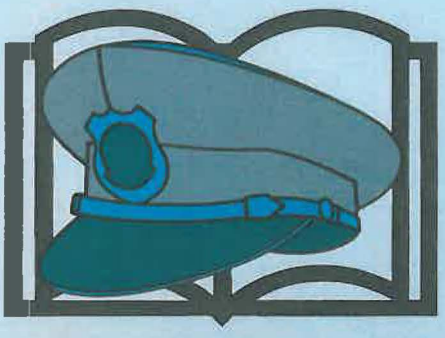

ISSUES OF INTEREST

VOLUME NO. 34

Justice Institute of British Columbia
POLICE ACADEMY
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ISSUES OF INTEREST

VOLUME NO. 34

Written by John M. Post

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LEGAL TID BITS

BONOGOFSKI DECISION REVERSED.
ROADSIDE SOBRIETY TEST CONSTITUTES DETENTION BUT COMPLIANCE WITH S. 10 CHARTER MAY BE BRIEFLY DELAYED

Regina v. BONIN
B.C. Court of Appeal - No. CA 008998 January 31, 1989

The Courts of Appeal usually sit with three justices. On very rare occasions five members will make up the Court, as the B.C. Court of Appeal did in this case. The reason was that the Crown applied for the Court to reverse its own decision of November 18 of 1987*. It held then that conducting a roadside sobriety test to determine justification for a demand for breath samples constitutes detention of the suspect and triggers his/her right to counsel. Apparent unawareness of this decision has caused numerous B.C. drinking-driving cases to bite the dust.

When the officer stopped the accused for a blatent traffic offence (prior to the Bonogofski decision) he made him perform some physical tests which convinced the officer that the accused's ability to drive was impaired by alcohol. He then made a demand for breathsamples followed by his charter right to counsel and right to remain silent. Breathsamples were analyzed and the accused was released. Not at any time during this investigation did the accused ask for or was given the opportunity to phone a lawyer. The accused's trial took place prior to the Court of Appeal's Bonogofski decision, and he was convicted of "over 08." Consequently, he appealed to the B.C. Court of Appeal to have that conviction quashed or reversed.

The Crown seized this opportunity to question the legal correctness of the Bonogofski decision or at least remove some confusion that seems to exist about that decision.

The Court of Appeal placed some weight on the fact that the section of the Criminal Code providing for a roadside breath test is not in force in B.C. Therefore, methods other than such a test must be used to elevate suspicion into reasonable and probable grounds. The roadside sobriety test is part of that substitute method. The Court was firm in its opinion that a person who performs that test is under detention and entitled to counsel. The only way there can be an exception is, under the "section 1 Charter test." In other words, the Court would have to find that, in the circumstances as described above, the right to counsel is limited for the purpose of such a test due to it being justified in a free and democratic society. However, the limitation must be one prescribed by law. For that, it has to be expressly provided by statute or result from the operational requirements of the law. Hence, it need not be an explicit limitation. The roadside sobriety test is as an operational requirement to the "demand" laws something "prescribed by law" and subject to the "section 1. test," held the Court.

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*R. v. BONOGOFSKI - B. C. Court of Appeal CC 007055
See Volume 29 - page 1 of this publication.

Furthermore, s. 214 of the B.C. Motor Vehicle Act provides that a peace officer may demand that a driver, who he, on reasonable and probable grounds, believes is impaired, surrenders his driver's licence. The B.C. Interpretations Act states that where the law gives a person the power to do or enforce something he is deemed to also have been given the power necessary to enable that person to do or enforce that thing. Again, this adds up to the roadside sobriety test being something prescribed by law.

Said the Court:

> "In my opinion, the operational requirement of s. 214 implicitly prescribes the reasonable limit of a brief delay in informing the driver of his right to counsel until the tests are completed."

Quoting from reasons for judgment by their Ontario counterparts* on this very issue of roadside sobriety tests and right to counsel, the B.C. Court of Appeal found the limitation demonstrably justified as:

> " . . . the evil of impaired drivers is so great and imminent to all who use the highway that I can only conclude that a police officer stopping a car under the provisions of (s.147. M.V.A. in B.C.) is empowered to require a driver to undertake a coordination test" . . . . "It must be remembered that the impaired driver may be to all who use the highways, an ongoing danger as great as any charged and ticking time bomb." . . . . "The potential for immediate harm to the public from an impaired driver continues as long as he is on the road. The need to test the driver in order to either confirm the suspicion or dispel it is imperative. The taking of the coordination test neither causes any real inconvenience not in itself, exposes the driver to a criminal charge."

In terms of an opponent different conclusion in the Bonogofski case, the Court explained they were correct in terms of detention, but had now reversed their decision in regards to "rights to counsel" based on the section 1 (Charter) test.

Appeal dismissed
Conviction of "over 08" upheld.

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*R. v. SAUNDERS (1988) 63 C.R. (3d) 37.

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PICKETING A COURTHOUSE
CRIMINAL CONTEMPT OF THE COURT

Newfoundland Association of Public Employees v. Attorney General of Newfoundland, et al
Supreme Court of Canada - 44 C.C.C. (3d) 186.

Under the labour laws of Newfoundland, the Public Employees Association representing personnel serving the Newfoundland Supreme Court were in a legal position to strike and picketed the courthouse. Only some supervisory staff were allowed to cross the picket line.

Mr. C., a bailiff, who executed and served the processes of the Supreme Court crossed the picket line and went about his duties, despite the fact he was not exempted. The Association, under a provision of its constitution commenced disciplinary proceedings against Mr. C. He successfully sought an injunction against the Association restraining it from continuing those proceedings. The Supreme Court Justice held that notwithstanding the lawfulness of the strike, inducing Mr. C. from his duties constituted criminal contempt of the Court because it interfered with the administration of justice. In other words, the labour laws and the Association's constitution had been superseded by the criminal law. The Newfoundland Court of Appeal upheld the views of the Supreme Court and the dispute ended up in the Supreme Court of Canada.

The Supreme Court of Canada emphasized in its reasons for judgment that it did not order anyone back to work nor did it intend to decide if Mr. C. was obliged to report for his duties despite the strike. The Court simply had two issues to decide on:

1. Does picketing a Courthouse in the course of a lawful strike constitute criminal contempt of the Court?

2. Does the Association in these circumstances have the lawful right to proceed with a disciplinary hearing against Mr. C?

The Court was unanimous that a picket line (regardless of its lawfulness under the labour laws) intended as a barrier to a courthouse, constitutes a criminal contempt of the court. The courts are the only focusses that can effectively defend and protest the rights and freedoms of all citizens and adjudicate on civil and criminal disputes. Any action to impede access to the Court is contrary to the rule of law and amounts to criminal contempt of those courts. The rule of law is enshrined in our Constitution and is fundamental to our justice system. This can only be maintained if access to our Courts is unimpeded and uninhibited, reasoned the Court. It recognized the right of the Union to enforce solidarity and demand from its members (and expect from others) respect for its lawful

picket lines. However, in view of the criminal contempt such a line amounts to at a courthouse, the Union cannot exercise its disciplinary authority to enforce respect for a picket line which in itself is unlawful. Only in the absence of illegality had the Union a right to discipline Mr. C.

In view of the Court stipulating that only a picket line intended as a barrier to a courthouse amounts to criminal contempt, the Association pointed out the absence of evidence that the picketers had interfered with anyone or had interrupted any court proceedings. Their behaviour had been peaceful and free of any threats of coercion or violence. However, the Court observed that the very purpose of a labour picket line is to "discourage and dissuade" persons from crossing that line. By its very nature, a picket line "has great powers of influence as a form of coercion." It is a symbol of solidarity, a matter of faith and morals obliging everyone not to cross it. Accordingly the Court . . .

dismissed the Association's appeal.

Note: Concurrent with this judgment, the Supreme Court of Canada delivered a consistent judgment regarding a similar dispute between the B.C. Government Employees Union and B.C.'s Attorney General.

* * * * *

SEARCH OF VEHICLES, BOATS AND PLANES
VIS-A-VIS SEARCH OF PLACES
DISTINCTION BETWEEN A WARRANTLESS SEARCH RESULTING
IN AN ARREST AND A WARRANTLESS SEARCH WHERE THERE ARE GROUNDS
FOR ARREST THAT IS NOT EFFECTED UNTIL AFTER THE SEARCH (ONTARIO

Regina v. JONES
44 C.C.C. (3d) 248 - Ontario Court of Appeal

Two Ontario police officers were given information by their dispatcher that a vehicle of certain description, bearing licence number so and so, was proceeding in a certain direction on the same highway they were on in their patrol car. This vehicle, according to information received by the dispatcher from another police department, had run the border and not cleared customs. The vehicle, according to the information received, contained contraband American cigarettes. Twenty minutes after receiving this information, the officers spotted the vehicle. As description and license number did match, the officers pulled the vehicle over and, without effecting an arrest, searched it. The vehicle (a van) was full of cigarettes. The American driver was then informed of the reason for the stop, being that they were investigating an offence under the Customs Act. The accused was then told of his rights to counsel and taken to police headquarters. The reasons for judgment do not state when exactly the accused was arrested, however, it is clear that it was after the search.

The trial judge ruled the evidence of the contraband cigarettes inadmissible as a consequence of his view that the search of the van had been unreasonable, contrary to s. 8 of the Charter. The reason for his views was the lack of reasonable and probable grounds on the part of the officers to conduct the search. He held that the "slight" indication by the dispatcher that the information relied on to justify the search came from another police agency was, at best, "once removed hearsay." The trial judge directed himself that an informant simply attesting that he had received information from a reliable informer, is insufficient for a justice to issue a search warrant. Such information must contain sufficient detail and evidence that the informer was in the know and not just gossiping. If that is so, reasoned the trial judge, then how much more are we to demand such safeguards to justify a warrantless search. The exclusion of the evidence resulted in an acquittal. The Crown appealed.

The Ontario Court of Appeal firstly made a distinction between searches of homes or real property vis-a-vis that of cars, airplanes or boats. These means of transport move quickly and consequently warrantless searches

based on reasonable grounds that they contain contraband are not necessarily unreasonable or unlawful. In such circumstances, the hearsay information of a reliable source or a fellow officer does not exclude it from amounting to prerequisite grounds for a search. The leading Canadian cases dealing with warrantless searches are not in relation to means of transport. But, in the U.S., exceptions to their reasonable search provisions have been created by precedents for warrantless searches of such means of transport. In one case, the Ontario Court of Appeal applied the U.S. approach* but the trial judge had considered that case to be distinct from this one.

The Ontario Court of Appeal acknowledged all the precedents regarding "information received" and its inadequacy without anymore to justify the issuance of a warrant, effecting an arrest or conducting a warrantless search. Sometimes such information amounts to no more than "conclusionary statements" by someone. It must be ensured that no warrant does issue, arrest is made or search conducted on what may be information amounting to some quantum leap from gossip to a conclusion. In this case, the officers received detailed information including a detailed description of the vehicle and the contraband it carried. In addition, they were informed where the cigarettes were loaded and what offence had been committed at the border crossing. All of this information had come from another police agency.

> "Such details . . . constituted reasonable grounds to justify a warrantless search"

concluded the Ontario Court of Appeal. It was not just some instruction to "stop and search" without any further information. In this case, the officers were duty bound to do what they did.

Furthermore, the search "was authorized as an incident to a valid arrest, even though the respondent (the accused) was not arrested until after the search" reasoned the Court of Appeal. It is well established law that a valid arrest authorizes searching the detainee and his vehicle. However, where a search precedes and produces the grounds for arrest, the unreasonableness of the former may invalidate the latter. In this case, if the officers had effected the arrest prior to the search, the arrest would have been valid considering the information they had received. In this case, if the officers had effected the arrest prior to the search, the arrest would have been valid considering the information they had received. In other words, what the officers found by means of the search only supplemented the already existing grounds for effecting an arrest. Consequently, the reasonable and probable grounds the officers had to effect a legal arrest at the time they stopped the accused made the search incident to that valid but uneffected arrest. Quoting from U.S. Jurisprudence, the Ontario Court of Appeal held:

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*R. v. DEBOT (1986)30 C.C.C. (3d)207

> " . . . if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in this conduct if he makes the search before instead of after the arrest."

In fact, the Court found that it may be to a suspect's advantage and be fairer to him, if the search precedes the arrest. The search may well establish the suspect's innocence while, in terms of the invasion on him, the search before is equal to a search after an arrest. It follows that an arrest and a search are more traumatic than a search alone. Another issue the Court mentioned to give support to their views is that some police officers (particularly prior to the Bail Reform Act) were and are of the erroneous belief that once an arrest has been made, they have no power to undo it or release the arrested person. This may be so when the arrest is made by means of a warrant, but not when the arrest is a warrantless one. Since 1971, (and pior to that at common law) the officer may release his prisoner unconditionally; particularly, where the grounds he had to effect the arrest found to be unfounded.

The Ontario Court of Appeal reasoned, that even if the search was technically unreasonable, there still was no basis to exclude the evidence of the contraband.

Said the Court:

> "In the circumstances of this case, the arresting officers had no choice, but, in response to the detailed information which was supplied to them, to carry out the order given to them. They were not acting in an arbitrary or highhanded manner and were acting in good faith."

Thus, even if we are wrong in our findings that the search was reasonable, admitting the evidence in the circumstances would not bring the administration of justice into disrepute, is what the Court of Appeal in essence said as a finale to their reasons for judgment.

Crown's appeal allowed; new trial ordered

Note: The Court of Appeal said that the officers had no choice but "to carry out the order given to them." These words may to some be misleading. Please do not interpret this to mean that the officers were justified to stop, search and arrest, because they received an order to do so. The case clearly indicates it was the detailed information upon which the order was based and that that information was given to the officers, that justified their actions as peace officers and free agents.

* * * * *

OFFICER'S SIGNATURE ON TRAFFIC VIOLATION REPORT. IS A SQUIGGLE THE EQUIVALENT OF A SIGNATURE?

Regina v. BROOKS
County Court of Vancouver -
No. CC 881777 - March 1989

Mr. Brooks was issued a Traffic Violation Report. In the space for the officer's signature was an illegible dash mark. Mr. Brooks unsuccessfully disputed the allegation and appealed to the County Court.

Mr. Brooks argued that as the Traffic Violation Report commenced process against him, the prescribed procedures must be strictly adhered to. He submitted that a signature must be capable of being identified by a third party. The mere dash, mark or squiggle the officer placed in the space for his signature did not amount to a signature. The B.C. Motor Vehicle Act provisions are clear and specific and require the officer to "complete and sign" the report. The fact that the officer during the dispute proceedings identified the mark he made as being his did not remedy the procedural omission, submitted Mr. Brooks

The County Court Judge held that no inequity or prejudice had been invoked by the mark not being legible. The document informed Mr. Brooks adequately what was alleged and had not disadvantaged him in making a full answer and defence. The officer had identified the mark as being his and in law that amounts to a signature.

The appeal was dismissed.

Note: The officer had explained that he always made the same mark on traffic tickets and that the illegibility was deliberate to prevent calls to his home. The County Court Judge included the explanation in his reasons for judgment but seemed not to attach too much weight to this explanation. The matter was decided strictly on law alone. The definition of "signature" and "signed" from Black's law dictionary was quite weighty. It is as follows:

> "The act of putting one's name at the end of an instrument to attest its validity; . . . and whatever mark, symbol, or device one may choose to employ as representative of himself is sufficient."
>
> "Signed. Includes any symbol executed or adopted by a party with present intention to authenticate a writing."

* * * * *

VALIDITY OF SEARCH WARRANT
- REASONABLENESS OF WARRANTLESS SEARCH -
ADMISSIBILITY OF EVIDENCE SEIZED

Regina v. WARNICK and POTTER
County Court of Kootenay - January 1989, Cranbrook Registry 130627

A police officer swore an Information to the effect that he had it from a reliable source that the accused was in possession of marihuana and was selling it. The cache was in the accused's bedroom the informer said. The officer did not know the accused, and the only thing he did to verify the tip was to assure himself of the accused's address. There was no surveillance, no description of the accused, or a layout of the house to determine where the bedroom was. In the past, the informer had given accurate information and the the officer therefore considered his source to be reliable. All the verifications defence counsel suggested to be prerequisite to the source being reliable were according to the officer impractical. He simply did not have the manpower, and secondly, " . . . there is always an urgency to these kind of investigations." He testified that " . . . people tend to move narcotics around rapidly" making it likely that the contraband won't be found where the informer said it was.

Two questions defence counsel asked of the officer remained unanswered, as the answers may identify the informer. The questions were: "Did the informer tell you that he personally knew Brent Potter" (the accused), and " . . . did you ask the informer how he knew that Brent Potter either had or was selling marihuana from this house."

Other than the name of the informer, the officer testified that he had not held back any information from the justice who had issued the search warrant.

The question was whether the officer, without relating that the tip he received reflected personal knowledge on the part of the informer, was sufficient to satisfy the justice that the officer had reasonable and probable ground. If all was revealed except the name of the informer, lack of mention in the Information that the informer had personal knowledge that the accused trafficked in marihuana leads to the inevitable conclusion that he did not have such knowledge. Consequently, the informer was not a reliable source, argued defence counsel.

The County Court trial judge agreed that personal knowledge on the part of the informer was of considerable weight. The judge did conclude that the officer was in error when he said that the justice was given all information he had at the time of swearing the Information for the search warrant. However, he attached no deviousness to this, and said:

> "There is nothing in any of the evidence before me to suggest that this was from anything other than inadvertence, or a belief that reference to the bona fides of an informer need not go further than a statement of the informant's reliability in the past (if that is so) and an expression of the belief in the truth and correctness of the information received."
>
> (Emphasis is mine)

Nonetheless, considering the evidence, the officer did not ask the informer the crucial questions. A vague reply or a firm one of personal knowledge are the extremities of the spectrum of credibility, a key factor in considering reliability.

The trial judge was not suggesting that the Information must contain anything that would lead to the identity of the informer. Mention that pertinent questioning or corroborative facts had verified the informer's reliability would, in addition to previous experience with the informer, suffice. In this case, the trial judge could not conclude that no pertinent questions were asked and that independent investigation had not taken place. The warrant had been issued based on first blush belief of what the informer said. That should have been the beginning and not the end of the police investigation, particularly where circumstances do not indicate time constraints. It was the officer's duty to inform the Justice of the Peace if he had verified the information received and it was incumbent on the justice to ask for such further information to be properly "satisfied" of the grounds prerequisite to issuing the warrant. In this case, lack of inclusion of verification evidence or questioning of the informer to determine reliability and veracity of information in the Information, was fatal to its (Information's) sufficiency. "Credibility-based probability" is the basis of the Justice's authority to issue the judicial licence to search someone's home. Singular reliance on the informer's past performance is inadequate to find such probability. Consequently, the warrant was invalid, and the search of the accused's home was warrantless. No matter how reasonable the officers were, or their sincere belief in the validity of the document they executed, their good faith cannot transform an illegal search into a reasonable one. Although unlawful search can be reasonable, they are not synonimous where the "illegality is one of substance." Despite the trial judge's personal belief that the officer had been careful and had asked all the necessary questions (it simply was not before him in evidence) and that the officer sincerely believed that attesting to the informer's past reliable performance was all that was needed, the illegality was nonetheless one of substance. Consequently, the warrantless search was unreasonable and the accused's Charter right not to be subject to such a search was infringed.

This left the last condition of the exclusionary rule to be considered: "Could admitting the evidence, despite the Charter infringement, bring disrepute on the Administration of Justice?"

The conduct of the police irrespective of the Charter violation, had not been flagrant, careless, malicious or in deliberate defiance of the accused's rights. The evidence was real and not 'self-eminating' and existed regardless of infringement. Admitting it did, therefore, not cause the trial to be unfair. Considering all these facts and all the binding decisions by superior courts on this issue, excluding the evidence would be more harmful to the reputation of the administration than including it.

Narcotics and all paraphernalia relevant to "trafficking" admitted into evidence

* * * * *

UNREASONABLE SEARCH - EXCESSIVENESS - EXCLUSIONARY RULE

GENEST v. The Queen
Supreme Court of Canada - January 26, 1989

Mr. Genest took up residence in a town after serving time for possession of narcotics for the purpose of trafficking. There was immediately at his residence, great deal of coming and going. Many of those who called on Genest, were motorcycle types. After a few weeks, the local police received information from a party they arrested for "break and enter" that Genest had stolen property in his home. There were also warrants outstanding for Genest for unrelated offences. Armed with a search warrant, the arrest warrants, and a battering ram, approximately 20 police personnel (in as many cars) attended at the Genest home. Apparently, those personnel were from various police departments. In approximately 30 seconds, the bolted door to Genest's home was opened with the battering ram. None of the officers could remember anyone announcing their presence or trying another means of gaining access. The stolen goods mentioned in the warrant were not found. The arrest warrant was executed and Genest was released on bail.

Approximately a month later, a similar incident took place when police searched the Genest home for drugs. Several police services were represented and the door was broken open without any advanced warning. No drugs were found but two prohibited and one restricted weapons were seized. The informer for this warrant had been the same person as the one who provided the information for the previous search warrant.

Although all this sounds quite bizarre, there are some explanations. Genest had "Hell's Angels" connections and the evening before the last search, there had been a considerable gathering of the 'congregation' at the Genest home. This fact coupled with the informer's version of things made police decide that this was the time to hit the home. The aggression by police on the first search, at least, had also been linked somehow with Genest keeping two Pitbulls and two Rottweilers in his home. The accused testified at his trial for the weapon charges and explained that the excessive traffic at his home was from hosting and billeting "Hell's Angels Brothers" who visited from Vancouver and other places. His cross-examination revealed a lengthy criminal record including crimes of violence.

The Genest appeal to the Supreme Court of Canada was exclusively on the validity of the search warrants and the reasonableness of the search.

Nutshelling the evidence surrounding the search warrant, the Court found that it had been issued on some unspecified background information. The

sole purpose of the search was to find drugs and for this a "small army" of police personnel tore the door out of its frame and crashed into the home without any warning or announcement. Furthermore, the warrant was aquestionable document as it was guess work to discover under what Act it was issued. It named in its content the Food and Drug Act, as well as the Narcotics Control Act. However, no officers were named to take charge of the search and some wording used would indicate that it was possibly issued under the Criminal Code of Canada.

The Crown conceded to the Supreme Court of Canada that the search was unreasonable and in violation of s. 8 of the Charter. This left, as a singular issue, whether admitting the evidence would bring disrepute on the administration of justice. The Crown urged that the trial judge had erred in law by excluding the evidence resulting from the unreasonable search as a matter of course without considering whether admitting it would adversely reflect on the administration of justice.

The Supreme Court of Canada reiterated that there is no automatic exclusion of evidence upon finding that a Charter right had been violated. The Court in addition must find: (1) that the evidence was obtained in a manner that infringed or denied any rights or freedom; and, (2) that admission would bring disrepute on the administration of justice. In 1987*, the Supreme Court of Canada devised a test to determine these factors. The test is divided into three groups, each of which can justify suppression of evidence:

1. Fairness of trial;
2. Seriousness of Charter violation; and
3. Effects of exclusion.

Fairness of Trial:

Despite the questionable warrant and the police demeanor in relation to the search, the evidence found was real, factual and concrete. It was not challenged that the weapons were found in Genest's possession. He had not made any statements and did not assist police in locating the weapons. Consequently, the evidence did not eminate from the accused and was not created by the Charter violation. There simply was no self-crimination and therefore admission of this real evidence (the weapons) would not have caused an unfair trial.

Seriousness of Charter Violation:

A Charter violation can be inadvertent or technical; have been committed in good faith or it can be flagrant, blatant, willful or deliberate. These possibilities cover a wide spectrum.

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*R. V. COLLINS - See Volume 27, page 1 of this publication.

Particularly where "circumstances" (see s. 24(2) Charter) have not prevented police from proceeding properly and where the same results could have been attained by not infringing a Charter right, the violation is likely to be in the latter category.

Firstly, the warrant was defect and not just from a technical perspective. Ignoring Parliamentary directives regarding the search of a person's home with a warrant is serious at any time but particularly when that document has as many flaws as this one. As a matter of fact, the warrant due to errors had been rendered worthless. A warrant under the Narcotics Control Act or Food and Drug Act is, for instance, not valid if it fails to identify the person responsible for the search. The warrant was a form and the essential information spaces were left blank. These police errors were, to say the least, advertent and indicate outright carelessness.

The behaviour of the numerous police officers, was not justified by the evidence the Crown adduced. Where there is a real threat of violence or harm to third parties, rapid action and certain liberties are allowed to avoid injury or even loss of evidence. However, in this case, the Crown had relied on "after the fact" justifications. There had been no grounds for believing that there were weapons in the house and the find had been unexpected.

The breach of s. 8 Charter had been a serious one. All common law limitations were ignored and justification for it was not demonstrated. The two searches had shown a pattern of search power abuse. Consequently, admitting the evidence of the weapons would bring the administration of justice into disrepute.

Effects of Exclusion:

Without the weapons as evidence, the Crown had no case. The result of suppressing this evidence would be an acquittal. The Court reiterated, however, that "excluding evidence necessary for a conviction because of a minor Charter breach could bring the administration of justice into disrepute just as much as admitting evidence obtained from a flagrant, intentional breach of a guaranteed right." In this case, the breach was not minor or technical and also under this third test, the evidence must be excluded.

Accused's appeal allowed
Acquittal substituted
for order of new trial

* * * * *

DESPITE CONSTITUTIONAL CONSIDERATIONS SELF INDUCED DRUNKENNESS IS NO DEFENCE FOR OFFENCES REQUIRING GENERAL INTENT

QUIN and The Queen, BERNARD and The Queen
Supreme Court of Canada - January, 1989

Mr. Quin was very upset that his girlfriend had ended her relationship with him. He drank heavily on the evening in question and did, while quite drunk and acting out of character, break into the woman's apartment and caused bodily harm to her. He had abused her verbally, choked her and had hit her over the head with a beer bottle. He had afterwards slashed his own throat. Apparently, the injuries sustained by both parties were such that after some treatment, they were discharged from the hospital. Quin was convicted of breaking and entering and committing the indictable offence of assault causing bodily harm. He appealed his conviction for want of criminal intent due to self-induced intoxication.

Mr. Bernard had the 18 year-old daughter of a late friend visiting at his apartment to talk about her father. Bernard did force the girl to have sexual intercourse with him. When she resisted, he punched her twice in the face with a closed fist, causing her bodily harm. He had also threatened to kill her if she failed to cooperate. He also was quite drunk at the time and admitted to police that he had intercourse with the girl but had due to drunkenness not known why he had done what he did. "When I realized what I was doing, I got off," he had said in his statement. He appealed his conviction of aggravated sexual assault and also claimed that drunkenness had not made it possible for him to have formed the criminal intent requisite to that crime.

Between the two cases, an aggregate of seven reasons for judgment were written with seven justices participating. In the Quin case, four justices concurred in the result of the appeal, that is, that it must be dismissed. In Bernard, the split was five to two in favour of dismissing the appeal. The Supreme Court of Canada, having the right to reverse its own decisions, may well do so in the future on the issues unsolved in these appeals. As it stands right now, the status quo was maintained that self-induced drunkenness is very limited in erasing the basic element of nearly all crime, the criminal mind, intent, mens rea. In 1978, the Supreme Court of Canada did establish a major precedent on this question. There were dissenting views then, and there were views now that that precedent should be abandoned. However, the opinion that accepting drunkenness as a defence is a legal luxury we cannot afford on this side of the pearly gates, carried the day.

Nearly all criminal offences must be committed with a criminal intent. If there is no such intent, a conviction cannot follow. There is no doubt that alcohol will diminish or even remove totally the capability of forming an intent. Consequently, if we follow the principle that we are not criminally responsible for our unintentional acts or their consequences, drunkenness ought to be a defence. However, the protection of the public is paramount it was always reasoned, and we cannot afford the inevitable exploitation of such a defence. "What you cannot do when you are sober, you can do with impunity when drunk." Consequently, where a person was drunk when he committed a crime, the Crown need not prove intent and the lack of intent is withheld from the jury for the purpose of determining the requisite mens rea, claim the opponents to our current common law. But, as related above, the status quo was maintained (for now).

The criminal offences requiring mens rea (nearly all) are divided into two categories. Many criminal acts are one act of wrong doing. What we intended to do in an assault for instance, is connect and hurt. There is no other goal or purpose beyond that. Those offences require a "general intent." Then, there are offences where the act of wrong-doing is committed with an ulterior intent for the purpose of attaining an objective beyond the performance of the wrongful act. Murder is a good example of such an offence. If one commits an assault with the ulterior intent to cause the death of the victim, then to convict the assailant of assault only, all we have to do is prove the general or a basic intent. However, if the Crown sets out to prove murder, or attempted murder, it must prove that there was a specific intent beyond the general intent to commit the assault. The specific intent, of course, was to reach the ultimate objective of the assault, to cause death.

For the reasons stated above, our Courts have held that self-induced intoxication is no defence for crimes requiring general intent. However, intoxication may deprive a person from forming a specific intent. Consequently, intoxication is capable of reducing a specific intent offence to one requiring a basic or general intent.

The offences committed by Quin and Bernard require general intent only and consequently their . . .

Appeals were dismissed
Convictions were upheld

Note: What may eventually force our Court to accept drunkenness as a defence in general is a basic constitutional matter. A basic principle of our criminal law is that without mens rea, there can be no criminal liability. The courts have modified this principle to protect the public. It can be pursuasively argued that the Courts did thereby not create a rule or doctrine but formed public policy. The latter is very clearly not the function of the judiciary but that of Parliament. The Court must adhere to and apply the principles of law. If those principles are unrealistic in the real world and contemporary society, then limiting those principles to affordable levels is clearly the function of the elected representative, who, by the democratic process, must make laws reflecting public policy, including limitations of principles and rights to protect the public interest. In other words, opponents of the common law, as explained above, claim that the Court must apply the principle that intent is an essential aspect of a criminal act and that, hence, drunkenness is a defence. Should we not be able to afford this legal luxury, then Parliament through legislation must limit the principle.

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ASKING QUESTIONS OF A SUSPECT WHO IS NOT DETAINED BUT INDICATES HE WANTS TO REMAIN SILENT

Regina v. HICKS
Ontario Court of Appeal - 42 C.C.C. (3d) 394

The accused left a tavern where they refused to serve him any alcoholic beverages due to his intoxicated condition. Shortly after he left, a young bicycle rider was struck down in the vicinity of the tavern. The young man died from the injuries sustained. The motor vehicle left the scene of the accident. Three days later, a lawyer phoned the police station and gave investigators the location of a van. Upon examination, it became apparent that this was the vehicle that struck down the cyclist. The accused (the registered owner of the van) attended at the police station with his lawyer. He was taken into an interview room, but the lawyer preferred to stay outside the room. The accused was informed of the investigation and was asked if anyone, other than himself, had driven the van on the day of the accident. When he answered, "No," he was arrested and given his right to remain silent.

The accused was acquitted in the District Court of criminal negligence causing death, impaired driving, and hit and run. The only thing that put the accused behind the wheel of the van at the time of the accident was his "No" when asked if anyone but him drove the van that day. It was the admissibility of that one word that was the issue of the trial and the appeal.

When the accused was placed in the interview room, he said he did not wish to make any statement. Subsequently, the question if anyone else drove the van that day was put to the accused. The trial judge held that the accused, at the time he entered the room, was no more than a suspect and he was not detained. There were no grounds to arrest him until he answered the crucial question. Because the accused had left no doubt that he did not wish to make any statements, he had exercised his right to remain silent. The putting of the question, despite what the accused had said, did put the voluntariness of the statement in doubt. The statement was excluded because of that as well as the infringement of the accused Charter right to remain silent.

Upon appeal by the Crown, the defence cited a number of cases where it is made clear that continuing an interrogation when a person has clearly indicated that he wants to remain silent is an infringement of his right under s. 7 of the Charter and leads to exclusion of any statement obtained thereafter. However, in all those cases, the person questioned was detained or arrested. They were more than suspects as police had reasonable and probable grounds to believe they had committed the crimes in relation to which they were questioned.

At common law, "police are entitled to question any person, whether suspected or not, from whom they think that useful information concerning the commission of a crime can be obtained."* The accused was a suspect at the time the question was put to him and his assertion not to make any statement did not preclude the asking of further questions, provided the person is not detained. The "mere asking of further questions without oppressive persistence does not affect the voluntariness of the answer and does not infringe any constitutional rights." The accused attended voluntarily with a lawyer by his side. He was obviously aware of his right to remain silent and yet answered the question voluntarily. The Court of Appeal agreed with the trial judge that the accused was not detained at the time. The statement was admissible.

Crown's appeal allowed
New trial ordered

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*Ontario Court of Appeal in R. v ESPOSITO 24 C.C.C. (3d) 88 (1985).

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CUSTOM SEARCHES - DETENTION - REASONABLENESS
LESSER EXPECTATION OF PRIVACY -
DISTINCTION BETWEEN THESE AND OTHER SEARCHES

Regina v. SIMMONS
Supreme Court of Canada - December, 1988

Ms. Simmons arrived at the Toronto Airport on a flight from Jamaica. She was considered to be nervous and agitated. The Custom officer also noticed a bulging around the upper abdomen, and it was decided to strip-search her. She was made aware of the sections of the Customs Act providing for such a search by bringing to her attention the wording of those sections displayed on the wall of the interview-room. She was not told of any rights under s. 10(b) of the Charter (right to counsel) and told to undress. A quantity of narcotics were found taped on her body where the bulging had been noted. She was then arrested for importing a narcotic and told of her rights. She immediately phoned her lawyer.

The trial judge of an Ontario County Court held that Ms. Simmons was detained from the moment she was taken into the search room. She should have been made aware of her right to counsel at that time. This could have resulted in advice on how she could challenge the need for the search under the Customs Act which, if successful, could have meant that the narcotics would not have been found. Consequently, he excluded the evidence and acquitted Ms. Simmons.

The Ontario Court of Appeal ordered a new trial. The justices held that there had been no detention, not even when the strip search took place. They had been guided by U.S. precedents in holding that border searches were different from those in criminal investigations and process. For Canada to maintain its sovereignty, a restraint for persons entering the country is justified and ought to be expected by everyone. The detention at a border crossing is, therefore, not included in the "detention" referred to in the Charter. However, the Court was not unanimous on this point. One justice felt that Ms. Simmons had been detained as intended by s. 11 of the Charter. He made distinctions between the levels of restraint placed on persons by Customs officers to determine whether they are detained. Despite this, he would, like the other justices, have admitted the evidence.

Due to the Ontario Court of Appeal not being unanimous, Ms. Simmons had access to the Supreme Court of Canada as of right, and she did appeal the order for her to be tried again.

The Supreme Court of Canada found that the United States, with their stringent "fourth amendment" that calls for reasonable cause as a prerequisite for any search and for warrants, has always in law and juris prudence made a clear distinction between border searches and those "within natural boundaries."

The Canadian Court of last resort reasoned that thousands of travellers are detained, in the common understanding of that word, when they enter Canada, and may be subjected to these types of border searches. There is firstly the routine questions, such as where you have been or what is the purpose of your visit to Canada. This may be accompanied by a search of baggage "and perhaps a spot or frisk of outerclothing." The second type is the skin or strip-search that can be done with the consent of the chief customs officer. Thirdly, there is the body cavity search done by a doctor with assistance of X-rays or other technical equipment.

The first type of search raises no constitutional issues. In other words, it does not and cannot amount to detention; consequently, there is no obligation to inform of right to counsel; and those searches are reasonable.

The second type of search, when authorized by the Customs Act, does constitute detention. A person subjected to such a search is legally and physically restrained. There is no alternative but to submit or commit an offence.

Needless to say, the third type of search then also constitutes detention.

The Supreme Court of Canada concluded that Ms. Simmons was detained when she was strip-searched and should have been informed of her right to counsel.

In 1984*, the Supreme Court had applied s. 8 of the Charter (reasonable search) to test the propriety of a search by Combines Investigation personnel. It held that authorization for a search was no longer to accommodate going onto someone's property or to order someone to part with certain property but to protect persons and their privacy. The Court emphasized that authorization must be issued by a person who is impartial and can therefore act judicially and said in the same breath that all warrantless searches must be considered unreasonable under the Charter unless the Crown proved otherwise.

The Supreme Court held that the stringent standards they did set for searches and seizures in the Hunter v. Southern case could not in their entirety apply to Custom searches. Firstly, Canada as a sovereign nation, has a right to prevent undesirable persons and goods from entering the country. This justifies more intrusive measures particularly where it involves drugs or narcotics. Anyone entering a country expects to be questioned and have their baggage searched or even being frisked. Consequently, there is a much lower expectation of privacy in these circumstances. The Court held that such warrantless custom searches of baggage and frisking are not unreasonable. This includes "the requirement to remove in private such articles and clothing as will permit

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*HUNTER v. SOUTHERN INC. - Volume 18, page 12 of this publication - [1984] S.C.R. 145.

investigation of suspicious bodily bulges." The descretion for the latter type search is subject to review upon the request of the suspect. Although the chief custom officer who reviews the request may not be sufficiently impartial to be acting judicially, the search is nonetheless reasonable.

Be that as it may, the Supreme Court of Canada found that the search of Ms. Simmons was unreasonable, not because of the type of search, or any inappropriate behaviour of the officers, but simply because the search was in the third category (as explained above) which constitutes detention and the suspect had not been informed of her right to counsel. The Court clearly indicated that this right is not only to have the detention reviewed but equally to receive legal advice. Ms. Simmons obviously did not know her options under the Customs Act, despite the fact that an officer pointed at copies of the search sections on the wall. Had she phoned competent counsel, all this could have been explained to her. Hence, the infringement of her right to counsel did impact on the reasonableness of the search.

The next question, of course, is whether the two Charter-right infringements should cause the evidence of the narcotics found on Simmons to be excluded. The Supreme Court reiterated their interpretation of the Canadian exclusionary rule, articulated in 1987*. Fairness of the trial is the kernel issue. Real evidence that existed irrespective of a Charter infringement can rarely, if ever, render a trial unfair. Where a person's rights are infringed when he is compelled to incriminate himself (breath tests) or where evidence emanates from him (statements) the fairness of the trial may be affected in such circumstances. If the infringement was committed in good faith, it will not likely cause an unfair trial and disrepute on the administration of justice.

In this case, the Customs officers had complied with a policy directive based on judicial precedents. They had complied with the laws as it was at that time. Therefore, they had acted in good faith. Secondly, the evidence found was real. Exclusion and suppression of evidence in such circumstances would bring disrepute on the administration of justice.

Simmons' Appeal dismissed
Order for a new trial upheld

On the same day that the Simmons judgment was rendered, the Supreme Court of Canada also handed down their judgment in Regina v. JACOY

Jacoy arrived at the Seattle airport, presumably on a national flight. Canadian police had him under surveillance as they suspected him of trying to import a quantity of cocaine into Canada. He drove from the airport to the Canadian border where Customs officers had been alerted and were requested to search Jacoy.

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*R. v. COLLINS - Volume 12, Page 1, and Volume 27, Page 1.

After the routine questions, Jacoy was taken into a private room and was searched by a Custom officer who specialized in detecting drug imports. A frisk search (not a strip-search as in Simmons) was conducted and two lots of cocaine were found secreted in Jacoy's clothing. He was then placed under arrest and told, for the first time, of his rights. When he wanted to phone his lawyer, he was told he could do so "at the earliest possible convenience." This was not until a good two hours later. Police wanted to (and did) firstly complete a search of Jacoy's home. The reactions of the B.C. Trial Court and Court of Appeal were similar to that of their counterparts in Ontario in Simmons.

The Supreme Court of Canada held that Jacoy was detained when he was ushered into the interview room. The officers took control of his movements and he had no alternative but to allow the search. At that point, he should have been told of his right to council.

Also, in this case, the Supreme Court held that the officers had acted in good faith and in accordance to the law as it then was. Also, the evidence was real and exclusion would bring disrepute on the administration of justice.

Jacoy's appeal dismissed
Order for a new trial was upheld

Note: Some other cases on these points are:

R. v. GLADSTONE, Volume 22, page 22
R. v. RODENBUSH & RODENBUSH, Volume 22, page 20
R. v. COLLINS, Volume 12, page 1 and Volume 27, page 1
R. v. HAMILL, Volume 27, page 10

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CATCHING FREE-FLOWING BLOOD FOR THE PURPOSE OF ANALYSIS - REASONABLE SEARCH

The Queen v. DYMENT
Supreme Court of Canada - December, 1988

Five days after the Charter of Rights and Freedoms came into effect, Mr. Dyment drove his car off the road and suffered head lacerations. There were no symptoms of impairment visible on the unconscious man. Before suturing the wounds, the doctor caught some of the accused's blood in a vial and gave it to the investigating officer. The doctor did not need to probe or even touch his patient to get the blood and, of course, he did and could not at the time ask him for consent. No demand of any kind was made of Dyment; and consequently, he was not required to give a sample of any substance of his body (s. 238(3)C.C.).

The blood was analyzed and consequently Dyment was convicted of "over 80 mlg." The issue in this case ended up in the Supreme Court of Canada. The Crown submitted that there was no search or seizure; that the taking of the blood was not contrary to s. 8 of the Charter; and should it amount to an unreasonable search or seizure, admitting the evidence would not bring the administration of justice into disrepute. (No submission was made in regard to good faith on the part of the officer.)

Section 8 of the Charter guarantees us to be secure against unreasonable search or seizure. Due to this entrenched supreme law, the emphasis of protection from intrusions now include people and their privacy where there is a reasonable expectation of privacy. Particularly in our society surrounded by and being administered with the assistance of computer technology, the dignity and integrity of the individual is threatened as "there is privacy in relation to information." We simply had to become more alert and prudent if we are to preserve our privacy. This applies to search as much as it does to authorities taking information or property without the owner's consent (seizure). Information may only be used for the purpose for which it was divulged.

The Supreme Court agreed that in the circumstances, there was no search in The Dyment case. However, s. 8 of the Charter does not relate only to seizures resulting from searches. In this case, information was seized from Dyment's unconscious body. The information, of course, was obtained by analyzing the blood. That action had invaded an area of personal privacy to the maintenance of Dyment's human dignity. The Supreme Court volunteered that even if Dyment had given his consent, then if it was restricted to medical use only, seizing the information of blood/alcohol level would still have amounted to an unreasonable seizure. The doctor's sole objective here was to render medical treatment. Dyment was entrusted to him, and catching blood exclusively for the police use was not included

in that treatment. The Court went not as far as saying that the doctor had breached the trust placed in him, but held that he had no right to do what he did; it was unethical the Court implied. Physicians, hospital employees, and health care workers must not be part of the "law enforcement machinery."

Mr. Dyment had a reasonable expectation of privacy while undergoing medical treatment. He was not "abandoning" his blood when it was taken for other than medical purposes. For instance, had spilled blood been taken from the car or anywhere it had dropped, there would have been a discarding or abandoning and no expectation of privacy.

The Supreme Court of Canada concluded:

> " . . . that in taking the blood sample, the officer breached Mr. Dyment's privacy interests in it, and so effected a seizure within the meaning of section 8."

This left the question if the seizure was reasonable. Mr. Dyment's was entitled to believe that, when in the hands of a professional medical doctor, any substance taken from him is used for medical purposes only. It was therefore unreasonable for the officer to ask for an take blood in these circumstances. Information from hospitals and doctors cannot be revealed to law enforcement agencies other than for compelling circumstances of pressing necessity. Although, it all seems logical and convenient, the need to protect such information is overwhelming. Quoting a justice of the U.S. Courts, our Supreme Court quoted him in agreement:

> "The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning but without understanding."

The Court went as far as to say that even if the seizure had been lawful, it would still be unreasonable. For all the reasons stated above, the Court also concluded that admitting the evidence would bring the administration of justice into disrepute. The evidence should be excluded.

Crown's appeal dismissed.

The dissenting reasons for judgment by one justice were pretty strong. He held that the police officer did not seize anything. If anyone did, it was the doctor without the knowledge of the officer. The officer had acted in good faith. The evidence was real and was decisive. He implied that the Court was inconsistent with its own previous decisions. (See Jacoy, Simmons in this Volume or Collins, referred to in the footnotes.)

Comment: If it was not for the Charter, the actions of the officer would have had no effect on the admissibility of evidence. In view of the Charter being four days old when this incident took place, it seems doubtful that any Court in Canada had made a decision based on the Charter. Considering previous decisions on good faith, there seems little doubt that it should have been, at least, considered. It appears that it applied in this case. Furthermore, considering this Court's reasoning in Collins on the exclusionary rule (s. 24(2) Charter) there seemed no doubt that the evidence of the analysis should have been admitted. It is as though the majority of the Court wanted to deal with the ethics of the medical profession and come to grips with "information." To say that information was obtained is at best indirect. If the blood was properly taken the "information" of the result of the analysis depends on the reliability of the analytical procedures or the continuity of the exhibit.

The Supreme Court of Canada decisions seem indeed inconsistent with one another. One hesitates to presume to have the competence to make such an observation. However, one of the members of that Court is of that opinion.

RIGHTS TO COUNSEL - IDENTIFICATION PARADE CONDUCTED BEFORE SUSPECTS CONTACTED THEIR COUNSEL - COUNSEL OF CHOICE

LECLAIR and ROSS v. The Queen
Supreme Court of Canada - January, 1989. (19176).

Two persons broke into a home at 10:00 P.M. The sound of broken glass was heard by neighbors who then unsuccessfully chased the perpetrators.

About 2 1/2 hours after this incident, police stopped a car with four young occupants. At first, the two accused gave fictitious names. A search revealed no evidence of any kind, however, three of the four occupants of the car were arrested for the break-in and advised of their right to counsel. At 2:00 A.M., the two accused attempted to contact the lawyers of their choice but received no answer. Leclair declined to phone another lawyer, and Ross was not asked if he wanted to.

At 3:00 A.M., the two accused were brought back from cells and placed in a line-up without being told that they were not obligated to participate. Apparently, the evidence police gained from this line-up was damaging to the accused. The kernel issue of the appeal was whether that evidence should be excluded due to the accused's right to counsel having been infringed. The Ontario Court of Appeal had held that the accused had been afforded a reasonable and effective opportunity to exercise their right to counsel and that the line-up evidence was therefore admissible. It was from that decision the two accused appealed to the Supreme Court of Canada.

In 1987*, the Supreme Court of Canada held that the right to counsel imposes on police two duties in addition to making the detainee aware of that right. Police must give a reasonable opportunity for the right to be exercised, and secondly, police must refrain from attempting to solicit evidence from the detainee until there has been such reasonable opportunity afforded. In this case, police had failed to comply with these duties.

Both accused had given a clear indication that they wanted to consult counsel. The attempt at 2:00 A.M. not being met with success was hardly surprising, reasoned the Court. The Court also rejected that LeClair had waived his right to counsel by declining to attempt another lawyer. He said he wanted <u>his</u> lawyer and did not want <u>another</u> one. "He merely asserted his right to counsel and the counsel of his choice." However, the Court said in the same breath that such right must be exercised diligently or the duties imposed on police in this regard are suspended. Whether such diligence is reasonable depends on the circumstances. Upon arrest, a person is perhaps in immediate need to receive legal advice. When selecting the most competent counsel to represent you at trial, such immediacy does not exist. Concluded the Court:

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*R. v. MANNINEN - Volume 28, page 1 of this publication - I.R.C.S. 1233.

> "Nevertheless, accused or detained persons have a right to choose their counsel, and it is only when the lawyer chosen cannot be available in a reasonable delay that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer."

Consequently, LeClair had not waived his right to counsel when he declined to phone "another lawyer." Furthermore, quoting from a decision the Court made in 1986*, the Court said that before it can be said that there is a waiver of a right it must be:

> " . . . . clear and unequivocal that the person is waiving the procedural safeguards and is doing so with full knowledge of the rights the procedure was exacted to protect and of the effect the waiver will have on those rights in the process."

The Crown failed to show that Leclair had waived his right with such awareness and knowledge. In regard to Ross, there were no grounds at all to even raise the issue of a waiver. As there was a total absence of urgency, the opportunity afforded the accused to exercise their right to counsel was inconsistent with the duty imposed by that right on police.

In relation to the second duty of police triggered by suspect's indication that he wants to exercise his right to counsel, the Supreme Court of Canada reiterated their 1987 decision by saying:

> "In my view, the right to counsel also means that, once an accused or detained person has asserted that right, the police cannot, in any way, compel the detainee or accused person to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right."

The Crown submitted that police had a matter of urgency on their hands in regard to the line-up. It is important to conduct such a process as soon as possible while impressions are fresh in the minds of witnesses. The Court responded that a delay of a few hours could not have hindered the police objectives other than the accused being told by their counsel that they were under no legal obligation to participate in this identification process. A suspect must exercise his right to counsel with due diligence and any deliberate maneuvers to use it to obstruct or unnecessarily delay the police investigative process is excessive of that right. However, in this case, there had not been a reasonable opportunity to exercise the right. Consequently, the "due diligence" question on the part of the accused could not be a valid issue.

*R. v. COLLINS [1987] I.S.C.R. 265.

Also see Volume 27, page 1 of this publication.

Was the identification evidence resulting from the line-up "obtained in a manner that infringed or denied rights guaranteed by the Charter?" The Court held that the infringement of the accused right to counsel and the evidence were not remote. In fact, it was decided that there was a direct link between the two. This left the question whether admitting the evidence could bring the administration of justice into disrepute. In 1987*, the Court held that this question had three factors:

1. Would admitting the evidence render the trial process unfair;

2. The seriousness of the Charter violation;

3. Would excluding the evidence, or more particularly, would admission or exclusion better serve the reputation of the justice system?

The Court held that participating in a identification parade results in "real evidence." Whether an identification was made or not is real and distinct from an admissions or confessions in terms of evidence. It is evidence that does not emanate from the suspect and is obtainable without his cooperation "inasmuch as a person's characteristics exist irrespective of any Charter violation or of any steps taken by the police." However, . . . nonetheless . . . identification evidence obtained by an identification parade is not simply "pre-existing real evidence." (See Collins.) The purpose of a line-up is not only to identify the suspect as the author of the crime under investigation, but also, with painstaking precautions, to render the line-up to be fair, to strengthen the credibility of the identification that may result from witnesses viewing persons of similar age, sex and appearance. Needless to say, without the suspect's cooperation, such a line-up is impossible. Consequently, the accused did not participate in obtaining the "real evidence" of the witnesses identifying them as the perpetrators, but did participate in enhancing the weightiness of that evidence by rendering the identification credible. Therefore:

> "An accused who is told to participate in a line-up before having had a reasonable opportunity to communicate with counsel is conscripted against himself, since he is used as creating evidence for the purpose of the trial."

Hence, the credible identification evidence against these accused could not have been obtained without their participation which they were under no legal obligation to render.

The admission of the identification evidence would therefore bring the administration of justice into disrepute.

Accused appeal allowed.
New trial ordered.

*R. v. COLLINS - Supra

Comment: Some aspects of these reasons for judgment should be noted. There was mention made in this judgment about police not advising the two accused that they were not legally obliged to participate in the line-up. After finding that due to their failure to contact counsel, the accused were ignorant of their legal position, the Court commented: "Nor did the police even give them the choice as to whether they should participate." This must not be seen as a suggestion (as in the U.S. Mirande precedent) that police are obliged to make a detained suspect aware of all of his rights, but for his right to counsel. In this and other judgments, the Courts have indicated that the right to counsel is the suspect's gateway to all that information. In the context in which the above quoted statement was made by the court, it seems simply an observation of an example of the importance of the right to counsel.

Although it was not a specific issue, the Supreme Court of Canada alluded to the question whether a suspect has a positive right to refuse to participate in a line-up. It found that there are no precedents on this point and observed that there is nothing in law that compels a person to participate in an identification parade. This, the Court observed, made the role of a lawyer so important to decide whether his client should participate voluntarily. However, in one case, a detainee refused to cooperate in a line-up. He was made to face a witness who identified him. Much was made of the fact that police had not conducted a proper line-up. In rebuttal, the Court got to hear that the accused had refused to participate. The Supreme Court of Canada held in that case* that the accused was under no obligation to participate, but had exercised the right to refuse at his own peril. A lawyer should be aware of the prejudicial consequences and how they may be avoided if refusal is for cause, e.g., the line-up being unfair in terms of dissimilarities of persons in the parade, etc.

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*MARCOUX and SOLOMON v. The Queen [1976] I.S.C.R. 763.

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SURREPTICIOUS INSTALLATION OF LISTENING DEVICE - USE OF POWER FROM BATTERY OWNED BY ACCUSED - LAWFUL INTERCEPTION

VANWEENAN AND CHESSON v. The Queen
Supreme Court of Canada - September, 1988

Vanweenan, Chesson, and others conspired to commit on armed robbery and to kidnap someone. Police had obtained an authorization to intercept the private communications the accused Chesson had with certain identified persons and "persons unknown." Vanweenan was not mentioned in the authorization and the Crown depended on the "persons unknown" basket clause to have her cummunications admitted in evidence. Vanweenan argued that the basket clause in an authorization provides for including persons in the authorization, who are at the time of the application unknown to police and whose communication may assist the information. At the time of the application, Vanweenan was known to police as such a person. The court held that the basket clause did not apply to her and her communications were consequently inadmissible.

Police, on the strength of the authorization, did place a bugging device in Chesson's pick-up truck. The device was connected to the truck's battery and drew a minute amount of power that would not have drained the battery in 30 days if the truck would not have been used. This, Chesson's counsel claimed, amounted to mischief under the Criminal Code and made the interception unlawful. Consequently, the communications incepted by this device were inadmissible in evidence, he argued. The installing of the device was authorized. Even if it was not so specifically, it was ancillary to the authorization.* The Supreme Court of Canada held that when a judicial authorization empowers police to intercept private communications, then it also authorizes.

> ". . . . any person acting under the authorization to enter any place at which private communications are to be intercepted to install or service a permitted listening device . . . provided such entry is required to implement the particular authorization . . . unless the authorization includes limitations or prohibitions of such entry. A judge in giving an authorization has jurisdiction to expressly authorize a person acting under the authorization to enter any place at which private communications are to be intercepted to install or service a device, provided such entry is required to implement the particular authorization."

The Court rejected the claim of mischief and unlawfulness and held that the communications of persons included in the authorization, either specifically or by means of the basket clause, were admissible.

Chesson's appeal was dismissed
Vanweenan's appeal was allowed.

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*See Volume 20, page 13 of this publication.

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"DANGEROUS SITUATION" INTERFERING WITH CHARTER RIGHT. OFFICERS NOT NAMED IN SEARCH WARRANT ASSISTING IN EXECUTING SAME

STRACHEN and THE QUEEN
Supreme Court of Canada - December, 1988

A search warrant did issue for the Strachen home and four officers were named to execute the warrant. Two could not attend and by telephone the justice, who had issued the warrant, gave permission for two substitutes. Police knew there were two registered handguns in the house and two officers not named in the warrant went along to assist.

The officers controlled the situation in the Strachen home quite strictly. They encountered two men who did not live there, and questioned them. Everyone was apparently made to stay put until the guns were located. Two officers named in the warrant found drugs and trafficking paraphernalia before Strachen had been given an opportunity to phone his lawyer. He had tried, but was told that he could not phone until "matters were under control." Upon the finding of the drugs, Strachen was taken to police headquarters where he phoned his lawyer one hour and forty minutes after the search of his home began. No opportunity had been afforded before. A "right to counsel" infringement resulted in an acquittal, but the B.C. Court of Appeal ordered a new trial. Strachen appealed to the Supreme Court of Canada on the grounds that (1) the search warrant was invalid and the search unreasonable; and (2) his right to counsel had been infringed. Consequently, the evidence against him was inadmissible.

The Supreme Court of Canada acknowledged that a search warrant under the Narcotics Control Act is quite different from the general warrant provided for in the Criminal Code. The former has a much wider scope; hence, the requirement that these warrants are issued to named officers who are responsible for control, conduct and the general scope of the search. However, if the named officers are present during the search, the use of unnamed assistants does not invalidate the warrant. Counsel for the defence had submitted that the warrant, due to the words, "a peace officer named therein" (s. 10(2) Narcotics Control Act) could only name one officer for the execution of the warrant. The Court rejected that argument also, pointing out that the Interpretation Act stipulates that where it is not specifically "indicated that the singular or plural is intended," words in the singular include the plural and the plural include the singular. However, naming all peace officers of a department or branch without identifying them by name is a non-compliance with the Act. Whether or not the telephonic amendment of the warrant was valid, the Court did not feel obliged to address. Two of the officers originally named were at the search and that made the implied question of validity of the warrant superfluous. The warrant was properly issued and reasonably executed. Consequently, the search was not unreasonable.

The Court confirmed that Strachen's right to counsel had been violated. This violation began when police were finished dealing with two male visitors and located the guns. At that point, the potentially volatile situation was under control, and Strachen should have been given the opportunity to contact counsel as he had previously indicated was his wish to do.

The evidence found was not linked to the infringement of Strachen's right to counsel. However, despite the words of s. 24(2) of the Charter which seem to only allow exclusion of evidence where it "was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter," the Court held that a causal link between the infringement and the discovery of evidence is not essential to consider suppression of evidence under this subsection. In other words, the evidence considered for exclusion need not be evidence that would not have been discovered if it was not for the Charter infringement. That test would be too narrow and cause very confusing situations where the Courts would have to split hairs to determine if the evidence was indeed derivative of the Charter violation. For instance, in this case, the right to counsel infringement demonstrates that clearly. Police had a valid authorization to search and did not in any way solicit evidence from Strachen. There was an unnecessary delay in accommodating him to consult his counsel. That is totally different from other cases decided by the Supreme Court of Canada on the exclusionary rule due to right to counsel violations.* In those cases, the right to counsel had been infringed and subsequently, the Police obtained evidence from the accused. The evidence either emanated from him or was discovered as a direct or indirect consequence of what he did or said. Imposing a causal requirement for our exclusionary rule would force the Courts to determine what role a lawyer could have played on the evidence gathering scenario. If none, as in this case, the infringement would be harmless. Such reasoning would remove the remedial objective from s. 24(2) of the Charter.

Said the Supreme Court of Canada:

> "In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained."

The test whether the evidence was obtained in a manner that infringed or denied any rights, would be to determine "<u>whether a Charter violation occurred in the course of obtaining the evidence</u>." What would be <u>prominent</u> in this is a temporal link (a link relating to sequence of time or to a particular time) between the Charter violation and the discovery of the evidence sought to be suppressed. This, of course, particularly so

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

R. v. SIMMONS - See page of this Volume.

where the two occur in the course of a single transaction. As the wording indicates, a temporal link is not a prerequisite but is "prominent." There will be many situations where the breach and the discovery of evidence will simply be too remote from one another to consider exclusion. Applying this test, the Court concluded that the narcotics found in Strachen's possession were obtained in a manner that had infringed his right to counsel. However, admission of the evidence would not bring the administration of justice into disrepute. The infringement had been one of convenience rather than one designed as a trap to get evidence. As a matter of fact, the Court was complimentary of the officer who was in charge of the search. He had demonstrated throughout to be careful and aware of the limitations of his authority.

Accused's Appeal dismissed.
Order for a new trial upheld.

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CORRECTION: "RE BAKER AND THE QUEEN" 26 C.C.C.(3d)123 - Volume 25, page 1 of this publication.

PRIVATE PROSECUTIONS

B.C. EXECUTIVE BRANCH OF GOVERNMENT ASSUMING EXCLUSIVE JURISDICTION OVER CRIMINAL PROSECUTIONS

Despite being blinded by the setting sun, a Mr. Brown continued to drive. Consequently, he struck two young children (brother and sister). One died, and the other survived the serious injuries sustained. A substantial petition from the community failed to persuade the public prosecutor to prefer any charges but careless driving under the B.C. Motor Vehicle Act. The parents of the children (the Bakers) then swore an information alleging Dangerous and Criminal Negligent driving. The Justice of the Peace issued process and compelled Mr. Brown to appear before a provincial court judge. The public prosecutor was there also and instructed the clerk of the court to make an entry on the record that the proceedings be stayed. This effectively stopped the private prosecution of Mr. Brown. The parents petitioned the Supreme Court of B.C. and challenged the Crown's right to stay their prosecution. It was argued on behalf of the informant (Baker) that the section of the Criminal Code empowering the Attorney General to enter a stay of proceedings is inconsistent with s. 15 of the Charter in as far as "private informations and indictments" are concerned. Section 15 is the "equality" section and specifically spells out that everyone is equal before and under the law. If this Criminal Code provision allows the Attorney General to interfere in someone else's (a private) criminal prosecution, then his authority is superior to the unfettered right of a citizen to swear an information and follow up with prosecution if process does issue.

The B.C. Supreme Court justice did recognize "that all citizens of this country possess (the right) to privately prosecute indictable offences." He, however, went on to say:

> ". . . once the Attorney General or counsel on his behalf intervenes, or for that matter causes informations to be sworn, then the counsel appointed on behalf of the Attorney General assumes control of the prosecution and that counsel's rights are paramount to the private person's or his counsel's rights."

As crime is regarded as a breach of the Queen's peace, rather than an offence against a private person, the Sovereign is the proper person to prosecute for all public offences.

The inequality argument was rejected. In the view of the Supreme Court Justice, the section does not refer to equality between the citizen and the Attorney General in relation to their respective rights to prosecute but between individuals and groups. The Criminal Code section that

authorizes the Attorney General to stay proceedings does not "indicate an evenness "of application to individuals or groups. Although the Attorney General is a human being, his prerogatives in relation to criminal law are not the actions of the individual but of the office he holds. The citizen's right to prosecute is unfettered but for the right of the Attorney General to stay the proceedings.

Baker Application was dismissed.

Note: In the synopsis of this case in Volume 25, page 1 of this publication, it is stated: "Had the Crown not laid any charges, it would not have been empowered to stay the proceedings. However, the Crown had acted and the father's (Baker's) private process had been superseded." That statement is erroneous and my misconception of the above quoted position of the reasons for judgment. The comments in the Martin's Annual Criminal Code (1989) under s. 579 acknowledge that this judgment has recognized that the Attorney General has broad powers to intervene in private prosecutions.

One could question if there is any distinction between a peace officer and a private citizen, in terms of pursuing a prosecution not approved by the Attorney General or his agent. If the views of this Supreme Court Justice will prevail, such a submission is likely superfluous. There are, however, some interesting arguments that can be advanced; not the least of these is the propriety of the executive branch of government having the sole authority to say who will be prosecuted and who not. Over the last decades, political appointments have penetrated deeper and deeper into that branch's infra-structure. There is no blatant indication that the prosecutorial services of this branch are not independently exercising the Attorney General's discretion. But to determine propriety, what appears to be (or what can be) is as urgent as what is. The current message is "trust us" and ". . . the Attorney General is ultimately answerable to the House." It is difficult to think that this will assure public confidence that the Crown agent's discretion is impartially exercised.

Crown counsel in this "Re Baker and The Queen" case may well have been legally correct in the selection of the charge to be preferred; furthermore, there is a real need for quality control and above all consistency in consideration for prosecutions. To add a large number of peace officers to the persons who decide whether or not a person shall be prosecuted does not improve those requisites. In the B.C., "Access to Justice" report of the province's Justice Reform Committee, the "Charge Approval

process" is discussed (pages 79-81). It is conceded that in England and Ontario, the police officers decide if charges will be laid. The committee writes that the measures B.C. implemented; by having only agents of the Attorney General decide if a person shall be prosecuted is envied by those who do not have this system. It is therefore recommended that it continues, but that an appeal system be implemented to give some recourse when they disagree with Crown counsel's decision. Emphasizing that the ultimate decision to change must remain with the Crown and not the police, the committee recommends that a Chief Constable or Detachment Commander can appeal Crown counsel's decision to Regional or Senior Crown Counsel. The former will respond to and advise the officers of the decision. If still unresolved, an appeal may be directed to the Assistant Deputy Minister and from there to the Deputy Attorney General. Needless to say, that this recommended appeal system does not address the concern of exclusive control by the executive branch of government.

The Law Reform Commission of Canada published a criminal law series study paper in 1981. Despite the authority of the Attorney General to enter a stay of proceeding, having been an enactment included in the Criminal Code since 1953-54, and despite statute law superseding common law, the Commission wrote (on page 101):

"The authority of the individual constable to investigate crime, to arrest suspects and to lay information before a justice of the peace comes from the common law and the Criminal Code and must not be interfered with by any political or administrative person or body."

The concept of police independence is one "whose roots can be traced in judicial utterances in Canada for over one-hundred years" said the Commission. It includes the laying of the informations. Admittedly, this does not say that the Attorney General must follow through with a prosecution. However, should the officer or the force prosecute without the Crown counsel's approval, then if a stay was entered by the Attorney General, the matter may be distinct from that in "Re Baker v. The Queen."

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HANDCUFFING - ARBITRARY DETENTION

Regina v. CHAPMAN
County Court of Vancouver - C.C. 880798 - November, 1988

Mr. Chapman was involved in a motor vehicle accident. The investigating officer made a demand for breath samples and made Chapman aware of his rights to counsel. No arrest was effected. Mr. Chapman was handcuffed and placed in the cage in the backseat of the patrol car where he was left until the officer was ready to leave the scene. (This was apparently a very short period of time.)

The handcuffs were not removed until arrival in the breathalyzer room. The accused provided one sample and, upon his request, was permitted to speak to his lawyer and then provided the second sample.

The officer testified that the accused had been very cooperative and that there had been no indication at all that he would give any problems or would not accompany the officer. However, the handcuffing was a matter of routine to prevent him from consuming anything that could have affected the accuracy of the breath analyses, and security. Furthermore, the officer testified that all persons transported in police vehicles are handcuffed by his own and, to the best of his knowledge, the Force's policy.

This blanket handcuffing policy applied in this case, caused the accused's detention to be arbitrary, contrary to s. 9 of the Charter. This infringement of the accused's right not to be so detained had caused the trial judge to exclude the evidence of the breath analyses. The accused's acquittal of "over 80 mlg" was appealed by the Crown.

The trial judge had responded to the Constable's evidence of the routine policy to hancuff anyone he transported, as follows:

> "It seems, at least in the mind of this Constable, that is his policy and he seems to think it is police policy to handcuff all persons who are put into a police car. I cannot see that at all. It is demeaning to the individual, particularly where that individual, and it seems pretty clear in this case, was being thoroughly cooperative."

The police policy to handcuff anyone who is detained is arbitrary reasoned the Appeal Court Judge. However, there was no link (no pun intended) between the detention and the handcuffing. Mr. Chapman was already detained when the handcuffs were put on him and that did not change the status of the detention. The detention itself was not arbitrary when it commenced with the demand nor was it prolonged in anyway by the handcuffing. When the cuffs were put on, Chapman was detained, and he still was when they were removed. Hence, the arbitrary policy did not cause any loss of liberty in terms of time.

Concluded the Appeal Court:

> "I have thus concluded that there was not an arbitrary detention, and in so deciding, I make no comment on this particular blanket policy of the police, and given certain fact patterns, it well could result in a Charter violation and a subsequent rejection of evidence obtained thereafter."

(Emphasis is mine.)

Crown's appeal allowed
New trial ordered

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RIGHT TO COUNSEL WITH EIGHT MINUTES TO GO ON TWO-HOUR LIMIT

Regina v. STREET
County Court of Vancouver - C.C. 871810 - February, 1989

At 12:55 A.M., the accused was involved in a one-car accident and was taken to hospital to be treated for minor injuries. Consequently, the accused, who was under demand for breath samples, did not arrive at the police station until 2:25 A.M. From 2:33 till 2:44 A.M., the accused was left alone with the yellow pages and a phone. He was then told that due to the two-hour time limit, there was some urgency for him to get on with whatever he was doing. The accused said, "No, I'm going to call . . . ." and he mentioned a name. However, according to the officer, the accused just continued to sit motionless in his chair, staring at the telephone book. In view of the accused's stated intent, the officer observed the accused for two minutes and as there was no change in his posture and no indication of any kind that he was to carry out that intent, the officer told him that his failure "to approach" the breathalyzer was taken as a refusal. The accused was convicted accordingly and now appealed claiming that is right to counsel had been infringed.

In the officer's testimony, he identified the critical time for the first sample of breath to be 2:45 A.M., and he informed the accused that he took his non-action as a refusal at 2:46 A.M. There could not have been a matter of urgency at that time. The demand was still binding on the accused, and the results of breath analyses after the two-hour limit are still admissible in evidence. The only thing the Crown loses is the advantage of the presumption of equalization. There was no evidence what the accused did in the eleven minutes when he was alone with the phone book and the phone, and the trial judge had found as a fact that the accused had not deliberately been stalling.

Due to the short period of time within the two-hour limit afforded the accused to exercise his right to counsel, some assistance should have been given to him. If counsel had been contacted, there would have been sufficient time to clarify the accused's position and take the samples.

Appeal allowed
Conviction quashed

Note: This is the second B. C. case where something was made of giving a detainee the yellow pages of the phone book only at a time when all offices are likely closed. In both cases, this was of some weight in determining if the right to counsel had been violated.

There is also some indication in these reasons for judgment that had the trial judge found as a fact that the accused had been stalling, then there would not have been a violation of the accused's right to counsel.

DEFENCE DEMANDING A REPRESENTATIVE AMPOULE AND SAMPLE OF ALCOHOL SOLUTION FOR PRIVATE ANALYSES TO DETERMINE SUITABILITY

HODGSON v. The Queen
County Court of Vancouver - C.C. 880198 - January, 1989.

The manufacturers of the approved Borkenstein breathalyzers certify the accuracy of their instruments providing the exact specifications are met. No responsibility is assumed by the manufacturer unless genuine breathalyzer ampoules are used. To test the accuracy, an alcohol solution is used and, needless to say, the validity of that test depends on the solution being suitable.

Prior to the Charter coming into effect (in 1972) a party by the name of Duke* appealed to the Supreme Court of Canada claiming he had been deprived of a fair trial as guaranteed under the Bill of Rights (1960). This argument was based on the fact that the police could not provide him with a sample of the breath he provided for the purpose of analysis. The Crown had used the analysis to convict him of "over 08." Without Duke having an equal opportunity to analyze that breath and assure himself of the accuracy of the police analysis, his trial was unfair. The Crown had simply failed to provide him with evidence for the purpose of his defence.

The Supreme Court of Canada had responded that such failure does not deprive the accused of a fair trial. A fair trial means that it is public, without bias, and with judicial impartiality. The law did not provide for Duke to have such a sample and the Crown's inability to provide it is irrelevant to the fairness of the trial.

In the post-Charter days (1983) a party by the name of Potma** took a similar plight to the Ontario Court of Appeal because the Crown had refused to supply a representative ampoule used to analyze her breath samples which caused her conviction for "over 08"." The Court of Appeal reasoned that the Charter had not changed anything relevant to the issue. Both the Bill or Rights and the Charter of Rights and Freedoms guarantee a fair trial based on the principles of fundamental justice. Hence, the decision made in the Duke case still stood despite the Charter.

In 1985***, the Supreme Court of Canada dealt with the issue of the distinction between the Bill of Rights and its guarantee that the principles of fundamental justice will be applied to our "right to a fair hearing" and the Charter pledging that those principles are fundamental to

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* Duke v. The Queen - (1972) 7 C.C.C.(2nd)474
** R. v. POTMA (1983) 18 M.V.R. 133.
***Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)

any consideration in regard to deprivation of life, liberty and the security of our person. Needless to say, the latter entrenched pledge is far broader than the narrow assurance of a fair trial in the Bill of Rights. Consequently, the Duke decision is no longer an exhaustive guidance.

In Saskatchewan, the Crown refused to supply a representative ampoule while it was conceded that the police still had ampoules available of that lot number. In 1987, the Saskatchewan Court of Appeal* based on the precedent explained above, held that the Crown by its refusal had violated the accused person's right not to be deprived of liberty other than in accordance to the principles of fundamental justice. That it was such a violation, the Court summed up as follows:

1. The Crown was in a position to supply the ampoule at the time the request was made and did not do so;

2. The defence request was sincere and not some delay tactic or grasping for straws;

3. The Crown has, despite the adversary mode of trial, a fact finding function;

4. Supplying the ampoule would have been within the Crown's (or Court's) obligation to disclose to the accused the essential material it relied on to meet its burden of proof.

The sections of the Criminal Code allowing the certificate of analyses to be proof of its content and its presumption of equalization (that the blood/alcohol level at the time of analyses is equal to that at the time of driving) are evidentiary short-cuts. Therefore, the observance of s. 7 of the Charter in issues like these must be diligent.

In another B.C. case (Provincial Court) defence counsel requested a representative sample of the standard alcohol solution used to test the accuracy of the breathalyzer in preparation for analyzing his client's breath. At the time the letter reached Crown counsel, the police still had such solution for that lot. However, a week's delay in Crown counsel's office caused inability to supply the sample. The ability to supply the ampoule and failing to do so had amounted to a violation of the accused's right (s. 7 of the Charter). In another case, the trial judge went as far as to say that no supply of ampoules or alcohol solution should be exhausted until the prosecutions of the persons who are charged as a consequence of analyses in which these substances were used, had been concluded.

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* R. v. BOURGET (1987) 35 C.C.C. (3d) 371.

Then the B.C. pendulum started to swing the other way when the B.C. Court of Appeal rendered reasons for judgment in 1987* on whether the "packet" content upon which a judicial authorization to intercept private communications did issue, should be disclosed to the defence. (In Ontario, access to the packet content is a matter of right.) The Court held that there is a right of access to the information providing the defence can show that the authorization was obtained fraudulently by means of deliberate non-disclosure, or that the packet contains information that may assist directly in shedding at least a reasonable doubt about guilt. Disclosing the packet content as of right will only be a license for a fishing expedition to find some flaw that may trigger the strict exclusionary rule contained in the Privacy Laws. Where the issue is not one of guilt or innocence in some direct way, there is not constitutional protection.

Said the B.C. Court of Appeal:

> ". . . . in relation to the matter in issue, here the approach taken in Potma remains valid . . . ." (see above)

In view of all this, the County Court Judge held that the question is whether the accused Hodgson, having been denied the opportunity of having a representative sample of the substances independently tested, had been deprived of his right to make a full answer and defence.

Absent a bare refusal to provide such samples, the Potma decision remains valid. However, a "mere non-production does not necessarily infringe the right to a fair trial in accordance with fundamental justice."

The request for the samples was akin to the Dersch, et al request to have the content of the packet disclosed to them. The suitability of the substances was not a live issue as no suggestion or foundation was laid that there may have been some defect. The request seemed to be made on the off-chance that some flaw may be discovered. For this kind of disclosure, some evidence that is a possibility of a defect is prerequisite held the Court. Any doubt at all about suitability does shift the burden to prove such is to the Crown. The accused had failed to show anything relevant to the substances.

"In the event I am wrong," reasoned the Appeal Court Judge, and the failure to supply the substances to the accused amounted to a violation of his Charter right under s. 7, admission of the certificate of analyses will not bring the administration of justice into disrepute.

Accused's appeal dismissed.
Conviction for "over 08" upheld

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*Re Regina v. DERSCH, et al (1987) 36 C.C.C. (3d) 435.
Also see Volume 31, page 23, of this publication.

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ATTEMPTED MURDER AND HIT AND RUN
MEANING OF "ACCIDENT" - ADMISSIBILITY OF STATEMENT

Regina v. HANSEN
B.C. Court of Appeal - No. C.A. V00488, Victoria, BC, December, 1988

The accused struck a pedestrian with his car and left the scene without identifying himself. As the person he struck was the estranged husband of the woman the accused was intimately involved with, he was not only charged with hit and run under the Criminal Code of Canada but also with attempting to commit murder. A jury returned verdicts of guilty on both counts. The accused appealed.

The accused had testified and told the jury that it was all an accident. He had not intended to strike the victim with his car. He had simply panicked when it did happen and had fled the scene. The car he drove was a U-drive and he had explained the damage to the owner by saying that he struck a deer. The victim, the estranged husband, also testified. Where the Crown had attempted to show that there was animosity between the two men, he said he hardly knew the accused. The fact that the victim had damaged the accused's parked car two days prior to him suffering two broken legs from the accused running him over, had also been a mere coincidence.

When police questioned the accused for two hours, he had been tenacious and adamant in not making a statement or to give any explanations. The taped conversation with the investigating officers contained no less than 24 explicit refusals by the accused to explain anything. He did, however, imply that there was something that needed explaining but said: "I'll make up the statement at another point in time." The officers urged the accused to explain things now. They pointed out to him that no explanation or a delayed one would be adverse to his interest. The former would imply guilt and the latter concoction. However, the accused persisted not to give any explanations. This two-hour conversation was transcribed and was admitted in evidence as a voluntary statement.

The exercise of the right to remain silent may (with a few exceptions) not result in a jury drawing inferences adverse to the accused. A trial judge must instruct a jury on this point. Therefore, the police version of the consequences of not explaining the accident were erroneous. Furthermore, the jury was not instructed on how to deal with the accused's refusal to explain. This meant that this voluntary statement, with little probative value had been very prejudicial to the accused. The B.C. Court of Appeal held that the admission of the statement had violated the principles of fundamental justice and would bring disrepute on the administration of justice.

In relation to the attempted murder conviction, the appeal was allowed and a new trial was ordered.

The accused also appealed his conviction of Hit and Run. The Crown alleged that he left the scene of an "accident." Arising from the same facts, they alleged attempted murder which requires the specific intent to take someone's life. That made the act of running down the pedestrian not an accidental but a deliberate one. The Crown wanted to have its cake and eat it too. An accident is an unexpected occurrence that produces hurt or loss.

Reviewing cases on this point decided in the U.S. and Canada*, the B.C. Court of Appeal concluded:

> "In summary, s. 236 must be construed to include both intentional and unintentional striking by a motor vehicle of a person."

Appeal re conviction of Hit and Run Dismissed.

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*R. v. STREET (1971)5 C.C.C. (2d) 232.

LEGAL TID BITS

ROADSIDE BREATH TEST - DETENTION - RIGHT TO COUNSEL

Thomsen was demanded to give a roadside breath sample. He bluntly refused several times while sitting in the police cruiser. He was there upon the instructions of the officer. He was released and charged accordingly. At no time was he told of his rights to counsel. The Supreme Court of Canada held that Thomsen's right to counsel was infringed while he was detained. However, to have a person contact counsel when demanded a roadside breath sample is totally impractical and would render the legislation useless. Consequently, the legislation, by implication, creates an exemption to the right to counsel. This exemption was therefore "prescribed by law" and is inconsistent with the Charter . . . unless demonstrably justified in a free and democratic society . . . (s. 1 Charter). In view of the devastation caused by drinking drivers and the perceived risk of getting caught being enhanced by this enactment, it is justified. Accused's appeal dismissed.

THOMSEN v. The Queen - April, 1988 - Supreme Court of Canada.

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CARRYING A CONCEALED WEAPON

The accused was, in the evening, standing near a pub. He was seen to adjust his clothing and was consequently searched. A knife was found near the small of his back, concealed by his pants and shirt. He explained he wanted to keep the knife away from a friend and had no intention to use it as a weapon. The trial judge rejected this explanation and convicted the accused of carrying a concealed weapon. The accused appealed. The appeal judge, who accepted the trial judge's rejection of the accused's explanation, had to decide whether the concealed knife was "used or intended to be used as a weapon" (definition of weapon C.C.). Having regard to the time and place and to the manner in which the knife was carried, it had to be established as a fact that the sole purpose of it was to provide a weapon to the bearer. Applying this test, the Court concluded that it was a rational inference that the knife was not carried for an innocent purpose.

Accused appeal dismissed.

Regina v. HORSEFALL - County Court of Vancouver -
C.C. 88137, January, 1989.

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IS USE OF A "DIAL NUMBER RECORDER" AN INTERCEPTION OF PRIVATE COMMUNICATION?

For whatever reason (probably to prove association) the police were interested, as part of their investigation, to learn who two parties (H & G) phoned. To install a "Dial Number Recorder" and connect it to the police telephone line, police required "facility information" from the telephone company. For this purpose, a search warrant was executed and a police technician hooked up the necessary connections. Police recorded for a period of time the dates, times and numbers dialed from those two telephones. Neither the origin of incoming calls were recorded, nor was any conversation intercepted. The spreadsheet of these calls was sought to be admitted in evidence. The defence objected and claimed that the information about the calls was included in the Privacy provisions of the Criminal Code and required an authorization to intercept. To back up his arguments, the defence showed how the telephone system can be used to communicate without conversation by means of arranged signals (letting the phone ring a certain number of times or placing a person to person call for a certain party). He also successfully used the definition of private communication in the Criminal Code ". . . or any telecommunication made under circumstances . . ." where there is a reasonable expectation of privacy. In addition, the Interpretation Act defines telecommunication to mean any transmission ". . . of signs, images, sounds, or intelligence of any nature by means of wire or radio. . ." This convinced the trial judge to hold that the police had intercepted private communication by means of the Dial Number Recorder and had required a judicial authorization to intercept the signals caused by dialing. Consequently, the evidence was excluded.

Regina v. GRIFFITH - Ontario District Court - 44 C.C.C.(3d)63.

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POSSESSION OF GOODS OBTAINED BY CRIME

To defraud the insurance company, S. arranged for D. to conduct a fake break-in of his home. Subsequently, various valuable items were taken to D.'s home to be stored there until S. could sell them. S. phoned the accused EPP and offered him his stereo equipment for $800.00. With the full knowledge of the insurance rip-off, the accused bought the equipment. Consequently, the accused was convicted of "possession of property obtained by the commission of an offence." He appealed to the Saskatchewan Court of Appeal submitting that the insurance company discovered the fraud before it paid anything to S.; he (the accused) had no part whatsoever in the scheme and did not become aware of the false claim until after the fake break-in (but before buying the equipment); when he did purchase the equipment, it was the property of S. and only part of (but not the proceeds of) an attempt to defraud. Hence, the property was not directly or indirectly obtained by means of an offence. The Court of Appeal agreed that the circumstances did not bring the accused within the purview of s. 312 C.C. Acquittal was substituted for the conviction.

Regina v. EPP - 42 C.C.C.(3d)572.

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WHEN ATTACKING A FINANCIAL INSTITUTION, THERE ARE AS MANY ROBBERIES AS THERE ARE PEOPLE WHO SURRENDERED ANYTHING BECAUSE OF BEING SUBJECTED TO VIOLENCE OR THREATS OF VIOLENCE.

The accused et al were convicted of three counts of armed robbery arising from one visit to a Credit Union. Three tellers were robbed and the money obtained was stolen from the Credit Union. The theft was from one institution and not from the robbed tellers. After all, robbery is theft involving violence or threats of violence. One of the accused appealed to the B.C. Court of Appeal, and argued that in view of there being one action against the institution and one theft, there should only be one conviction for robbery. The Court was not persuaded. Not the Credit Union, but three separate persons were robbed, and therefore, the three convictions were proper.

Appeal dismissed.
Conviction upheld.

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INFERENCE TO BE DRAWN FROM TAKING FLIGHT

The accused weaved and drove at times on the wrong side of the road. When police tried to stop him, he sped away, again on the wrong side of the road. This maneuver was obviously an attempt to escape being spoken to by police. When finally apprehended, the accused resisted arrest, and the officer subdued him by hitting him across the thighs with his night stick. The accused was acquitted of failing to blow. Due to the violent overreaction of the officer, his refusal was reasonable reasoned the trial judge. It had caused fear of prejudice. He was, however, convicted of impaired driving. Thus, the accused appealed claiming that the evidence was no more then some observation of erratic driving and smell of an alcoholic beverage on his breath. The Vancouver County Court agreed with the trial judge's finding of the fact that the accused displayed all symptoms of impairment, when linked with his obvious attempt to flee justified the conviction. The aggregate of the driving, the symptoms, the fleeing, and the resistance to arrest amounted to proof beyond a rasonable doubt.

Accused's appeal dismissed.

Regina v. TOMKO - Vancouver County Court -
C.C. 881622 - January, 1989.

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