statutes. In other words in terms of arrest without warrant, lawfulness and arbitrariness do not equate.

Then, after reviewing a number of cases on this point, the trial judge concluded:

> "....that the arrest and detention was not only not for the purpose set out in section 450(2), but it was for either of the purposes which have been found by other courts to constitute an arbitrary arrest and detention."

He consequently found that the accused's right not to be arbitrarily detained had been infringed. The "either of the purposes" for the arrest are, one assumes, compliance with implied or expressed arrest policy or to accommodate the investigation.

Everything had been done according to the book and no criticism could be levied. The accused was made aware of his rights to counsel and did have a lawyer advise him at the police station prior to making any statements. Subsequent to whatever good or bad advice he received from his lawyer the

accused made a conscious and informed decision to give police a totally voluntary statement. Could accepting this statement in evidence, bring the administration of justice into disrepute? Considering the flawless police procedure, other than the arbitrariness of the arrest, the trial judge found that admitting the statement could and would not bring disrepute on the administration of justice.

Statement by accused admitted into evidence

Comment: One thing that seems not to be considered in these reasons for judgement is if wanting to further investigate, is included in one of the exemptions to the "shall not arrest" (s. 450(2) C.C. or 495 (2) C.C. in 1989 C.C.). A suspect's statement in relation to an offence is very weighty in evidence and may be adduced by the Crown not only to prove that the statement was made by an accused but more importantly, to prove the truth of it's content. Consequently, if there are reasonable and probable grounds to believe that a person has committed an offence securing and preserving such evidence is in the public interest. Subsection (2) of the section seems awkwardly worded. It takes a little mental gymnastics to capture it's meaning the first time one reads it. However, if one considers the kernel aspect of the section, it seems to emphasize something, establish a priority; or place the intent of the lawmaker into proper perspective.

In 1970 there was a quantum change imposed on police arrest routines. Too many people were unnecessarily in custody in between arrest and first appearance in Court. It is not totally unfair to say that that routine was based more on the legality of the arrest and custody than on the need for it. Sometimes the arrest and period preceding the first court appearance were apparently part of the penalty for allegedly having committed an offence. Bail procedures were favouring the sophisticated and the economically blessed suspects only.

Those who did not belong in either category simply stayed in the holding units. All the enactments now contained in our Criminal Code that limit and guide the powers of arrest and force continuous scrutiny of the justification for continuing the custody of an arrested person and all the provisions for police to release such persons, came into effect in 1970. The package was usually referred to as the Bail Reform Act. Subsection (2) of s. 450 C.C. was obviously to lessen the number of routine or policy arrests for offences on the lower end of the scale in terms of gravity. The hybrid offence of sexual assault is one of them. Mind you sexual assault can be the unconsented touching of another person that offends the sexual integrity of that person to what was known as rape. Such broad coverage is a characteristic of a hybrid offence;

the very reason for classifying the offence as one that may be tried upon the accused's election by a superior court with a jury to a mere prosecution upon summary conviction. Needless to say that when Parliament wanted to restrict the unnecessary custody of suspects it had to be very careful how much of the medicine to administer to the patient. Too much could cause paralysis. The Court did not consider if the taking of a statement in the circumstances of this case, "TO SECURE EVIDENCE" is included in "the public interest" definition. On the surface this provision seems to fit the circumstances and be capable of rendering the arrest to be justified. However, there are opinions that the words "to secure or preserve evidence" do not provide alternative aspects of "public interest" but must be read together. These words in conjunction with the other provisions in the definition, imply that the reason for arresting despite the "shall not", must be a matter of urgency. You either arrest or it is probable that there will be a continuation of the offence; the commission of another offence; the suspect cannot be identified and consequently proceedings cannot be commenced; the suspect will abscond; etc. The collective tenor of these provisions imply -- arrest or else. In other words, in these circumstances the public interest supersedes what Parliament attempted to remedy by this legislation. Applying the "urgency" test one may infer that the part of the definition dealing with evidence dictates to only arrest where otherwise evidence will probably be lost, destroyed or simply not obtainable. In this Charbonneau case police had as much authority to speak to the accused without the arrest as they did with it. The accused had regardless of the arrest the right to remain silent. As already pointed out, the evidence obtained was not real, but a statement.

* * * * *

WHAT IS THE CROWN OBLIGED TO PROVE
FOR A CONVICTION OF REFUSING TO GIVE A SAMPLE OF BLOOD

Regina v. MARTIN - County Court of Vancouver -
No. CC870101

The accused was involved in an accident and ended up in the hospital emergency ward where a demand was made of him to allow a sample of blood to be taken for the purpose of analysis. Everything had been done properly and there was proof that the accused refused to allow blood being taken other than for medical purposes. He was convicted in Provincial Court and appealed the verdict.

The section providing for the demand and stipulating the conditions under which the sample can be taken, states that only a qualified medical practitioner (who is satisfied that taking the blood does not endanger the health or life of the suspect) can do so. Defence Counsel submitted that the Crown must not only prove that there was such a practitioner available but also that he was of the opinion that taking the blood would not be adverse to the health of the suspect. These are essential elements of the offence of refusing to give such a sample and the onus is on the Crown to prove them.

The County Court rejected the argument and held that if the accused had not refused the Crown would have had to prove that these essential conditions existed to have the analysis admitted in evidence. If this was not so then, nearly all convictions of refusing to give a breath sample would be improper. The offence of refusing is complete when the suspect does refuse...period. The Crown need not prove that there was in fact an approved breathalyzer and a certified operator available at the time. All these matters come into play when the sample is given, analyzed and the results are adduced for acceptance and proof.

Accused's appeal dismissed

* * * * *

BODY SEARCH INCONSISTENT WITH
REASON FOR ARREST - ADMISSIBILITY OF EVIDENCE

Regina v. GREFFE - 41 C.C.C. (3d) 257
Alberta Court of Appeal

Police had reasonable and probably grounds for believing that the accused arriving on a direct flight from Amsterdam, was importing heroin. Police and Custom officers took charge of him at the Calgary airport but could not find anything on the accused or in his baggage. The police officers' evidence had been conflicting on this point, but the trial judge concluded as a fact that the accused was arrested for outstanding traffic warrants. He was not told of his right to counsel and was taken to a hospital where a doctor found two condoms containing heroin in his rectal canal, approaching $225,000.00 in street value. The accused was acquitted as all evidence was suppressed for the following reasons; the arrest had been invalid due to it being "a convenient artifice"; a search of the rectum when arrested for outstanding traffic offences is unreasonable; and his right to counsel had been infringed as he was not told of that right. The Crown appealed the acquittal.

One of the three Court of Appeal Justices found that the officers' activities had amounted to the epitome of bad faith. They had been deliberate, and flagrant in the way they investigated this case without regard for the accused's rights. He considered the violations serious and would dismiss the Crown's appeal. His two colleagues agreed that the rights of the accused had been infringed but held that the breaches by police "pale" when compared to the accused's duplicity and deception when he attempted to gain entry into Canada posing as a routine traveller while in fact he was a narcotics courier. The Court commented that those in the heroin trade seldom use the customs and immigration stations at our airports as confessionals. Considering all circumstances, and comparing the flawed police actions with the criminal purpose of the accused, a reasonable man would not consider it disreputable for the Court to admit the evidence that was found as a consequence of those flaws. Here is how the Alberta Court of Appeal reasoned in relation to each ground for appeal.

The accused had the right to be informed of the reason for his arrest. Police did undoubtedly use the outstanding traffic matters as a camouflage for the real reason for the arrest. Section 10 of the Charter is concerned "with the right of the subject to be given the information and opportunity to seek judicial interim release from detention." rather than a legal right to defer and delay lawful investigation and reasonable searches. The Court reasoned that drug enforcement is difficult and those who carry out the drug trade have a tremendous negative influence on society. The accused knew he was a courier and police had sufficient grounds to believe he was on this occasion carrying contraband. The arrest, though not for a narcotic or drug offence, was valid. With the heroin being secreted where it was, the accused was very much aware "of the realities of his detention and coming search" well before it took place. The Alberta Court of Appeal accepted the reasoning of its Ontario counterpart in 1986[5] when it, backed by three Supreme Court of Canada

---

[5] R. v. DEBOK 30 C.C.C. (3d) 207

rulings[6], held that reasonable on-the-spot drug searches resulting from reasonable and probable grounds that a person has illegal drugs in his possession do not become unreasonable or even legally vulnerable, because the person searched was not told of the reason for the detention (s. 10(a) Charter).

The manner of the search of Greffe had also been reasonable. An experienced surgeon carried it out. The Supreme Court of Canada said in the Collins case in 1987 that a search authorized by law is reasonable only if that law itself is reasonable and the search is carried out reasonably. The Court recognized that there is hardly a greater intrusion imaginable than a search of the rectum and reminded itself that Greffe did not consent to the search but did not object to or resist it. The Court reasoned, however, that the accused had profaned his own bodily integrity by secreting the drugs in his lower bowels. Furthermore, there had been a strategy behind all of this. Greffe had placed the heroin where it was, so nothing could be found if a normal search would take place. Now he claims that because the nature of the search, needed to locate the contraband, was repulsive, he provided himself with a defence. The Alberta Court of Appeal concluded:

> "To me there is little sense in the invalidation of a lawful arrest by the failure to repeat to an accused what he demonstrably knows and has taken steps to disguise."

The arrest was valid, and the search was reasonable in terms of the law and the way it was carried out.

One objection to the search by defence counsel was interesting. It was reasoned that if the arrest was valid and if the police had knowledge that Greffe was importing drugs, then human regularity being what it is the evidence would eventually have emerged. The search was unnecessary and so were the discomforts it caused the accused. The Court responded that the argument ignored that police were unaware of the quantity, did not know where precisely in the canal the heroin was located and if it was sufficiently protected against dissemination if left to come out naturally.

Crown's appeal allowed; conviction ordered; referred back to the trial court for sentencing

* * * * *

---

[6] COLLINS v. The Queen 33 C.C.C. (3d), Volume 27, page 1 of this publication
POHORETSKY v. The Queen 33 C.C.C. (3d) 398.
R. v. TREMBLAY 37 C.C.C. (3d) 565.

DOCTRINE OF RECENT POSSESSION?

KOWLYK v. The Queen - Supreme Court of Canada -- September 1988

Kowlyk and his brother kept an eye on the obituaries and assumed that the family home of a deceased person would be unattended during the funeral services. They successfully burglared three homes of bereaved families. Subsequently, the accused's brother was arrested for an unrelated theft and he confessed to the three burglaries. He took police to the place he shared with the accused and upon entering the house shouted: "Wake up Ray. The Police are here. They got us. It is all over." Seventy-six items from those homes were in the accused's secured bedroom. The accused did not at the time of his arrest or by means of personal testimony at his trial give an explanation of how he came to be in the possession of the recently stolen property. All he said was: "All you got me for is possession. I'm not saying anything."

Without any direct evidence that the accused was involved in the burglaries he was convicted of three counts of break, enter and theft. The convictions were exclusively based on the application of the doctrine of recent possession. This, the accused argued, was inappropriate and he unsuccessfully appealed the convictions to the Manitoba Court of Appeal.[7]

What is somewhat surprising is that the only ground for appeal was the question of propriety to convict a person of the crime by means of which the property, found in his possession, was taken from the owner. Although the Court did touch on the question of the doctrine of recent possession offending the Charter right to be presumed innocent until proven guilty, the anticipated emphasis on that point did fizzle out.

The common law doctrine of recent possession provides that a person who is found in possession of property obtained by means of an indictable offence, that he fails to explain contemporaneously to being found in possession of those goods or through personal testimony, may presume to have the guilty knowledge requisite to the offence of possessing stolen goods or <u>may</u> presume to have committed the crime by means of which the owner was deprived of the property.

The theory was born in 1830 when a party was found to have a horse in his possession that had been stolen three days previously. In 1836, the aspect of "recency" was added to the unexplained possession as a requisite for the possessor to be convicted of the theft. It was refined in 1864 in the well known Longmead case. He was charged with not only stealing a number of sheep, but also "receiving" (as it was then called) the stolen animals. The highest English courts ruled that it was not excessive to presume from the unexplained recent possession that Longmead had committed either one of the two offences alleged, whichever one better suited the circumstances.

---

[7] Volume 25, page 28 of this publication.

The Supreme Court of Canada concluded that labelling "recent possession" a "doctrine" or "principle" is excessive. It also reasoned that it is not a "presumption" or "reversed onus" either. The majority of the court called it a "rule of evidence" instead of a doctrine. A doctrine teaches something and the common law application of "recent possession" teaches nothing. Furthermore, this rule of evidence does not allow anything to be presumed but simply provides for an inference that may be drawn by the trier of fact from certain proof. It is not a reversed onus either as the burden of proof remains with the prosecution and does not shift at any time to the accused person. The "rule of evidence" provides that a person who is found in possession of property recently obtained by the commission of an indictable offence and fails to give a reasonable explanation at the time, or fails to so explain by means of his own testimony, the trier of fact may infer that the possessor knew that the goods had been so obtained or that he did commit the indictable offence by means of which the goods were obtained. It was emphasized that the explanation or personal testimony must be capable of belief. In other words reasonableness is believability. When an explanation is rejected as unbelievable then there is no explanation. This means that a jury needs not to be convinced that the explanation is true before they can accept it. Furthermore, the Court emphasized that the trier of fact may (not must) draw the inferences.

The jury must, by considering the proof of unexplained recent possession be convinced beyond a reasonable doubt of the accused's guilt. Consequently, the Charter right to be presumed innocent is not offended by this rule of evidence.

In summary the Supreme Court of Canada said:

> "....it is my view,....that what has been called the doctrine of recent possession may be succinctly stated in the following terms. Upon proof of an unexplained possession of recently stolen property, the trier of fact may - but not must - draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

Appeal dismissed
Convictions upheld

* * * * *

ARBITRARY ARREST FOR AFFECTING ADMISSABILITY OF STATEMENT

Regina v. CHARBONNEAU - County Court of Prince Rupert -- Smithers, BC 68444 - April 1988

The accused was arrested for "sexual assault" and given all his rights, including the right to remain silent. Subsequent to his arrest, the accused made a perfectly voluntary statement the Crown adduced in evidence at the trial. Defence Counsel argued that the statement must be suppressedd due to the accused's right not to be arbitrarly arrested or detained had been infringed. He submitted that the arrest was only effected to comply with departmental policy and that there had been no consideration to release the accused until, in their view, the officers had completed the investigation. The Court found that none of the public interest issues summed up in s. 450 (2) C.C. (s. 495 under the new numbering) existed at the time the arrest was effected and all during the investigation of this alleged hybrid offence. This defence counsel argued that the arrest and subsequent custody was arbitrary and an infringement of the accused's Charter right not to be so arrested or detained. Needless to say, this submission was made to have the voluntary statement by the accused excluded from the Crown's evidence.

In answer to all the evidence adduced during the *voir dire* on this issue the Court found that an arrest or detention for the purpose of enhancing or accommodating an investigation is capable of being arbitrary for that reason alone. The cases now reported on this issue are going from a strict conclusion that a lawful arrest contrary to s. 450(2) C.C. is an infringment of the Charter right mentioned above and that all evidence subsequently or consequently obtained must be excluded, to findings that such a lawful detention does not necessarily call for exclusion as long as it was not despotic or capricious.

The County Court Judge emphasized that a lawful arrest is very much capable of being an arbitrary arrest. In section 450(2) C.C. it clearly states that where an arrest is effected in spite of the "shall not," unless the public interest is not satisfied, it is still a lawful arrest for any purpose under the Criminal Code. However this Court held that there is no equasion between the two.[8] It reasoned that by the same token an arrest could be unlawful and still not be artibrary.

The arrest in this case was not only contrary to s. 450(2) C.C. but was also arbitrary and had infringed the accused's Charter right.

---

[8] See also Page 36 of Volume 38 of the publication -
R. v. LITHART
R. v. BYERS

The accused had been properly advised of his right to counsel. He had phoned a lawyer who attended at the police station and consulted with the accused for a considerable length of time. After that, the accused gave the statement in issue here. In view of this, admitting the statement despite the infringement would not bring the administration of justice into disrepute.

Statement admitted in evidence

* * * * *

THE DEFINITION OF DEATH - MURDER

Regina v. GREEN and HARRISON - Supreme Court of Canada - Vernon - No. 18024, June 1988

Two men were asked by the barkeeper to remove a passed-out drunk from the pub. They dragged him to the sidewalk and simultaneously let go of him. His head had hit the concrete like a ripe tomato. Agreeing that he possibly could have been hurt the two pro-tem bouncers left the drunk where he dropped. Someone else saw to it that the victim was taken to hospital where brain death was diagnosed as a consequence of the injuries sustained. The body functions were maintained by life support equipment until twelve hours later, after having removed the kidnies for transplant purposes, that support system was disconnected and the victim was allowed to die. The twosome was convicted of manslaughter and appealed their convictions to the Manitoba Court of Appeal.[9]

The two accused argued that the doctors and not they caused the death of the victim. The injuries they caused were serious but had not resulted in the physical death of the victim. The event of death had occurred when the life support system was disconnected. The Manitoba Court of Appeal rejected the arguments and was (to the best of my knowledge) the first superior court to hold that brain death is synonymous to death and that death is not an event anymore but a process. It follows that he who causes that process to commence causes death.

Comptemporary medical technology is forcing society to come to grips with the modern concepts of death, from a legal, moral and medical viewpoint. New organ transplant procedures have proven successful and are now common place. At what stage of what is believed to be the process of death, are we allowed to terminate the life of one person to preserve that of another. It does not require a genius to conclude that incredibly complex legal and moral questions may arise from this practice.

In this Green and Harrison case the legal issue was different and more complex. In the Manitoba case the two bouncers were equally responsibe for inflicting the injuries that commenced the process of death. They clearly were equally responsible for causing the brain death as each on the count of three, so-to-speak, had deliberately let go of the limp drunk, full well knowing that his head would severely impact with the concrete sidewalk. In the B.C. case it became crucial when the event of death occurred.

Homicide is causing the death of another person and murder is a culpable homicide. Harrison fired a shot into the head of a Mr. Frie. Subsequently, Green pumped two bullets into Mr. Frie's head. The medical evidence was that all three shots caused damage to the brain stem and any, by itself would have caused the brain death of Mr. Frie. This meant that regardless which of the three wounds Harrison caused, by the time Green fired his shots, Mr. Fire was already dead. Harrison had already caused the brain death of Mr. Frie and not

---

[9] Regina v. KITCHING and ADAMS (1976) 32 C.C.C. (2d) 159

Green. The Crown argued that the traditional approach to determine the event of death should prevail, namely that death does not occur until "all vital functions of the human body have ceased to operate". The medical evidence disclosed that anyone of the three shots as well as all three combined would not have caused instant cessation of the function of the heart. It would have continued to function for at least three minutes. Evidence of arterial bleeding in each of the bullet tracks proved that the heart was functional when each of the bullets were fired in Frie's head. If the stopping of the body's most vital organ, the heart, is the occurrance of the event of death, then Mr. Frie was alive when shot by Green.

The Manitoba Court of Appeal decision that brain death is synonymous with death received a lot of attention and following. The medical profession were very pleased with this common law definition of death and the Law Reform Commission of Canada recommended that Parliament define death by means of an enactment, that "irreversible cessation of brain function be determined by the prolonged absence of spontaneous circulatory and respiratory function".

Green's defence counsel urged that the jury would be instructed along the lines of the Manitoba decision (which was not binding on this trial judge). The Supreme Court Justice declined to do so. He held that the Manitoba Court of Appeal approach did suit the case before them in that cessation was the cruicial issue. In this case the crucial issue was the time of death. He observed that the Law Reform Commission and the medical profession had addressed themselves to the civil law concerns, such as sustaining life and transplant procedures. Their definition of death had disregarded the issues arising in criminal law, this case being a prime example of such unsuitability. The only way the Crown could prove to the jury that Green committed murder if the new definition was applied, would be to have the results of an EEG test after Harrison did his dirty work and before Green pumped his two bullets in Mr. Frie.

The jury was given all the medical evidence and were told that the victim did not die until his hear ceased to function.

* * * * *

ABUSE OF THE PROCESS OF THE COURT
DELAYING ALLEGATION AGAINST A PEACE OFFICER
UNTIL HE HAS TESTIFIED IN A MAJOR MURDER CASE

Regina* v. *PUYPE - County Court of Caribou - Prince George 14745, August 1988

The ex-common-law wife of the accused Puype alleged that he disposed of "certain chattels" and then made an insurance claim for the loss of those chattels. He was charged in January of 1988 with fraud and public mischief in that he falsely caused a peace officer to enter upon an investigation. Crown Counsel was aware of the evidence, at least, in September of 1987. The accused is a police officer who was about to be a major witness in a murder trial. By memo from Regional Crown Counsel, the local prosecutor was advised to interview the ex-common-law wife and if she was found to be credible the charges should be preferred. He was advised to be prepared to defer any "action on our part" until the murder trial was concluded. The main witness against the accused was not interviewed until about two weeks after the murder trial was over and the charges were preferred some 14 weeks later.

The accused moved for a judicial stay of proceedings. He claimed the Crown had abused the process of the Court. The Crown had simply put its decision whether or not to prosecute the accused, in abeyance to preserve his credibility for the murder trial. This had deprived the defence in the murder trial from discrediting a major Crown witness.

The Crown argued that at the time of the murder trial they did not know that there was a complaint in which they could have confidence, against the accused. Therefore nothing of importance was withheld from defence counsel. Secondly, if the Court would find that the Crown had been wrong in the way they handled their dilemma then the misdeed did not call for the remedy of the judicial stay of proceedings. Thirdly, if a process was abused, it was not the one against the accused but the process in the murder case.

The Court held that the delay was not deliberate to deceive the Court even though the accused's credibility was expected to be an issue in the murder case. At most it had been a careless failure on the part of the Regional Crown Counsel. The decision to delay the accused's case could affect the murder as well as the accused's trial. The carelessness had not amounted to a violation of "those fundamental principles of justice which underlie the community's sense of fair play and decency". It had not affected the proceedings against the accused and had only saved him an embarrassing cross-examination during the murder trial. The accused in other words could hardly complain. If anyone has a complaint it is the person who was tried for murder.

The accused was not entitled to a remedy. Application dismissed.

* * * * *

DETENTION - RIGHT TO COUNSEL

Regina v. HOTTSLAND - County Court of Vancouver Island
Nanaimo #3753 - July 1988

At 6:45 hours a man was awakened by the noise of a motor vehicle accident. He ran to the window and saw a Corvette stuck in the middle of his lawn and pieces of the car scattered about the mailbox and near the house. The two occupants of the car fled and the resident did get a good look a the driver. Police obtained the R.O. of the car and went to his house. The accused answered the door in his undershorts but did not show any of the usual evidence of coming out of bed or from sleep. His hair, for instance, was not even ruffled. He smelled of alcohol and had scrapes and crusted blood about the face. He was told that his car had been involved in a single car accident and was requested to come to the scene. He did put on some clothes and complied with the request. He had volunteered that he had been home since 2:30 hours. The police officers were obviously suspicious that the accused had been the driver of the car and were interested to see his reaction when he would see the heavy damage to his expensive car.

At the scene the resident of the house was asked if he recognized the accused as the driver of the car. He made a very positive identification. Consequent to this and his emotion (or lack of it) indicating that he knew about the scene and the damage to his car an arrest or demand for a breath sample was made of the accused. The reasons for judgement do not indicate which, but the clearly states that from that point on the accused was detained. The defence submitted that the accused had been detained from the moment the police officers requested him to come along to the scene of the accident.

The trial judge who convicted the accused for over "80 mlg." disagreed with the defence position. He had reasoned that no arrest can be effected until there is evidence to do so. The coming along to the scene was a cooperative gesture of the accused and until he was positively identified, "I don't see how he can possibly detain the accused.", held the trial judge. The accused appealed his conviction.

The County Court judge who reviewed the case obviously disagreed with the trial judge. He saw no distinction between this situation and that involving a Mr. Bonogofski[10] who, for investigative purposes was asked to alight from his car and perform some sobriety test. "Regard must be had for the purpose of an officer in calling upon the driver to stop." In this case, then, regard must be had for the purpose for which the accused was requested and did accompany the officers to the accident scene. Repeating the words of the Supreme Court of Canada in 1985*, the County Court held that as a general rule it is not realistic that compliance with a direction from a police officer is truly voluntary in the sense that a person feels he has a choice to obey or not.

---

[10] R. v. BONOGOFSKI: Volume 29, page 1 of this publication.

The way the Court described the scenario at the accused's home that had triggered the detention, was that the accused "was confronted by three police officers, told to dress and accompany them to the scene". The Court concluded that the accused was detained from the time of being told to accompany the officers. Consequently the accused's rights were infringed and the evidence of identification and the blood/alcohol content resulted. If such evidence was admitted it would bring the administration of justice into disrepute.

Appeal allowed.
Conviction for "over 80 mlg" set aside

Comment: In reviewing the evidence that was before the trial judge the County Court judge wrote that one officer had "asked" the accused to dress and accompany him to the scene. In deciding whether this asking had caused detention he wrote that the accused was "told" to dress and accompany. No further reference was made to this conversation that had caused the detention. When, in the Bonogofski case, the B.C. Court of Appeal used examples to show when a person would be detained when following the directions of a constable, it exclusively used examples of car drivers who are pulled over or do as they are directed to do. All scenarios where persons in the role of drivers, compelled by law to follow the directions of a peace officer. Of course, Bonogofski was not compelled to comply with the roadside sobriety test.

In this case the police investigation was related to a traffic accident but the accused when asked to accompany the officers to the scene was not in the role of a driver who must comply with the directions of the officer. The fact that the investigation was related to driving was coincidental but not relevant to the fact in issue. It could have been any kind of scene with the police mandate to investigate. Whether a person is detained is not determined exclusively by what the prospective detainee believed at the time but depends on all relevant circumstances. If a store burned down during the night and police called at the home of the proprietor to notify him they no doubt, will be observant as arson is always a possibility. If they ask the proprietor to come along to take possession or secure certain property or to just see what has happened to his business, surely the ride to the scene alone will not cause detention.

Except for the manner in which the accused was requested, asked, told, or ordered to accompany, there seems no distinction between the two scenarios. Despite the fact they had little or anything on the accused other than some inconsistencies in regards to his claim of having been in bed for a few hours, the officers may have considered the accused suspect as they may any registered owner in similar circumstances or the store owner in regards to the possibility that he has set fire to his own store to collect the

insurance. No police officer worth his salt would close the door on these possibilities and in a sense the individuals are suspects although he may and perhaps should not let that be obvious. Consequently, the binding precedents indicate that detention includes a person being in a situation where he or she is in need of legal advice; being in a predicament where the layman can but only guess what option, if any, is advisable to take or to discover what the option and rights are. This obviously is not the case with anyone police ask questions of in their investigation or give a ride to to take charge of or to view the damage done to their property. Police may well be speaking with a person they believe to be no more than a victim, bystander or witness who later turns out to be the perpetrator. Their initial utterances may well be important evidence when it is later discovered that they were false and intended to cover up their tracks or to divert any possible suspicion from themselves. One has to agree that the accused in this case, depending what information police had at the time, may have been in that category, but it seems hardly reasonable that our Courts suggest that every person accosted, approached, interviewed or "asked" for information or to view something during an investigation must be told of their right to counsel...just in case they later are discovered to be the culprit.

It seems that it is important if the accused was given a direction to accompany with an implied...or else, or was simply offered a ride to view the damage to his expensive car and take charge of his property. It is obvious that the trial judge when he held that without some evidence that made the accused a suspect and hence the so-called request a direction, there simply was no detention.

* * * * *

LAWFUL AND REASONABLE SEARCH -
ACTING UPON INFORMATION OF COLLEAGUE

Regina v. BING - County Court of Westminster - X018808, New Westminster - April 1988

The accused was known to police as the possible user of heroin and a police officer had received reliable information that a certain Mr. B was supplying him. This officer observed some kind of exchange take place between Mr. B and the accused right on the public street. This officer who had shared the information he had received with a colleague informed that colleague what he saw. The colleague searched the accused, found heroin and effected an arrest. The Provincial Court Judge acquitted the accused as the arresting officer had no more than the instructions of another officer. This did not give him the reasonable grounds to search under s. 10(1)(e) of the Narcotics Control Act. The trial judge held that consequently the search and seizure were unreasonable and had infringed the accused's right. He excluded the evidence under s. 24(2) of the Charter. The Crown appealed to the County Court and asked that the Court follow the precedent set by the Vancouver County Court in the unreported case of Regina v. Gordon in 1984.

The County Court judge did follow the Gordon case and held that the officer who searched and arrested the accused had in the circumstances by "overwhelming implication" knowledge that the accused might have narcotics in his possession.

To understand the reasoning in the Gordon case the following is a synopsis of it, as it appeared on pages 25 and 26 of Volume 16 of this publication.

> Regina v. GORDON - Vancouver County Court, Vancouver Registry C.C. 831503, March 1984.
>
> Police gained surreptitious entry to a locked parking area of an apartment building. They then opened a locked car (previous visits were made to gain impressions of the lock) and searched it. A cache of what appeared to be cocaine was found in the trunk. The vehicle was placed under surveillance and the accused was arrested when he opened the trunk and handled the substance which in the meantime was analyzed and found to be cocaine.
>
> The accused was tried for possession for the purpose of trafficking. He raised the obvious defence in this case. He claimed that the search was unlawful and unreasonable. Therefore, the infringement of his right to be secure against unreasonable search should be remedied by the Court excluding the evidence of the cocaine.
>
> The defence subpoenaed the officer who had conducted the surreptitious search. He said he believed that what he did was lawful and in any event, he had been instructed to conduct the search by his superiors. He also expressed the opinion that no warrant could be issued for a parking lot or a car.

The Crown, of course, relied on section 10 of the Narcotic Control Act which authorizes an officer to search any place, other than a dwelling house, if he reasonably believes that the narcotic is had or kept contrary to the Act. The Crown also relied on a comment made by the BC Court of Appeal[11] that if section 10 is read to justify only reasonable searches, it is not in conflict with the Charter. The Crown also argued (and the Court agreed) that in this case the garage was not part of the dwelling house.

Defence counsel raised the old, but interesting argument that s. 10(1)(a) N.C.A. is excessive and should be declared inoperable or invalid. This has been argued frequently and the Courts have held that the section is not as excessive as it appears to be on the surface. Grammatically, the section could be interpreted to say that a peace officer only needs to have "reasonable belief" to enter a dwelling house with a writ of assistance or a warrant, but can arbitrarily enter and search any other private or public place without any prerequisite beliefs or grounds. The Courts (with the exception of one Ontario District Court[12]) have never believed that Parliament had any intentions to grant such sweeping and excessive powers to peace officers. Reasonable belief is requisite to all searches under that subsection the Judges said. This Court agreed with those views and held that the section is operable and valid and that the reasonableness of the search had to be weighed on the basis of the section. Defence counsel, of course, argued that even with s. 10(1)(a) in tact the search was unreasonable.

The Crown had to prove the legality of the search. Then it is up to the accused to show on a balance of probabilities that the search was unreasonable and that acceptance of the evidence obtained thereby would bring the administration of justice into disrepute[13]. Just because a search is legal does not mean that it cannot be unreasonable while an illegal search is capable of being reasonable, held this County Court Judge.

It was proved that the officer who conducted the surreptitious search had adequate reasonable grounds for believing that narcotics were illegally kept in the car. He gained those grounds from his supervisor who had told him of the evidence he and other investigators had of cocaine being stored in the trunk of that car*. Therefore, the search was lawful and the defence failed to show that the search was unreasonable and had infringed the accused's rights.

---

11 R. v. COLLINS (1983), 33 C.R. (3d) 130. Also see page 1, volume 12 of this publication.

12 R. v. RAO, not reported.

13 In October of 1984. (subsequent to this case) the Supreme Court of Canada held in Hunter v. Southam Inc. (Volume 18, page 12) that warrantless searches are *ipso facto* unreasonable unless *the Crown* shows otherwise.

The County Court Judge concluded:

> "The conduct of the search was not shocking to the community. There was no flagrant abuse of power on the part of the police, nor was there a gross invasion of privacy. The police officer was acting in good faith and reasonably. Indeed, the exact opposite would be true - to exclude the evidence under the circumstances would be more likely to bring the administration of justice into disrepute."

Evidence admitted.

* * * * *

ADMINISTERING ALCOHOLIC BEVERAGE TO THE EXTENT THAT IT CAUSES DEATH - MANSLAUGHTER AND CRIMINAL NEGLIGENCE

Regina v. JORDAN - BC Supreme Court - Vancouver CC 880535, October 1988

The accused asked a native Indian woman he met in a bar, to drink with him in a hotel room. He booked in giving his real name but an inaccurate address. His intent was to have sex with the woman and to get drunk with her. He is an alcoholic.

At 0600 hours, the accused left the woman "stupidly drunk" in the hotel room. He went to his own room in a different hotel. Police received a call from the accused at 0740 hours that the lady "became deceased". The woman was found dead. An autopsy revealed an unbelievably high blood/alcohol content and the cause of death was "massive inhalation of gastric content due to alcohol poisoning". Consequently, the accused was charged with manslaughter. In his defence he contended that the deceased committed suicide.

The accused did testify but had problems with his credibility. He had a lengthy criminal record and his recollection of events was "selective" in that he remembered all things favourable to him and drew a blank on matters adverse to his interest. He also got caught in an unexplained inconsistency. He said that the deceased was still alive when he left the room, but phone one hour and forty minutes later from his own room that she "became deceased". His testimony was apparently quite inadequate in explaining this.

The Crown's evidence of similar facts showed that the accused was involved in six "drinking orgies" involving other native women over a period of six years. They all died of alcohol poisoning - at least their respective blood/alcohol levels were, extremely high.

That of the deceased in this case was 910 ml. The others ranged from a low 340 ml to 790 ml. This revelation had caused police to keep the accused under surveillance after the death that led to this manslaughter charge. In a period of six weeks he was seen to approach native Indian women. On four occasions the investigators had to step in and "rescue" those women before they also became the victims of alcohol poisoning. The investigators had listened at the hotel room doors and overheard the accused do nothing but encourage these women to "drink up", to pour it "down the hatch", "finish that drink" and promised them up to $75.00 if they would drink it all. This evidence was admitted to show his method of operation and that there was an intent on the part of the accused to commit manslaughter.

The evidence of his methods was adduced for the trier of fact to draw the inference that he had acted similarly with the woman whose death he allegedly caused. What corroborated this theory were notes he made in his diary. He wrote that he searched for intoxicated women, using them sexually, and "priming" them with alcohol.

Manslaughter is homicide that is blameworthy or culpable. For the accused to have committed the homicide he must have caused the death of the woman. For that homicide to be manslaughter (to be a crime) it had to be blameworthy. The Crown's strategy in the case was to show that the accused was blameworthy in that giving of the excessive amount of alcohol to this woman was criminally negligent. To do this there had to be proof beyond a reasonable doubt that the accused had a wanton and reckless disregard for the life and safety of that woman or that the accused showed such disregard by omitting to do something that was by law his duty to do. Alcohol is a poison and at common law[14] we have a duty to preserve human life by being cautious with the use of "dangerous things":

> "It is the legal duty of every one who does any act, which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it."

says the precedent.

The accused knew the danger of excessive consumption of alcohol. He had learned this, or ought to have discovered this. Six women drank themselves to death in his presence.

The accused's claim that the woman committed suicide was raised by means of his testimony. He said that she was taking pills while she was drinking. This was rebutted by the pathologist's evidence. The exclusive cause of death was alcohol poisoning.

Criminal negligence is a unique feature in criminal law. It is not a crime to be criminally negligent except where the law specifically provides for it to be a crime due to its consequences (death, injuries) or in specific activities (operation of a motor vehicle, vessel, or airplane). Furthermore, criminal negligence does not require a specific or general intent on the part of the actor. It is a crime of advertence and indifference. Advertence refers to heedfulness; knowing what you are doing....but being indifferent to the consequences....in general a "negative state of mind". The similar fact evidence may also be examined to see if it proves such a state of mind - such an indifference towards the Indian woman.

The whole of the evidence, including the similar fact evidence, was overwhelming to show that the accused "preyed" on native Indian women for sexual gratification and "perverted satisfaction in watching them drink themselves into insensibility". He knew it could cause death and was indifferent whether it did when he fed the victim the alcohol.

Accused was convicted of manslaughter

* * * * *

---

[14] R. v. COYNE (1958) 124 C.C.C. 176

OFFICERS TESTIMONY REVEALING DIFFERENT OPINIONS - REASONABLE DOUBT

Regina v. WISE - Court of Appeal - Victoria CA V00718, October 1988

A constable and an auxiliary constable encountered a driver who had been drinking. The constable made the suspect perform certain tests and on the basis of what he observed he made the demand for samples of breath. The accused had not been told of his rights to counsel before the sobriety test. The trial judge did not allow the evidence from the test in evidence.[15] The constable testified that he had a strong suspicion that the accused was impaired but felt he did not have the grounds to make the demand until he saw the failing performance of the sobriety test. The auxiliary constable however, testified that the accused showed all the symptoms of impairment and that he observed them before and after he alighted from the car.

The trial judge relied on the auxiliary constable's evidence and convicted the accused of impaired driving. Referring to the regular constable's investigative process the trial judge said:

> "The constable well meaning as he was, is a fellow who appeared to me....who was trained to ask people to do tests and take breathalyzers, and because they are trained that way they rely on those tests and breathalyzer results in their dealing with so-called impaired drivers, and sometimes because of that they are not as observant at the scene as other people who just look at you and say, as the auxiliary constable did, "He was impaired"."

The trial judge then held that the evidence of the auxiliary constable particularly and what the regular constable testified to about his observation of the accused's condition prior to the sobriety test, had proved beyond a reasonable doubt that the accused was impaired.

The accused appealed his conviction. He argued that since everything that came as a result of the roadside sobriety test and the test itself were inadmissible, that left the regular constable's evidence as that of suspicion and doubt. In that regard the evidence of the two Crown witnesses was inconsistent with one another and creates a reasonable doubt of which the accused should have been the beneficiary.

The BC Court of Appeal rejected the appellant's argument. It held that the inconsistency does not have to create doubt. If the trier of fact acts judicially and accepts the testimony of a witness as being the true state of facts, he/she may reach a verdict based on that acceptance. If evidence of a

---

[15] See R. v. BONOGOFSKI Volume 29, page 1 of this publication

less positive nature on those facts raises a doubt in the mind of a trier of fact, then of course, there is a doubt. If it does not, then the evidence may be proof of the facts it relates to.

The Court of Appeal having reviewed the trial court's reasoning, held that the trial judge had simply accepted the auxiliary constable's testimony as proof of the facts related to the accused's condition. After due consideration the trial judge held that the constable's "suspicion only" evidence did not cause him to doubt the accuracy and credibility of the auxiliary constable's evidence.

Appeal dismissed
Conviction for impaired driving upheld

* * * * *

ARBITRARY DETENTION AND UNREASONABLE SEARCH
STOPPING VEHICLE UPON REQUEST OF INVESTIGATORS

Regina v. CURSON and SISKA - County Court of Vancouver Island - September 1988, Victoria Registry 42891

A police officer had a reliable informer. His information had nearly always proven to be accurate. The informer gave the officer an address from which cocaine was regularly trafficked. The officer and his partner staked out the house and observed activities consistent with trafficking. Cars came and went short periods apart. A tow truck with two occupants also arrived and left after a very short exchange at the house. The officer requested by radio that a marked cruiser stop the truck and hold it until he arrived at the scene. The uniformed officers complied under the guise of a routine inspection of the vehicle and documents. The two occupants (the accused) were asked to step out of the truck. The conversation between the uniformed officers and the two accused was consistent with such an inspection.

The investigating officers arrived on the scene shortly after and the accused were told there were reasonable and probable grounds to believe they were committing an offence related to cocaine and arrests of both accused were effected; the accused were transported to the police station and the tow truck was searched.

The reasons for judgment are in relation to a *voir dire* and do not relate the charges against the accused. The judgment does not say if any drugs or narcotics were found, but the list of items that were seized included a video cassette recorder, a bag of jewellery, and camera equipment. But whatever the charge, the object of the *voir dire* was whether there had been an arbitrary detention of the accused and if their right not to be subjected to unreasonable search or seizure had been infringed. It should also be noted that even if no drugs were found, the officers obviously relied on the Narcotics Control Act's search provisions.

The officer in charge of the team related to the Court his experience and how he had learned certain patterns of behaviour on the part of people involved with drugs. The conduct of the two occupants of the tow truck coupled with the reliable information he received had "raised an awareness or belief.... that the occupants had attended at the residence for the purpose of involving themselves with cocaine." The fact that no lights were switched on or off in the house during the extremely short visit and that he could not think of any reason for a tow truck to attend that hour of the night, gave him reason to take the action he did.

Dealing with the question whether there had been an arbitrary detention of the two accused, the Court considered it an after though of the Crown to rely on the familiar provisions in the BC Motor Vehicle Act that drivers must stop and produce documents when requested to do so by a peace officer. The testimony of the officers had been complimentary candid and they frankly told the Court that their sole reason for stopping the truck was to discover if there were drugs being transported. Whatever the uniformed officers did after stopping the tow truck, it was no more than a strategem to wait for the investigators

to arrive. Be that as it may, the trial judge concluded that being pulled over does not constitute detention. The uniformed officers "had no grounds, no independent grounds on which to stop the tow truck". The trial judge seemed to reason that since they did not know why the truck was to be stopped they were not detaining the accused for purposes under the drug or narcotic laws. The uniformed officers asked the two accused to step out of the truck. Also this did not constitute detention held the Court. When the investigators arrived at the scene the two accused were arrested "for charges related to cocaine". Needless to say, this constituted detention. The Court held that the investigators had the necessary reasonable and probable grounds to effect the arrest and consequently there had not been any arbitrary detention.

One of the uniformed officers had seen the video cassette recorder, the camera and the jewellery in the truck's cab when he asked one of the accused to alight. He had passed this on to the investigators who then searched the truck. Looking where the uniformed officer did, did not constitute a search said the court. The items were in "plain view". In terms of the "plain view doctrine" applying, the trial judge held:

> "So far as it is necessary for them (the items) to have been seen by the officer, for the Plain View Doctrine to have application, then I find that he did see them.....there has not been an unreasonable search or seizure."

Consequently, the Court found, for the purpose of the *voir dire* that there had been no infringement of the accused's right to not be arbitrarily detained or to be secure against unreasonable search or seizure.

Comment: The reasons for judgment were oral and sometimes difficult to follow. Because the issues are so crucial to police practices was an attempt made to write about them. The findings of the County Court judge are of course, binding on our provincial courts and deal with matters the police community has been anxious to have cleared up. It seems, in relation to the Plain View Doctrine that there is not anything unique. That stopping cars to detect crime and using the Motor Vehicle Act as a guise, does not camouflage the true intent and cannot be relied upon to make police actions lawful, is also old hat. However, that there was no detention when the accused's where stopped and still not when asked to step out of the truck is in view of what the BC Court of Appeal had to say in Bonogofski[16], somewhat surprising. That highest court in BC said that not everyone who gets pulled over by police is detained. It used the example of police stopping traffic to warn drivers of hazardous road conditions ahead as an exception to such detention. The Court stopped there and did not say if a person who gets pulled over for a traffic infraction is detained. Considering the Court using as an example such an innocuous reason for a "pull over" an

---

[16] R. v. BONOGOFSKI - Volume 29 page 1 of the publication.

inference to say that stopping for the purpose of collecting information or evidence to prosecute constitutes detention seems not unreasonable. The practical aspect of considering everyone detained who is stopped for a road check or for any traffic offence, is frightening and could effectively paralyse traffic enforcement. There are some formulas that would allow a middle road to be travelled. But those would be conjecture at this stage. However, to say that there was no detention until the arrests were effected in this Curson and Siska case seems inconsistent with cases where detention was found at much earlier stages in encounters with police.

* * * * *

THE CHARTER: MURDER - CONFESSIONS - AND RIGHTS - APPARENT FRUSTRATION

Regina v. ***EVANS*** - BC Court of Appeal - Vancouver CA 005498, December 1988

The accused, a 21 year old man, was left with a mental deficiency from a motor vehicle accident when he was 9 years old and heavily scarred from being burned a couple of years later. Consequently he has a low I.Q.; is not attractive; and is mentally and physically disabled as the injuries also left him with an abnormal gait. His family life was not good and his older brother is a person who has been in and out of jail for armed robbery and like offences. His relationship and his perception of the potential of any kind of familial or sexual involvement with women was and is nil. He feels that women do no only want no part of him but hold him up to ridicule.

In November of 1984 a woman, in her twenties, was stabbed to death in a home. A few months later a female real estate agent while holding an "open house", died a similar death.

Police suspected the older brother (who was out on parole) to have committed the murders. It was also believed that the younger brother, the accused, could have some information to assist their investigation of the murders. There was evidence that the accused was doing some petty trafficking in marihuana. To accommodate the questioning of the accused in regard to what he knew of his brother and the murders, he was arrested for trafficking in marihuana.

When the arrest was effected he was told of his rights and asked if he understood. He replied, "No". He was told that he was to come with the officers and was asked if he understood that. He said he did. There was no attempt made to explain his rights to him at that time.

At the beginning of the first interview, the right to counsel was explained but the accused did not indicate to understand at the time. In cells he spoke to an undercover officer (cell mate) and expressed the hope that he would be allowed to talk to a lawyer as that would makes things, "Go a little better with me." He was questioned about the marihuana but refused to say anything.

During a subsequent interview (a short time later) the accused confessed to both murders. He was asked if he wanted to speak to a lawyer and he made an unsuccessful attempt to contact one. After that confession he spoke again to the undercover officer in cells and told him that he had confessed to the murders. The officer said, "You confessed?" Upon an affirmative reply he asked, "Did you do it?" The accused said, "No" and said, "....they would not give me a rest until I confessed." He also was on the telephone to his brother. The conversation was obviously recorded and was adduced in evidence by the Crown. The brother told the accused that he had talked too much. He also questioned the accused if he knew his rights and upon this question the

accused recited the typical "TV version" of the rights to counsel and to remain silent. Said the accused to his brother, "Oh yeah I know, I watch TV man, I know what is going on."

A jury convicted the accused and he appealed to the BC Court of Appeal. The main grounds for appeal were the infringed rights of the accused to consult and retain counsel and that the subterfuge on the part of the police (arresting him for trafficking but questioning him on the murders) had deprived the accused of his Charter right to be informed of the reason for his arrest.

The three Justices wrote separate reasons for judgement. One would allow the appeal and order a new trial on the issue of right to counsel. The other two Justices dismissed the appeal, agreeing with each other on the disposition of the appeal, but parting ways when it came to the comments one of them made about the Charter and its effects on criminal procedures.

The confessions by the accused were a major portion of the Crown's case. Finding that the accused's rights were infringed, would, of course, jeopardize the admissibility of those statements. The Justices found that technically there was a first and second detention. The reason for the first (trafficking in marihuana) he was informed of, but the second (the murders) he was never told about until well after the crucial interviews. The BC Court of Appeal rejected this ground for appeal and held that kernel to the issue was whether the accused understood his rights at the time. If there was a breach of the accused's right to be informed of the reason for the arrest it was inconsequential. Suppressing the statements for such a breach would bring disrepute on the administration of justice said the Court by majority.

There had also been considerable argument about the accused's mental capacity to understand the consequences of confessing. He was very much in need of legal advice and was not capable to waive his right to silence. The defence relied on the cases that have clearly indicated that the right to counsel is an adjunct to the right against self-incrimination.

One Justice of the Court of Appeal commented on this and indicated strongly that such a link was not what the drafters of the Charter had in mind. She said the Courts have given this a mistaken and too broad an interpretation. Realizing that it was "too late" at this stage, she nonetheless gave her views on this point. The Charter rights of being informed of the reasons for arrest and to consult and retain counsel are a reiteration of the common law right to have that detention tested for propriety; to be delivered and released if it is not lawful by means of a writ of *habeas corpus* if necessary. The right to counsel is in conjunction with the right to know why you are detained. It is not a right to be advised on your strategy with the authorities. She consequently disagrees with the cases where statements were disallowed in evidence because the accused's right to counsel had been infringed. Such infringement had and cannot be the "manner" in which the statements were obtained (see s. 24(2) Charter). She held that the accused's right to counsel had been infringed prior to the taking of the first statement and, with apparent reluctance, conceded that the confessions were subject to exclusion if admitting them would bring disrepute on the administration of Justice.

The evidence obtained from the accused was not real but self-incriminating. According to the ruling by the Supreme Court of Canada[17] such evidence, obtained subsequent to a denial of right to counsel, goes to the fairness of the trial and should be excluded. Despite those strong words, the Charter itself allows admission if no disrepute is thereby cast on the administration of justice.

Apparently assuming that the Charter places obligations on all citizens and not just on the governments and those who join the government in its interests (see s. 32(1) Charter), the Justice held that the Charter does not only extend rights to persons accused of crime. The Charter guarantees the right to life (section 7), the accused deprived his victims of that right. Said the Justice,

> "Nothing can be done to give them back that right they have lost. But something can be done to prevent another young woman who has never done Evans any harm being killed by him without a fair trial."

Fairness of the trial, she said, must be weighed against the victims' right to life. Before the Charter the accused's trial would have been fair. Now, because of the Charter provisions, it is unfair. By national community standards what could be more unfair than to let a self-confessed killer go free only to kill again. Seventy-five years ago he would have been hanged for these murders; twenty-five years ago his death sentence would have been commuted to life imprisonment; now, the same evidence leads to adjudicative unfairness acquittal and more killings. "Such a result would not be the act of a civilized, but an uncivilized society." concluded the Justice.

The Justice finished her reasons for judgment with these comments:

> "Wesley Evans is a pathetic creature. His crimes are rooted in things over which in truth I suspect he has very little control. An authority higher than this or any Court may not consider him a sinner. But Society must be protected from those who are incapable of resisting the impulse to kill innocent strangers."

Appeal dismissed
Convictions of first degree murder upheld

---

[17] R v. Collins - Volume 27, page 1 of this publication.

Note: The other Justice who agreed that the appeal should be dismissed, opened his reasons for judgment by saying that he did not necessarily agree with the comments made about the Charter. Neither did the Justice who wrote the dissenting reasons for judgment. He would have allowed the appeal and ordered a new trial.

* * * * *

CONSTITUTIONALITY OF FINGERPRINTING A PERSON CHARGED WITH, BUT NOT CONVICTED OF AN INDICTABLE OFFENCE - IDENTIFICATION OF CRIMINALS ACT

The Queen v. BEARE and The Queen v. HIGGENS - Supreme Court of Canada 20384, December 1988.

Beare was charged with breaking, entering and theft and was served an Appearance Notice which besides ordering him to appear in Court on a certain date also compelled him to attend at the police station to be processed under the Identification of Criminals Act. Higgens was charged with defrauding someone of more than $200.00 and was served a summons with instructions similar to those given to Beare. Neither party attended as instructed for the fingerprinting and other signaletic information to be recorded. Both parties applied to the Saskatchewan Queen's Bench for relief from this legal obligation. They claimed that the provisions for the taking of signaletic information prior to conviction is contrary to the principles of fundamental justice; is an unreasonable search; violates the presumption of innocence; constitutes arbitrary detention etc. Two Justices of Queen's Bench rejected the applications but the Saskatchewan Court of Appeal allowed Beare and Higgens' appeals. This Court held that the practice does relate to criminal activities and to be "processed" under the Identification of Criminals Act is to be treated like a criminal. This, for a person presumed to be innocent is a humiliating experience that refers to physical and mental integrity which is included in the concept of "life, liberty and security of the person". (s. 7 Charter). This meant that in Saskatchewan, no signaletic information was to be taken under the Identification of Criminals Act until a person was convicted of an indictable offence. This decision was appealed to the Supreme Court of Canada with the Federal Attorney General, the Canadian Association of Chiefs of Police and four provinces joining the Attorney General of Saskatchewan in the submission that fingerprinting is an integral and invaluable part of criminal investigations and that the current laws are fundamentally not unfair.

The Supreme Court of Canada reviewed how by construction of enactments "lawful custody" captures the situations Beare and Higgens found themselves in. A person who received an appearance notice or has been served a summons for the alleged commission of an indictable offence is for the purposes under the Identification of Criminals Act in lawful custody. The questions before the nation's highest court were:

1. Is this law in view of our guaranteed rights excessive?
2. If this law is excessive is it demonstrably justified in our free and democratic society?

One aspect of the laws in question that had added to its constitutional condemnation in Saskatchewan was the fact that each person charged is totally at the mercy and whim of a police person whether he shall be processed. The matter is totally discretionary and the law provides no guidance in that regard. An example of such guidance in a discretionary authority is that provided in the "powers of arrest" section of the Criminal Code. It provides

for discretion where certain categories of offences are involved and states that no arrest shall be effected unless certain public interest issues prevail. In other words in terms of fingerprinting the law leaves us open to capricious treatment. Furthermore, there are no provisions that signaletic records be destroyed if a person is discharged. All these aspects had aggravated the apparent ignoring of the presumption that the person subject to all of this is innocent. Despite that innocence, the charged person must surrender himself to custody and that humiliating process or face criminal charges for failure to do so. The Saskatchewan Court of Appeal had implied that only if Parliament would take the arbitrariness out of the process, or make the decision for a charged person to be processed a judicial one, would the legislation be capable of being within the boundaries of constitutional properties.

The Supreme Court of Canada did address these issues but felt that since the fingerprints of Beare and Higgens were never taken the matter of disposing of the prints upon acquittal did not arise in the appeal.

The Court then summed up the significant uses of fingerprint identification in our society, from being proof that a person was at the scene to exonerating him from any wrong doing and many other uses for the purpose of security, prevention of crime and precautions to identify children in case they go missing.

With this as a prelude the Court considered whether the Identification of Criminals Act is inconsistent with the principles of fundamental justice. The Court observed how in 1971 the Bail Reform Act was included in the Criminal Code to reduce the number of people who were unnecessarily arrested or after an arrest kept in custody. Appearance Notices, Promises to Appear and Recognizance were provided for to compel court appearances and the broad definition of "lawful custody" became part of this package. This so custody was not extended or invoked simply for obtaining the suspect's fingerprints. Though a good argument can be made that all of this law enacted in 1971 to prevent unnecessary custody now offends the constitution, the Supreme Court of Canada said of the right to security of the person, "It should be given a generous interpretation, but it is important not to overlook the actual purpose of the right in question". The Court immediately rejected as too broad and indefinite the notion that feeling demeaned or indignant on account of the identification process brings the matter within "the security of the person" right. The fact that a person must appear at a certain time and place or be criminally liable, is far more capable of violating the right than how a person may feel about it.

Furthermore, it must be kept in mind that although persons subjected to this process are presumed to be innocent, there are reasonable and probable grounds to believe the committed an indictable offence. The presumption of innocence only gives that person they right to remain silent and have the Crown prove beyond a reasonable doubt what it alleged. Also, the Court seemed to find the personal impact of being fingerprinted to be exaggerated. Custodial fingerprinting is "innocuous" and was a justifiable at common law as far as back as 1933. Is that all changed now because of our Charter? Considering the wide acceptance by the Courts of this practice before there was

legislation on this point and the fact that nearly every Nation provides for the practice including those with stringent human rights law, the Supreme Court of Canada concluded that the procedure provided for in our statutes to obtain a suspect's fingerprints are not inconsistent with the Canadian Charter of Rights and Freedoms.

Responding to the alleged arbitrariness of the process (because peace officers have discretion whether or not to take fingerprints, and that those officers should only be able to do so if they have shown a need for the taking of the prints) the Supreme Court of Canada reminded that the daily operation of law enforcement depends on the exercise of discretion. It would be totally impractical to do as the Saskatchewan Court of Appeal appears to suggest. The exercise of discretion in this, does not offend any Charter right concluded the Supreme Court of Canada. Should it be shown that the exercise of this discretion was done for improper or with arbitrary motives, the person can seek relief and remedy under s.24(1) of the Charter. Although it may be desirable to have a senior officer approve the investigating officer's decision to have the prints taken (as in the U.K.) it is not constitutionally mandated in Canada.

In relation to the right to privacy and not to be subjected to unreasonable search the Supreme Court of Canada drew a distinction between a body search or a house search, and the taking of fingerprints. There is no penetration into the body and nothing is removed; neither is there any searching or probing. It is as it were, part of the arrest which is by far a more serious violation of one's privacy.

For all those reasons the Court found that the process of taking fingerprints from a person charged but not yet convicted of that indictable offence does not offend our Charter of Rights and Freedoms.

* * * * *

REASONABLE SEARCH - SEARCH WITH WARRANT
UNDER S.10 N.C. ACT

Regina v. KOKESCH - BC Court of Appeal - CA008483, December 1988

Police had Kokesch's home under surveillance for four days consequent to information from police in another community that he was cultivating marihuana. This surveillance did not yield too much information and at 2000 hours the officers took a closer look. They went down at 75 foot driveway right up to the house; they found the basement apparently sealed off and condensation on the inside of the windows. There was also a humming sound coming from that part of the house, and the smell of marihuana came from lowered vents.

It was conceded by the officers that when they conducted this search it was based on suspicion. However, this search gave them the requisite reasonable and probable grounds for obtaining a search warrant. Upon execution of that warrant plenty of evidence was found of cultivating marihuana and Kokesch was charged accordingly and tried in County Court.[18]

The trial judge had not allowed the evidence to be admitted as he deemed the search to be unreasonable. He held that in fact there had been two searches - one to obtain the reasonable and probable grounds for the search warrant and the second when the warrant was executed. Consequently, Kokesch was acquitted. The Crown appealed this decision. The Crown claimed that though the officers said in testimony that they had no more than suspicion to conduct their first search, in law they had reasonable and probable grounds. Furthermore, they had perhaps searched near a dwelling house but not inside one. This meant that their search was lawful under s. 10(1)(a) Narcotics Control Act and there was nothing unreasonable about the search. Reading s. 10(1)(a) of the Narcotics Control Act "in its ordinary grammatical sense" it clearly states that with reasonable and probable grounds for believing that something is, had or kept contrary to that Act a peace officer may search any place without warrant. For a dwelling house a warrant is needed.

In 1984, the Ontario Court of Appeal heard a Crown's appeal in the case *R. v. RAO*.[19] The trial judge had interpreted and suppressed the evidence of hashish found in Rao's office. The Ontario Court of Appeal agreed with the trial judge's view of the section in question. It looked at this section in the setting of contemporary law, particularly the Charter. It reasoned that if a place other than a dwelling house to be searched is one where an individual has reasonable expectation of privacy and if circumstances make the obtaining of a warrant not impracticable in that it would impede effective law enforcement, police must have a warrant to search. The right not to be subjected to an unreasonable search was very weighty in this decision. Also, our Supreme Court of Canada held that lawful warrantless searches are by there

---

[18] See Volume 30, page 31

[19] R. v. RAO (1984) 4 CR (3d) 1.

very nature unreasonable unless the Crown shows otherwise.

The Crown reasoned that when the officers went to Kokesch's house they were not searching for narcotics under s. 10 N.C.A. but were merely seeking some justification for getting a search warrant. There was no search so what they did was not something against which Kokesch was constitutionally protected. What they did amounted at most to a minimal intrusive practice. They had reason to suspect Kokesch was cultivating and trafficking marihuana and were from an investigation point of view backed against a wall. There were simply no investigative measures open to them. Their suspicions were more than substantiated when they trespassed on to Kokesch's property.

The BC Court of Appeal agreed that the officers were only trespassers and not searchers when they entered Kokesch's property without warrant. He was suspected and was found to flout the laws and could as such, not expect privacy. Private interest had given away to public interest in effective law enforcement. Consequently, the evidence the officers collected to justify the warrant had perhaps been obtained by means of petty trespass but not through an infringement of Kokesch's Charter right to be secure against unreasonable search. The search with the warrant was not in any way flawed and was reasonable and even if the search was unreasonable the trial judge had not given adequate consideration to the common law of the exclusionary rule. Said the Supreme Court of Canada:[20] "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone." In other words the BC Court of Appeal seemed to say to the trial judge; "Even if you are right on the constitutional issue of this case, you are still wrong."

Crown's Appeal Allowed
New trial ordered

Note: Several cases in BC had been decided based on the reasoning of the trial judge in this Kokesch case. The Crown appealed all of them and new trials were ordered for each.

What is also of interest is that three other Justices of the BC Court of Appeal decided the Marceau case that in circumstances appears not to be distinct from the Kokesch case. Their reasons were handed down one month before those in Kokesch - (see next page).

* * * * * *

---

[20] COLLINS v. The Queen (1987) 33 C.C.C. (3d) 1...Volume 27, page 1 of this publication.

Regina v. MARCEAU - BC Court of Appeal, CA 007595, Vancouver, November 1988

The appellant Alain Marceau lived with his brother Claude in a townhouse. They were suspected of robberies and thefts and were kept under surveillance. A person, at one point in time, came out of the house and buried something in the back yard. That person was not believed to be the appellant Marceau. A couple of days later when no one was home police conducted a search of the back yard. A syringe was found in the garbage can and the buried object was a thermos bottle filled with a white power. A sample was retained and the thermos was put back. Armed with this information a search warrant was obtained. When the warrant was executed Claude Marceau flushed the toilet and emerged from the bathroom with a spoon. Claude's bedroom contained a quantity of the usual pariphanalia connected with trafficking. Alain Marceau had $4,000.00 in small bills on his person as well as plastic baggies. Besides this, there was an abundance of evidence in the house and in the appellant's car, of an active consumption and trafficking of drugs at this location.

Two weeks after all this, the brother, Claude Marceau, committed suicide. He left a note to say he and he only was involved in the drug trade and that his brother Alain, the appellant, was innocent.

The officer who had supervised the investigation testified at Alain Marceau's trial. He was asked if he had given any though to obtaining a search warrant instead of allowing the surreptitious search of the yard by the investigating officers. He said that he though none was required and that the search was based on "hunch, suspicion and hope". The officer seemed to have relied on s. 10 Narcotics Control Act for authority to search the garden without warrant and conceded he did not have the necessary grounds to get a warrant. The BC Court of Appeal did not find any evidence in the trial transcript that the officers who actually carried the search, had grounds to search under s. 10 N.C. Act.

There were three grounds of appeal:

1. Should the evidence of what was found as a result of the unreasonable search not have been excluded?
2. Was the proof against the accused sufficient to convict him?
3. Should the suicide note of Claude Marceau not have received greater weight than it did?

The BC Court of Appeal held that from the evidence adduced it could have been concluded that the officer who carried out the search of the garden had the requisite belief for doing so. It was the supervisor's evidence that brought that belief in question and the trial court had accepted his evidence as fact. Regardless of that evidence reasonable and probable grounds were shown (it was for the Court to decide if there are sufficient grounds and not the supervisor) and a reasonable person would conclude from the information the

searching officer had, that a narcotic was present. This means that the search was reasonable. But even if it was not, in these circumstances it would be contrary to the interest of the administration of justice not to admit the evidence. As in the previous case (Kokesch) real evidence was found and admitting such evidence will rarely render a trial unfair.

In regards to the sufficiency of evidence against the appellant. The Court of Appeal reasoned that the evidence showing that the appellant was in possession of the narcotic must be weighed against the evidence that he was not in possession of the narcotic. Reviewing all the evidence a reasonable trier of facts would be sure beyond a reasonable doubt that the appellant possessed the forbidden substance.

The suicide note had received sufficient consideration as well. The defence called it a dying declaration (which it not likely is). The trial judge had not analyzed the note as he ought to have done according to the appellant. The BC Court of Appeal held that the reasons for judgement indicated that the note received the attention it should have.

Appeal against conviction was dismissed

* * * * *

COMPETENCE AND COMPELLABILITY OF SPOUSE OF ACCUSED TO TESTIFY WHERE HE IS CHARGED WITH ARSON

Regina v. LATIMER - County Court of Prince Rupert
No 10382, September 1988

The accused allegedly set fire to clothing that very likely would have caused his home to burn down. He was charged with arson. At his trial his wife was called by the Crown. The indictment did not allege that the alleged arson related to the "wife's person, her health or liberty". This meant that she was neither compellable nor competent to testify against her husband. This issue became the subject of a *voir dire*.

The trial judge listened to the wife's evidence which revealed that she and the children were in the house when the fire was set. Smoke alerted her of the fire and she and her children did get out. The witness testified that she did not think at any time that she was in danger.

A BC Court of Appeal decision in 1978[21] did set the precedent that where a person is charged with a crime and the allegation does not relate to the person, health or liberty of the spouse that does not mean that the spouse is not competent to testify. If that testimony shows that the accused's action which constituted the crime, had caused a threat to the person, health or liberty of the spouse, then it must be regarded that the testimony is within the exception as contained in s. 4(4) of the Canada Evidence Act.

Despite the fact that the wife did not consider that she was in danger at the time, the Court nonetheless found that the substantial fire that resulted, was in fact a threat to the wife's person and health. Hence the wife was competent to testify. Based on an abundance of law on this point the Court held that where a witness is competent he/she is also compellable.

The Crown also intended the wife to testify about relevant communications she had with the her husband, the accused. Accordingly to s. 4(3) of the Canada Evidence Act and at common law communications between man and wife are privileged to the extent that spouses are not compellable to disclose such communications.

The Quebec Court of Appeal[22] is of the opinion that if persons are competent and compellable they "may testify about all aspects of the case, subject only to the ordinary rules of evidence", despite s. 4(3) of the Canada Evidence Act.

However, the trial judge in this case, felt he did not need to decide that issue. He made a distinction between "conversation that goes to the circumstances surrounding the alleged offence" and "some sort of statement or

---

[21] R. v. SILLARS 12 C.R. 202 (1978).

[22] R. v. ST. JEAN (1976) 34 C.R. 378

confession of culpability" one spouse may make to the other. For instance, if the charge is the attempted murder of the spouse/witness and the words the accused spoke while he made the attempt that would indicate the alleged intent (or disclaim such an intent), that communication is not intended to be privileged. In this case, the words spoken by the accused, the Crown intended to adduce through the wife's testimony was part of the circumstances of the alleged offence.

Witness was held to be competent and compellable - She was permitted to relate the communication between her and the accused.

* * * * *

ENTRAPMENT - WHAT IS IT? -
HOW MUST A CLAIM OF ENTRAPMENT BE
DISPOSED OF DURING A TRIAL

MACK v. The Queen[23] - Supreme Court of Canada
December, 1988.

A Mr. M, (who police conceded was difficult to handle), was placed as an undercover agent under police handlers who investigated the accused, Mack. It was agreed that Mack would supply a quantity of cocaine to M for about $40,000. - per pound. When Mack delivered a 12 oz sample of the product he was arrested.

Mack raised "entrapment" in his defence. He testified that he had been petrified of M. The persistence to deliver had been very intimidating and "No" was not accepted as an answer. Mack told how he was made to believe M belonged to a syndicate; he was shadowed; and at one time M took Mack into the woods, showed him a gun and commented how people could get lost in remote areas like these.

The trial judge had held that Mack had a propensity for drug transactions and had not done anything he had not wanted to do. Profit and not fear had motivated him to do as M had insisted. The conviction that followed was upheld by the BC Court of Appeal. That Court concluded that entrapment is available as an aspect of the abuse of the process of the Court and may result in a judicial stay of proceedings. However, the burden of proof is on the accused to prove on the preponderance of evidence that the State's practices had been so outrageous and shocking that not stopping the proceedings against the accused would bring disrepute on the administration of justice. He had failed to do so. The Court of Appeal agreed with the findings of the trial judge and upheld Mack's conviction. He then appealed to the Supreme Court of Canada.

Summing up the kernel topics of this appeal the Supreme Court of Canada wrote in the Judgement's introduction:

> "The central issue in this appeal concerns the doctrine of entrapment. The parties in essence, ask the Court to outline its position on the conceptual basis for the application of the doctrine and the manner in which an entrapment claim should be dealt with by the Court."

The Supreme Court of Canada made the following observation at the outset of its analysis of the issue of entrapment:

---

23 See Volume 22, page 29 of the publication (BC Court of Appeal)

> "If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must the methods employed to detect their commission."

Particularly in consensual crimes (where the victim consents) such as gambling, prostitution or drug offences, where either participation, blackmail or extortion prevent reporting the crimes to police innovative methods to ferret out the crime and the offenders is essential in our free and democratic society. Also fraudulent scams go undetected by the victims. Consequently the common law recognizes, sanctions and protects informers, agents provocateur, undercover operations. Even instigating the commission of an offence to ensnare the perpetrators is permissible.

The Court made it clear that the police has a considerable latitude to infiltrate entities and deceive the deceptors but may not do so to randomly test citizens level of resistance to profit from crime; to challenge their virtues to determine who would commit crime if an attractive proposition came along. Police and their agents only have that latitude if they act on a "reasonable suspicion" or a "*bona fide* inquiry". Secondly the Court drew attention to the crucial distinction between providing an opportunity for a person to commit a crime and police actually creating a crime so a person can be prosecuted. Quoting a classic definition by an American Judge, the Court said that an example of entrapment is:

> "....the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer."

Further on, again quoting from U.S. juris prudence, the Court said whether there is entrapment

> "....a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

Should police be allowed to buy contraband from itself through an intermediary and then jail the intermediary? That is strictly ferreting out those who are predisposed to commit crime if the profit is beyond their resistance to temptation. Should, instead, entrapment only be allowed to uncover ongoing criminal schemes?

If Police conduct that ensnares a person in a criminal act is shocking, repulsive and beyond the scope of their duties, is the remedy then to free the equally guilty accused or should he stand convicted along with the police "applicable provisions" of the law that apply to their office?

Can the Courts withhold their processes for the prosecution of a person who did in fact offended a law enacted by a duly elected government and veto the State's decision to prosecute? Are the appointed officials (the judges) empowered to interfere in prosecutorial discretion or police strategies where there are no infringements of constitutional guarantees of rights or freedoms?

If the Court establishes that to those who are predisposed to commit crime the defence of entrapment is not available does that not encourage inequality and prejudice in law enforcement practices? Furthermore, to determine predisposition an accused's criminal record would become relevant similar to showing "similar acts" by the Crown. Again inequality at trial would result as the defence of entrapment would be easier available to those who never got caught than to the possibly unsophisticated offender who has been convicted before.

The reason why the Canadian Courts have never recognized entrapment as a substantive defence is that it does not create a reasonable doubt or violates any rights or freedoms and most certainly does not exonerate the offender. It simply is a circumstance of the crime. His act and intent render the accused punishable and the entrapment fails to excuse him or "contradict the obvious fact of his commission of the offence". We therefore don't excuse the entrapped person for committing the crime. Entrapment is simply a public policy consideration. The public does not expect the police to behave repulsively or shockingly, particularly where they are testing a persons resistance to temptation without being involved in a specific inquiry. The U.S. Supreme Court put it as follows:

> "The Court has an obligation, with the power derived from its inherent jurisdiction, to refuse to lend its processes and effectuate the enforcement of the law by 'lawless means or means that violate rationally vindicated standards of justice'."

The Supreme Court of Canada concluded that "the doctrine of entrapment" must be recognized in Canada. Being cognizant of the competing social interest to repress criminal behaviour the Court gave the following reasons:

- Judicial acceptance of unacceptable conduct by investigatory and prosecutorial agencies would bring disrepute on the administration of justice;
- Authorities do not have unlimited power to intrude into our personal lives or to randomly test the virtue of individuals;
- Entrapment will cause criminal acts on the part of person who would otherwise not have committed the crime;
- Police should not commit crimes or engage in unlawful activities <u>solely</u> to entrap others;
- To manufacture crime is an inappropriate use of police power;
- Authorities are inherently limited in their power to manipulate people and events for the purpose of attaining specific objectives or obtaining convictions.

In view of the competing social interest the Court emphasized that they had to strike a balance between it and the justice concepts. However, said the Court:

> "....it must be stressed that the central issue is not the power of a court to discipline police or prosecutorial conduct but, as stated in Amato:[24] the evident of the improper invocation by the State of the Judicial process and its power."

The Courts cannot become a party to the spectacle of a person being convicted of a crime which is the work of the State. The only way the court can dis-associate itself from this impropriety is to withhold its processes from the prosecuting State by means of the Court's inherent power to stay the proceedings to prevent what otherwise would amount to the State's abuse of the process and powers of the Court. Although a guilty person may benefit from the Court's disapproval of prosecutorial discretion, the larger issue is "the maintenance of public confidence in the legal and judicial process". The application of the doctrine of entrapment is necessary to preserve the purity of the administration of justice and is no more than a coincidental and derivative benefit to the accused person. Consequently it cannot be considered a substantive defence. If it was, a stay of proceedings upon finding entrapment would amount to a pronouncement that the is accused legally innocent. Unless the police conduct is such that the defence of duress or "necessity" is available to the accused, entrapment cannot negate the criminal intent and the wrongful act on the part of the accused.

The Supreme Court of Canada emphasized, that should a trial court hold that an accused was entrapped the Crown must be able to appeal that decision. Consequently, <u>for that purpose only</u>, a judicial stay of proceedings is the equivalent to an acquittal. "Otherwise, the two concepts are <u>not</u> equated" said the Court. Once again reviewing numerous decisions on the defences of duress and necessity[25] the Court concluded that entrapment was not likely to go as far as to make these defences available and that consequently entrapment does not relate to blameworthiness or culpability of the accused and is therefore (despite the submissions of Mack's counsel) not a substantive defence but rather an aspect of the abuse of the process of the Court. Furthermore, assume that a person was enticed and importuned to commit crime by someone other than the police (or other agents). If he could not withstand the temptation this entrapment would most certainly not be available to the accused. When entrapped by the police, the accused in unaware that the offer of profit (or whatever the advantage may be) is extended to him by investigating authorities. Nonetheless, regardless who makes the proposition the temptation is the same as is the intent and wrongful act if he goes

---

[24] R. v. AMATO (1979) 51 C.C.C. (2d) 401

[25] PERKA, NELSON, HINES, JOHNSON and the Queen. Volume 18, page 5 of this publication. Supreme Court of Canada, October 1984. 2CSR 232

through with it. Consequently how could one reason that entrapment by another criminal does not diminish the intent to be excused for committing the crime while if the temptation is held out by police it would have that effect. Needless to say, the criminal mind in both is the same. Again the conclusion is that, considering the objective of the Court to not make their processes available where the police and the prosecutors (not private individuals) have overstepped their ethical boundaries, entrapment cannot be a substantive defence.

In theory this all sound very idealistic but....

> "....what is the appropriate method of determining whether police conduct has exceeded permissible limits such that allowing a trial to proceed would constitute an abuse of process?"

Furthermore, should the test whether there was entrapment be an objective or a subjective one? If objective police conduct in isolation will determine if there was entrapment; if subjective the propensities and predispositions of the accused will be included in that deliberation.

The Court rejected the suggestion that entrapment is where a hypothetical non-predisposed person would likely have been induced to commit the crime.

Instead the Court concluded that to include predisposition of the accused in the test for entrapment is to permit unequal treatment. It is always possible, reasoned the Court, that a person notwithstanding his propensities, has been led by police conduct to commit a crime. Not wanting to ignore this possibility the Court said:

> "Obviously it is difficult to determine exactly what caused the accused's actions, but given that the focus is not the accused's state of mind but rather the conduct of the police. <u>I think it is sufficient for the accused to demonstrate that viewed objectively, the police conduct is improper</u>" (Emphasis is mine).

If that is not so, then a predisposed person could never avail himself of the doctrine of entrapment regardless how outrageous the police conduct was. If we presume that a predisposed person will commit an offence when given the opportunity, then it logically follows that where police has to go beyond creating an opportunity to induce a person to commit an offence, he is likely not predisposed. Consequently the predisposition test (created by the U.S. Supreme Court) is fundamentally flawed, said the Supreme Court of Canada.

The Supreme Court of Canada observed that the incidence of entrapment seems more likely for police conduct in the U.S. than in Canada. It doubts that, considering police conduct in Canada many allegations of this sort will occur. Then the Court gave some examples where police tactics would be bonafide and

malafides. If for instance, in a particular location certain criminal offences are committed, then, despite the fact that there are no suspects, police may create an opportunity for someone to commit that offence. Where there is reasonable suspicion to believe that known individuals are engaged in criminal conduct police are also entitled to provide opportunities for them to commit the offence(s) they are suspected of committing. However, where police would plant a wallet containing money and ample of identification of the owner in a public park in the hope someone will come along and take the money, they acted without any grounds. Their actions run the risk that otherwise law abiding citizens will commit a crime while police were not engaged in an investigation. Their action amounts in such circumstances to random virtue testing.

Another example was reports of thefts of handbags at a bus terminal. Planting a handbag in an obvious location and charging the person who takes it would not amount to entrapment.

There are situations where the past criminal conduct of a person cannot be ignored. By itself it cannot lead to reasonable suspicion. If <u>it and other factors</u> cause reasonable suspicion then police may provide an opportunity for that person to commit an offence provided there is a proportionate and rational connection between the crime he is suspected of and the one he is given an opportunity to commit.

Examples:

> Police reasonably suspect a person of frequently possessing marihuana and give him an opportunity to import heroin into Canada ---- or a person reasonably suspected to be active in the drug trade and police provide him with the opportunity for him to steal a car.
>
> About reasonable suspicion, the Court said that a criminal record is no prerequisite but can be based on many factors. "Information" of criminal activity may lead to a reasonable suspicion, and is sufficient to provide an opportunity to commit an offence.

Therefore, entrapment is:

1. Authorities providing an opportunity to commit an offence to persons without reasonable suspicion or acting *malafides*; or
2. Authorities who have a reasonable suspicion or are conducting a *bonafide* investigation and go beyond providing an opportunity "and induce the commission of an offence".

To test if police conduct has gone beyond opportunity and has induced the commission of the offence, the Courts must consider if an average person "i.e. a person with both strength and weaknesses" would have been so induced if placed in the same position as the accused person. If the common response from the public would be in the affirmative "police have exceeded the bound of propriety". This test, of course, is vulnerable to the criticism that the

average person is as obscure as the reasonable man the law has always somewhere in the woodwork. What is tempting to the "lambs" among us is perhaps not even bait to "wolves". The Court responded that should these be persons with particular vulnerabilities it must be considered "whether the (police) conduct was likely to induce criminal conduct in those people who share the characteristic which appears to have been exploited by the police".

That "wolves" will benefit from the "average person test" the court found not "particularly troublesome". The same comment can be made when the "wolves" among us benefit from infringements of Charter rights.

> "In the short term it may well be "better" for society to convict such persons, but it has always been held that in the long term it would undermine the system itself."

said the Court.

The Court went on to say that the "average person test" is not the exhaustive means to determine entrapment. Exploitation of known mental weaknesses or disabilities; appeals to persons' instincts, compassions, sympathies or friendships can all lead to the conclusion that there was entrapment. Some person (particularly those struggling to recover from additions) need protection and not abuse. Disproportionate police involvement may cause the role of the police to outdo the wrong doing of the person targeted. The Court hastened to add that it was:

> "....not willing to lay down an absolute rule prohibiting the involvement of the State in illegal conduct."

Furthermore, absent exceptional circumstances, existence of any threats made to individuals targeted by inducement techniques or any strategy that will cause a risk of potential harm to third parties are included in impermissible police actions.

In the final paragraph, of the judgement's chapter entitled, "The Proper Approach", the Supreme Court of Canada seemed to create a "basket clause". It emphasized that its description of entrapment was not exhaustive and that in many cases something that is improper may vary. Understanding of criminal activity is imparative said the Court and permissibility of Police conduct will depend on the criminal situations under investigation or of which police have a reasonable suspicion.

In summary The Supreme Court of Canada came up with the 10 Commandments of entrapment. Like the infallible 10 Commandments they are not exhaustive:

To determine whether police have employed means which go further than providing an opportunity, it is useful to consider any or all of the following factors:

1. the types of crime investigated and the availability of other techniques for the police detection of its commission;

2. whether an average person, with both strength and, weaknesses, in the position of the accused would be induced into the commission of crime;

3. the persistence and number of attempts made by the police before the accused agreed to committing the offence;

4. the type of inducement used by the police including deceit, fraud, trickery or reward;

5. the timing of the police conduct, in particular if the police have instigated the offence or became involved in ongoing criminal activity;

6. whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;

7. whether police have exploited a particular vulnerability of a person such as a mental disability or a substance addiction;

8. the proportionality between the police involvement, as compared to that of the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves.

9. the existence of any threats, implied or expressed, made to the accused by the police or their agents;

10. whether the police conduct is directed at undermining any constitutional values (such as legitimate exercises of freedom of thought, belief, opinion and association).

Considering that entrapment is subject to an objective test, the issue is one of law and must be decided by a judge rather than a jury. If the Court is the master of its process it cannot be a jury decision whether or not its processes shall be withheld.

Needless to say, if the method of entrapping someone is such that it infringes a Charter right, then the issue may well be one of exclusion of the evidence resulting from the entrapment.

Finally the issue of entrapment can only result in a stay of proceedings where the Crown has proved beyond a reasonable doubt that the accused has committed the offence alleged. If there is a jury, it must render a verdict of guilty and then the trial judge must be decided if a stay of proceedings lies. This is to protect the accused's rights to an acquittal if the Crown cannot prove its case. When a verdict of guilty is returned the trial judge may stay the proceedings by refusing to register the conviction due to entrapment. Remember, entrapment does not effect the guilt or innocence of the accused. The onus to prove on the balance of probabilities that the police conduct is an abuse of the process on account of entrapment, is on the accused. It seems then that where an accused may lay a foundation for entrapment during his trial, the issue of entrapment will become subject to a separate trial after a finding of guilt.

The Supreme Court of Canada repeated what it held in previous decisions that a judicial stay of proceedings only lies in the "clearest of cases". Also, it emphasized that entrapment is a very serious allegation against the police or the State. Police does need the room to combat crime in society.

In this Mack case, the issue of entrapment had been tested subjectively as the Courts included the accused's motives for profit. Had they tested it objectively, they "ought to have" come to the conclusion that the conduct of police amounted to entrapment. Consequently the Court

> allowed the appeal, set aside the conviction, ordered a new trial, and entered a stay of proceedings.

* * * * * *

SHOWMAN v. the Queen - Supreme Court of Canada
December, 1988

Showman's cause of appeal is also the issue of entrapment. The Supreme Court of Canada gave its reasons for judgement on the same day as they handed down the Mack decision. The case seems "convenient" to show the application of entrapment and demonstrate the leeway of police in curbing the social decease the drug trade amounts to.

A Mr. K, a friend of Showman for some seven years, was caught committing a narcotics offence. Police received information from K and other sources that Showman was a supplier of narcotics. For "considerations" in relation to the narcotics charges against him, K would contact Showman to arrange for a sale of narcotics. K arranged for three separate transactions between Showman and a police undercover officer.

On March 15, K introduced the police agent to Showman at the latter's home. Showman acknowledge "doing pounds for $1900.00" (marihuana). As this was too rich for the agent they met again on March 18, Showman sold the agent half an ounce of marihuana (no charge resulted from this transaction) on March 15.

On March 18, Showman showed the agent three half pound blocks of marihuana. The agent purchased one of them and learned that Showman could and was willing to supply cocaine and had been doing so for years.

On April 13, the agent contacted Showman. Consequently Showman took him two days later to the home of Mr. M. After the introduction Showman left and five pounds of marihuana was purchased from M (M was charged separately for this trafficking).

Showman's version of the transactions differed from that of the agent's. He claimed that his friendship with K had been exploited to overcome his reluctance to traffick in narcotics and to entrap him in committing the offence. K. had phoned and said a friend with lots of money wanted to buy; Showman had declined to become involved. The next day K phoned again and said the friend wanted 15 pounds, "You are talking to the wrong man" Showman had replied, but did promise to "ask around".

K phoned again and practically begged Showman to help him "just this once" and reminded Showman of all the profits to be made. The following two consecutive nights K phoned emphasizing that his friend was becoming impatient. Showman then had agreed to meet K's friend (the agent) to see if he was O.K. If so, testified Showman, he would introduce him to a supplier.

The following day K phoned twice (according to Showman) to see if the arrangement had been made. Showman claims to have been reluctant again but had told K to phone him the next day. When K placed that call Showman had not done anything towards the arrangement and told K to phone back in an hour. When he did he had agreed to the March 15 meeting. In addition Showman testified he had never sold one narcotics to anyone before. The three half pound bags of marihuana (of which he sold to the agent making a profit of $250.00) had been supplied by M who gave him that quantity just in case "the guy will like it and take more". Showman told the Court that K's importuning and offer of profit had finally caused him to do as K, a good friend for many years, had asked him to do. He had the impression K was in trouble and wanted to help his friend.

The Supreme Court of Canada responded to Showman's appeal as follows:

- The police had acted on reasonable suspicion and were fully entitled to provide Showman an opportunity to commit a related offence;

- Drug offences are difficult to detect and the use of informers and undercover agents (like K) are common and necessary;

- There was no exploitation of a friendship as the use of the friendship was not "unduly exploitive" as the dignity of their relationship was not violated;

- The number of calls by K to Showman were over a short period of time and did not exceed the normal caution of any drug dealer to become involved in any offer of profit and opportunity;

- K's solicitation would not have induced an average person in Showman's situation to have committed the offence he was accused of; and

- Consequently police conduct had not gone beyond the limits "society deems proper".

Showman's appeal was dismissed
Conviction for trafficking upheld.

* * * * *

NOTE: These two synopses may due to its volume, not seem like such. However, the reasons for judgement in these two cases amounted to 110 pages.

We have gone from barely recognizing entrapment at all to it being a doctrine of law that will oblige the Courts to withhold their processes to remedy police and prosecutorial excessiveness. This seems a quantum change that should be understood to grasp the uniqueness of the procedures by which to determine if a person was by entrapment induced to commit the crime he is accused of.

TID BITS

IMPAIRED DRIVING AND "OVER 80 MLG"

A Mr. Phillips was apprehended for impaired driving. By department policy his vehicle was towed from the scene. This caused a 15 minute wait for the tow truck. On the way to the station for the breath tests another impaired driver was encountered. Arresting that driver caused another 11 minute delay. The conviction for "over 80" was appealed by Mr. Phillips and ended up in the Ontario Court of Appeal.

He argued that the delays in compliance with department policy had caused an unreasonable delay and his breath tests were not done "as soon as practicable." The Court of Appeal pointed out that this term does not mean as soon as possible. He also challenged the practical and the constitutional validity of the presumption that the blood alcohol level at the time of an analysis within two hours of driving, is the same as that at the time of driving. He lost on both counts. In essence the Court held that the relevant law was not perfect but justified in a free and democratic society (s. 1. Charter). The Court also rejected submissions that the breathalyzer laws violate the Charter right to be presumed innocent. The 25 page reasons for judgement deal with the history of our laws in regard to drinking drivers; deals with the scientific aspects; reviews all constitutional aspects and compares our laws with comparable laws in other Nations. For those involved in this area of law enforcement, it is nearly a "must read" judgement.

Regina v. PHILLIPS. 42 C.C.C. (3d) 150.

"SEARCH, SEIZURE AND EXTENSION OF DETENTION OF GOODS"

Police seized by warrant a quantity of documents. After 90 days, the investigating officer applied for an extension to retain the documents for an additional nine months. The Justice of the Peace granted the application but ordered the officer to supply the owner of the documents with photocopies so he could continue to conduct his business. Apparently this was sensitive to the investigation and the officer appealed the decision. The Quebec Court of Appeal held that a Justice of the Peace has no authority to order photocopies to be issued. He can only grant or reject the application. Only a judge of a superior court can order copies to be made and returned (s. 446 (15) C.C.). Furthermore, the challenge had been that the Attorney General and not the police should have been the applicant. Not so, said the Court. At the investigatory stage the police and not the Attorney General is a party to proceedings like these.

FILION v. SAVARD 42 C.C.C. (3d) 182

CONSTITUTIONALITY OF PRESUMPTION THAT OCCUPANT OF SEAT ORDINARILY OCCUPIED BY THE DRIVER, HAS CARE OR CONTROL OF THE VEHICLE

The accused was convicted of "over 80" while having the care or control of a motor vehicle. He had been found in the driver's seat and he failed, on the balance of probabilities to show, that he had not entered the vehicle for the purpose of setting it in motion (s. 258 (1) (a) C.C. - previously 237 (1) (a) C.C.). The trial judge held that if it was not for this presumption he would have had a reasonable doubt that the accused had care or control of the car. The accused ended up in the Supreme Court of Canada appealing his conviction on the grounds that the presumption offended the Charter right to be presumed innocent. The Supreme Court of Canada agreed that any presumption an accused must rebut, even where the trier of facts has a reasonable doubt, does violate the right to be presumed innocent. However, there is a rational connection between what may be presumed and the facts requisite to it. Furthermore the Court found that the presumption was demonstrably justified in a free and democratic society (s. 1 of the Charter). The presumption was inserted in our criminal law to resolve two shocking aspects of the law. On the one hand a conviction without any consideration for the (intoxicated) mental state of an accused is repugnant. On the other hand to see a person acquitted because of intoxication, of an offence that has intoxication as an essential element, is equally repugnant. The presumption is simply a response to a very pressing social problem.

Regina v. WHYTE - 42 C.C.C. (3d) 97

IS A CAR BEING DRIVEN ON A PUBLIC STREET A PUBLIC PLACE?

Boy and girl met; he was in a car she was on the sidewalk. He asked her if she "is working" and having received an affirmative answer he asked her to get in the car. While driving along they discuss what sexual service she will provide for what price. As the "boy" is a police officer she is charged with soliciting under S. 195.1 (1) C.C., but acquitted. The Provincial Court judge felt that a motor vehicle that is moving along the road is not included in the special provision in subsection (2) which states that a motor vehicle "located" in a public place is a public place. She felt that "located" implied a stationary car to which attention may be called or from which conversation may be overheard. The Crown successfully appealed the decision. The Vancouver County Court held that the interpretation applied by the trial judge was too narrow. The car was at all relevant times in a public place and that is where the transaction took place.

Regina v. SMITH - Vancouver No. C.C.C. 871887
September 1988

CONSTITUTIONALITY OF PUBLICATION BAN IN SEXUAL ASSAULT CASES

The accused was alleged to have sexually assaulted his own wife. She successfully applied for a publication ban under s. 442(3) C.C. (now s. 486(3) C.C.). This section stipulates that in sexual assault cases trial judges may order that the identity of the complainant not be disclosed in the press or broadcast and shall so order when the Crown or the complainant applies for it. The Canadian Newspapers Company challenged the validity of this provision on the basis of the constitutional assurance that there shall be a freedom of press. The Supreme Court of Canada saw nothing unconstitutional in the enactment providing for the ban, despite it limiting the freedom of the press. It protects complainants from unnecessary trauma, embarrassment and humiliation; it stifles complainants from coming forward and makes the administration of justice less effective etc. Consequently the restriction of the media's right to publish the identity of the victim is demonstrably justified in a free and democratic society. This despite the fact that the ban is mandatory upon application and could provide comfort and convenience for those who complain to humiliate a person.

The Queen v. The Canadian Newspapers Company - September 1988