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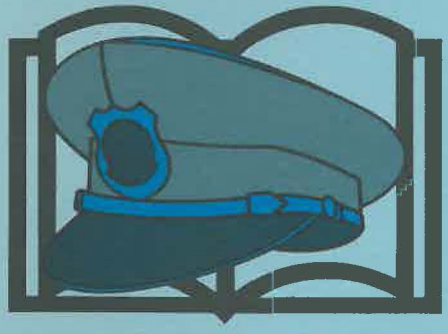
ISSUES OF INTEREST
VOLUME NO. 39



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

ISSUES OF INTEREST

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Written by John M. Post
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TID BITS:

RIGHT TO TRIAL WITHOUT UNREASONABLE DELAY

REGINA v. ASKOV - Supreme Court of Canada, [1990] 2 S.C.R. 1199, October 1990.

The accused Askov and three others were engaged in a territorial dispute with a Mr. B. over supplying of exotic dancers in a region in Ontario. The mode of negotiations with B. (which included meetings in the company of body guards) was such that charges of extortion, possession of prohibited weapons, possession of weapons dangerous to the public peace, and pointing of firearms resulted. All four were arrested and released on recognizance involving substantial sums of money and stringent conditions. (Askov was re-arrested for an unrelated charge while out on bail).

The Crown had in a "commendable manner" prepared for an early preliminary hearing which was upon request by the accused "put over" for several months. The accused also failed to respond to an offer for "an early date" to proceed. On the agreed to date, the hearing was not completed due to conflicting Court schedules and this resulted in it not being completed for 10 months after the arrest.

A trial date was finally agreed to for a date some 13 months after the completion of the preliminary hearing. As the date approached it became obvious that due to cases having greater priority, the trial could not go ahead. All counsel involved agreed then to a trail date 11 months later. That meant that the matter would go to trial nearly three years after the arrest. When the trial finally began, defence counsel despite the agreement to the trial date moved for a stay of proceedings as the accused's right to be tried within a reasonable time had been infringed. The stay was granted by the trial court, but was reversed by the Court of Appeal for Ontario. The accused appealed this reversal to the Supreme Court of Canada (S.C.C.).

Although no blame for these delays were attributable to the Crown, the S.C.C. held:

> "It must be remembered that it is the duty of the Crown to bring the accused to trial. It is the Crown which is responsible for the provision of facilities and staff to see that the accused persons are tried in a reasonable time". [Charter 11 (b)]

An accused has no duty to bring himself to trial. Administrative and facility problems cannot justify inordinate length of time for delay.

When the meeting of counsel took place and a date was agreed to, had the accused then not waived their rights to a trial within a reasonable time? "No", responded the S.C.C. There was not a choice given to the accused. The date was the earliest one available and it was assigned or allotted to him. Not objecting to a lengthy delay does not amount to a waiver. The onus is on the Crown to demonstrate that the accused agreed to the deal or explicitly waived his rights. Therefore there was no specific or inferred waiver in this case.

But what about an accused person who deliberately has a concealed strategy to delay his trial until the period between arrest and trial amounts to an unreasonable delay? In view of the Crown's responsibility to bring an accused's person to trial within a reasonable time being an aspect of fundamental justice (s. 7 Charter) and a specific right of the accused [s. 11(b) Charter].....

> "....It follows that any inquiry into the conduct of the accused in no way absolve the Crown from its responsibility to bring the accused to trial".

The S.C.C. held that where an accused claims an unreasonable delay and the record does not make it clear and apparent that the affect of the accused's actions amounted to an intentional causation of delay, the Crown must prove that the accused deliberately employed a calculated tactic to delay his trial.

However, where the delay was caused by factors beyond the control of the accused, or a situation where the accused did nothing to prevent a delay caused by the Crown, then the claim of unreasonable delay can not be rebutted. The Court seemed to say that even where the accused wants a delay to accommodate an infringement of his right to a trial without unreasonable delay so he can reap the benefit of that infringement (a judicial stay of proceedings), and there is a contributory causation of delay on the part of the Crown, the accused is entitled to a finding that there was unreasonable delay.

Agreement to or absence of objection to an adjustment of trial date which causes an unreasonable delay, is not a waiver on the part of the accused or disentitlement to a claim that his right in this regard was infringed.

Appeal allowed.
Stay of proceedings directed.

Note: Judgment day whether on this earth or elsewhere is something we humans do not mind to postpone for as long as possible. In criminal law, the earthly judgment day can be avoided altogether by allowing the Crown or Courts to violate one of our entrenched fundamental rights. It is an absurd theory that by victimization we can gain a most desired benefit. The exclusionary rule as well as judicial stays of proceedings under section 24 of the Charter have in essence caused a violation of our rights by the State, to be a favour. With regard to unreasonable delays of trials the Honourable T.G. Zuber said in his "Report of the Ontario Courts inquiry (1987);

> "This unique attitude on the part of the accused towards this right often puts a court in a position where it perceives itself as being asked to dismiss a charge, not because the accused was denied something which he wanted, and which could have assisted him, but rather because he got exactly what he wanted, or at least was happy to have.....delay."

The last thing an accused may want, is a speedy trial. The dismissal does not come because the accused was wronged in a real sense, but rather he successfully played the waiting game. Apparent cooperation with Crown or Court scheduling dilemmas can be part of that game's strategy.

LIABILITY OF PARTY TO A CRIME THAT RESULTS IN MURDER

REGINA v. KIRKNESS - Supreme Court of Canada, 60 C.C.C. (3d) 97, February 1991.

The accused and his friend S. broke into the home of an elderly woman in the early morning hours. The woman, described as frail at the age of 83 years, was found in her bed. S. removed the woman's clothing and raped her. He ordered the accused to wait in the hallway until he was finished. The accused placed a chair against the front door of the home to prevent anyone from entering. He then proceeded to search the house and steal various items. When S. had finished the assault he dragged the woman into the hallway where she "just laid". The accused then searched the bedroom for valuables. When he came out of that room he found S. choking the elderly woman. The accused asked S. not to do that as he might kill her. S. then placed a plastic bag over his victim's head and dragged her into the bath tub and turned on the hot water, the woman suffocated. The accused did not once touch the woman. The assault, the choking and the tub scene had all been S.'s actions. No evidence linked the accused to either the sexual assault or the suffocation of the woman.

The accused and S. were charged with first degree murder. S. was convicted but the accused was acquitted. The Crown appealed the acquittal and the Manitoba Court of Appeal ordered the accused to stand trial for manslaughter. The accused appealed this decision to the Supreme Court of Canada (S.C.C.).

The Court opened its majority judgment (four to three) with what seems a prelude to vent the personal feelings of the Justices before handling the law in a detached way. They confessed to a strong tendency to closely associate the accused with this despicable crime. They seemed to remind themselves that both the despicable and the personable are entitled to be judged solely on the basis of the relevant evidence. They also expressed respect for the jury which acquitted the accused of first degree murder after a long deliberation. As representatives of the community they were able to apply the principles of law and fairness despite having heard first hand, the evidence of a brutal murder of a defenceless, frail woman in her own home located in that very community. Their tendency to associate the despicable accused with that homicide must have been much stronger than that of the members of the S.C.C.

The Manitoba Court of Appeal had found that the accused was clearly a party to the crime S. committed. He had ensured that S. would not be interrupted in the sexual assault and had stood guard as it were. The entire sequence of events could not be broken down in components or distinct incidents. The aggregate of the actions on the part of both men had led to the killing of the elderly woman. Consequently the unlawful acts of the accused had resulted in the woman's death. That amounts to manslaughter reasoned the Court of Appeal and the jury should have been instructed accordingly.

The S.C.C. held that the sordid events, right from the break and entry through to the woman being placed in the bathtub, did not amount to a single transaction. The trial judge had properly instructed the jury that they had two options in regard to the occurrence of the death. It was either part of the sexual assault (in that case both S. and the accused were guilty) or they could find the death had occurred due to suffocation at the hands of S. In either case the jury would have to find that there was a degree of planning and deliberation to convict them of murder. Clearly the jury decided that suffocation by S. was the case as they convicted S. and returned a verdict of not guilty for the accused. The accused could only be implicated as a party to the sexual assault. (s. 21 C.C.) by aiding S. in committing it.

These instructions to the jury and the verdict it returned clearly indicate that the "single transaction" approach on the part of the accused was not taken. The intent of the principal offender and that of the aider or abetter must be the same. If the intent of the aider or abetter falls short of being the same as that of the principal offender, he can be convicted of manslaughter if the unlawful act in which he rendered assistance is to his knowledge likely to cause harm short of death. In regard to the suffocation, the cause of death, there was no intent demonstrated to cause death or bodily harm on the part of the accused. He was not a party to the suffocation of the victim. As a matter of fact when the accused informed S. to stop choking the woman, he did serve notice on S. that he was on his own. He may have been a party to what happened up to that point but resiled from any agreement or arrangement with S. and was consequently not a party to the suffocation.

Accused's appeal was allowed
Acquittal was restored

OFFICERS ENTERING PRIVATE PROPERTY SURREPTITIOUSLY TO VERIFY THEIR SUSPICION THAT MARIHUANA WAS CULTIVATED IN THE HOUSE -- SEARCH WARRANT OBTAINED ON BASIS OF THAT VERIFICATION -- REASONABLE SEARCH AND SEIZURE

REGINA v. KOKESCH[1] - Supreme Court of Canada, November 1990, 61 C.C.C. (3d) 207

Acting upon information from police on the lower mainland, a house on Vancouver Island was kept under surveillance for four days. Not much was learned from this effort. In the evening and under cover of darkness two officers walked 75 yards onto the property to where the house was situated. They discovered that the basement windows where sealed and there was condensation on the inside; a humming sound could be heard and a smell of marihuana came from vents. This perimeter search was conducted strictly for the purpose of obtaining the reasonable and probable grounds prerequisite to a search warrant under the Narcotic Control Act. A search warrant was executed and plenty of evidence was found to support the charge of cultivating marihuana. However, the trial judge considered the exploratory search illegal and this had contaminated the search warrant. Consequently the search of the house had been warrantless and unreasonable. The evidence seized was excluded from evidence.

The BC Court of Appeal allowed the Crown's appeal and ordered a new trial. It held that the officers had at best, been petty trespassers when they did their exploratory "look-see". They had not violated the accused's rights. The trial judge had not given sufficient consideration to the common law of the exclusionary rule, as it was expressed in the *Collins*[2] decision. Said the Supreme Court of Canada in that case:

> "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone".

The accused is to be tried again, ordered the BC Court of Appeal and he took this decision to the Supreme Court of Canada (S.C.C.) for its opinion.

The S.C.C. decision was a majority judgment, with 3 of the 7 Justices dissenting. There is no doubt that the exploratory search around the house of the accused at 2:00 a.m. amounted to trespass. There simply was no authority to search. A warrantless search under the Narcotic Control Act has reasonable and probable grounds as a prerequisite for it to be lawful. The

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[1] See Volume 30, page 31 of this publication for synopsis of trial results and Volume 33, page 42 for judgment of BC Court of Appeal

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

whole question hinged on whether the officers had such grounds. If they did have such grounds the exploratory search was superfluous as those grounds are the same as those needed to obtain a search warrant. Warrantless searches are unreasonable unless the Crown establishes otherwise. One of the elements to prove that the search was reasonable is to show that it was lawful. When cross-examined about the grounds or suspicions the investigators had for conducting their warrantless search the officer testified, "I don't believe I had enough to get a search warrant to enter the residence"....."I did not have reasonable and probable grounds that there was an offence being committed. I had suspicion". When pushed that there surely must have been more than suspicion for him to conduct the search the officer replied, "Well, I had more than just suspicion. I had solid grounds, but not enough for a search warrant". At the beginning stage of the cross-examination the officer was asked if he did have reasonable and probable grounds to conduct the search. He started his answer with, "Your Honour, I believe...." and was cut off by defence counsel who wanted "an answer" preferably a "yes or no". This was the Crown's case to support the exploratory search and consequently that is all the Courts had to work with.

If the officer had an honest but mistaken belief that he could lawfully conduct the exploratory search that does not cause him to act in good faith. The S.C.C. said that police cannot be heard to say that they misapprehended the scope of their authority. They knew or ought to have known that they were trespassing. The search was unreasonable and had infringed the accused's right to be free of unreasonable search or seizure.

The S.C.C. did not see the trespass by the officers as a petty trespass. They entered private property and searched the perimeter of a dwelling to discover what was inside even by attempting to look inside the windows. There are stringent statutory provisions, which constrain police from unwarranted invasion of privacy. These provisions are complemented by judicial interpretations and common law. For police to test those limits and ignore the constraints is unacceptable and cannot be condoned by the Courts. The Courts must clearly disassociate themselves from such surreptitious practices by rejecting the fruits they yield. The majority of four, felt that the administration of justice would suffer great disrepute if in a case like this, the evidence was accepted.

The search by means of which the reasonable and probable grounds for the search warrant were obtained was unreasonable. Consequently the evidence obtained by the search warrant was gained in "a manner" that violated the accused's right to be secure against unreasonable search or seizure.

Accused's appeal allowed
Acquittal restored

Comment:

This case and the Collins case seem, from a legal as well as from a police view point, to be similarly flawed and should perhaps have been similarly remedied by the Supreme Court of Canada. In the Collins case, police had rushed Ms. Collins in a pub and choked her. Her mouth was clear but she had a balloon with heroin in her hand. When the officer who conducted the search testified he was asked about grounds for his actions. He said, "We were advised....". Defence counsel was on his feet objecting to any hearsay evidence that was likely to follow. Although the officer by using "we" tried to testify to what people besides himself did know, it was only the hearsay aspect that was objected to. The trial judge never ruled on the objection and the issue got lost in the procedural shuffle. Needless to say the officer, to establish his reasonable and probable grounds for the search was as an exception to the hearsay rule, permitted to say what he (not we) was advised and what he knew. The absence of that evidence meant that the crown failed to establish that the search was lawful and the S.C.C. had to conclude that the officer had taken a flying tackle at Ms. Collins without any justification for doing so. The Supreme Court of Canada ordered a new trial and expressed the hope that the officer be given an opportunity to complete his testimony.

In my opinion, in the Kokesch case a similar flaw occurred. Other than testimony that, as a result of a tip from the lower mainland, a truck was followed from the ferry terminal to the Kokesch residence the evidence of what the officers knew when they conducted the exploratory search was skilfully stifled by defence counsel. First (according to the transcript) the officer was asked in cross-examination if he had only a suspicion or had reasonable and probable grounds that an offence under the N.C. Act was being committed on the property. Perhaps Crown Counsel should have objected at this point. Whether, what the officer knew, amounted to only suspicion or reasonable and probable grounds is a point of law and for the judge to decide. The officer's answer was not too bad as he said that it was a matter of opinion. Defence counsel then solicited the officer's opinion on this point. The officer thought he had reasonable and probable grounds to conduct the exploratory search and then botched it by saying that he did not think he had enough to get a search warrant. Needless to say if he had the grounds to conduct the warrantless search he had grounds to obtain a warrant. Then the officer was very specifically asked, "Did you believe, ... that you had reasonable and probable grounds to believe that an offence had been committed on the property under the N.C. Act before you went on the property?" The officer answered, "Your Honour, I believe...." That is as far as he got. When he was about to tell the Court what he believed, (the very thing he was asked) the defence counsel interrupted (as he was possibly afraid of the answer) and said, "Can you just answer the question, please, Constable?" The Court Reporter read the question back to the officer and defence counsel then alluded to the officer taking his time and perhaps having trouble understanding the question. He then demanded a "Yes or No" answer. The officer then said to have had only a suspicion. Defence counsel for some reason not leaving his client's well enough alone probed further and asked, "Surely, you must have suspected something to go

there?" The officer replied, "Well, I had more than just suspicion, I had solid grounds, but not enough for a search warrant. The officer's beliefs at the time were admissible in evidence; he was asked what these beliefs were and was cut off when he tried to relate them to the court. Defence Counsel opened a can with the label "worms". Before he determined whether there were any worms in it he managed to get the lid back on. Like in the Collins case, the S.C.C. should perhaps have ordered a new trial instead of restoring the acquittal.

THE ADMISSIBILITY AND USE OF VIDEOTAPED STATEMENTS BY THE UNDERAGED VICTIM OF CERTAIN SEXUAL OFFENSES

REGINA v. MEDDOUI - 61 C.C.C. (3d) 345, Alberta Court of Appeal - November 1990

Section 715.1 C.C. provides that in any proceeding relating to certain sex offenses in which the complainant was under 18 years of age at the time of the alleged offence, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts the content of the videotape while testifying. The law was proclaimed in 1988 and there is not much in terms of precedence to give guidance to its meaning. Although it may seem quite complete and simple, the enactment leaves many ancillary issues for the judiciary to decide. Particularly in the area of evidentiary weight, or the meaning of the complainant "adopting" the content of the tape. For instance, is the tape admissible in evidence as proof of the truth of its content; or simply as proof that the statements were made; or to show previous statement consistent with the complainant's testimony.

The accused was charged with sexually assaulting a child. Police video taped their second interview with the complainant, two days after the events which amounted to the alleged assault. The complainant gave unsworn testimony. She watched the tape in the accused's presence during the trial and said that the statements she made were true. This was the extent of her testimony. The accused was convicted and he appealed that conviction to the Court of Appeal for Alberta on the following interesting grounds in relation to the use of the video tape in evidence:

1. The tape should not have been admitted as proof of the truth of its content. The tape should only have been used to show that she had previously made a statement that was consistent with her testimony. Only that testimony could, if accepted, prove facts.

2. Two days after the event was not within a reasonable time as the section demands.

3. The complainant did not "testify" as she was not sworn and was consequently not in a position to adopt the videotaped interview.

4. The interview resulted in unreliable statements as the interviewer had put leading questions to the young complainant.

There are at least four different ways the new section can be interpreted in terms of its application. The Alberta Court of Appeal searched for that application in light of the relevant parts of Bill C. 34 (1988) in comparing it with; new approaches to testimony from children adopted or considered in other western nations; academic papers on this topic; and our law of evidence. The removal of the provision that unsworn evidence of a child needs to be

corroborated makes the issue of credibility very sensitive. Where it was believed in the past that the evidence of a child was no more than a "Whim of a Moment" unrelated to past events, a matter of reconciling the irreconcilable, now there seems to be a belief that young children can distinguish fact from fiction and are, like adults, good or bad witnesses. Parliament must have accepted this last theory as it, like the UK Parliament, repealed the rule about corroboration of child witnesses.

The Alberta Court of Appeal held in essence:

> "The child witness might adopt the statement made on the tape in a sense less strong than recalling both it and the events discussed."

The Court dealt with the questions whether "adopting" the earlier video-taped statement means that the child witness must recall the making of the statement as well as the events it relates and must in addition confirm that what the statement says about the those events is true. The Court rejected such a stringent application and held:

> "The witness might adopt the statement in the less strong sense that, whether or not she recalls the events discussed, she does believe them to be true because she recalls giving the statement and her attempt then to be honest and truthful."

The Court answered the following to the above listed grounds for appeal:

1. The tests contained in this statement by the Court had been met and the tape can be admitted as evidence in proof of the truth of the content. The weight of that evidence is for the jury to decide.

2. The law about "freshness" in the context of "past recollection recorded" applies and the two day period explained above could be within "as reasonable time". (See explanatory notes of this rule of evidence below).

3. The verb "testify" commonly describes sworn and unsworn testimony. The new law virtually extinguishes the legal significance between the two. Consequently for the purpose of the section the girl had testified.

4. A tape cannot be excluded just because the interviewer had asked leading questions of the girl. However, such questions do affect the evidentiary weight of the answers to those questions. The jury must be accordingly instructed.

The tape was admissible in evidence.

Note:

The rule of "past recollection recorded" refers to a witness who has in some way recorded events at a time that they were still fresh in his or her mind. Then, when the witness testifies, and cannot recall a relevant event or detail he or she may refer to the record made of that event or detail at a time when it was remembered. Without researching the details of the English case in the early part of this century which gave birth to this rule, I do recall the following. A tramway company had a dispute with a person who had been injured due to a faulty component of a tramcar. That car had been safety tested shortly before the incident that had caused the injuries. The inspector who had carried out the test, testified. He could not remember the inspection but had completed the company form designed to carry out the test while he was putting the car through its paces. This form was produced and the witness attested that he always accurately recorded the results of each aspect of the test. His testimony was consequently evidence that the car had been tested on the date and time recorded and that the equipment functioned then as described by him on the form. Referral, by a police witness, to his/her notebook for details not remembered when testifying but recorded at a time that they were recalled, stems from this rule.

The Alberta Court of Appeal held that due to the content of s. 715.1 C.C. the videotaped recording is distinguishable from the rule of "recent recollection recorded" in that it removes the prerequisite that the child witness at the time he or she testifies, has no recollection of the events recorded. In other words, even if the witness remembers the events without referring to what has been taped, the tape is admissible for the truth of its content.

WHO MUST TESTIFY TO PROVE THE VOLUNTARINESS OF A STATEMENT

REGINA v. JAMES - BC Supreme Court, Victoria No 54942, November 1990

Four police officers searched a home and found narcotics that caused charges to be preferred. The admissibility of evidence and particularly the statements the accused made during the search became subject to a *voir dire*. When the first statement was made to two officers in a bedroom the other two were in the livingroom. The Crown only called the two officers in the bedroom. The defence argued that all four should have testified as to the general conduct of police during the search. This was relevant to the admissibility of the statement he submitted.

One officer could only partially open a drawer. With the assistance of a flashlight he could see plant like material and plastic baggies. He told the accused that if he was not provided with a key he would break the drawer open. The accused responded "You might as well take it all", and gave the officer the key. The officer to whom this second statement was made was the only witness called on the *voir dire*, while two other persons were within hearing and two other officers present in an adjacent room. It was not claimed that the officers could or did hear the conversation in question.

The Supreme Court of Canada has held[3] that to prove the voluntariness of a statement:

> ".....the Crown calls witnesses, normally the police officers to whom the statement was made or given, and any other police officers who might have been in a position to threaten or to offer hope of advantage to the accused." (Emphasis is mine)

The BC Court of Appeal[4] held likewise but elaborated on the meaning and application of the rule that all persons around at the time must testify. It held that each case must be considered on its own merits and circumstances. It is clear what the Crown must prove to show voluntariness on the part of the accused. Said the Court:

> "In different cases, the principle may require the production of all or some or none of the persons in authority who were present when the statement was made, or all or some or none of the persons not in authority who were then present".

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[3] Eruine v. The Queen - 44 C.C.C. (2d) 76

[4] Regina v. Wert - 12 C.R. (3d) 255

In relation to the first statement made in the bedroom to two officers, the Supreme Court Justice held that all witnesses as required by the principle were called. The Crown did prove voluntariness and the statement was admissible.

In regard to the second statement, again the witness required by the principle had been called. However, voluntariness had not been proved. The threat of breaking open the desk drawer had caused doubt as to the voluntariness of "You might as well take it all." The statement was excluded from evidence.

THE UNDERCOVER "CELL MATE" - ADMISSIBILITY OF STATEMENTS MADE BY ACCUSED WHILE INCARCERATED

REGINA v. GRAHAM - Ontario Court of Appeal, 62 C.C.C. (3d) 128. January 1991

The accused became the principal suspect in the murder of a woman. He was requested to attend the police station. Two police officers interrogated him extensively and oppressively. He was not made aware of his rights to counsel. The 8 hour questioning resulted in a confession and the accused was arrested for second degree murder. The improprieties of this interview were such that Crown Counsel at trial did not press for admission of the confession in evidence.

The day following the interview two other officers remedied all the mistakes that had been made. They extensively made the accused aware of his primary and secondary rights and insisted that he spoke to a lawyer. They assisted him in every way and accommodated him in the exercise of those rights. The action of the second team of officers had impressed the trial court and the relationship between them and the accused was labelled as "harmonious". Despite police insistence however, the accused (other than speaking to duty counsel) did not engage the services of a lawyer until 11 days later.

A week after the initial interrogation an under cover officer was placed in cells with the accused. This Constable R. was to discover some missing evidence. The constable testified that it is assumed that lawyers have advised prisoners to remain silent and not to speak to anyone and therefore "we give the same appearance and tell the prisoners that we are not going to talk to anybody". He said he also tells whoever wants to hear it in the cell block, that the place is likely bugged and that there may well be a cop amongst them. Constable R. had done the same with the accused and had even gone around looking for bugging equipment.

The only question Constable R. asked the accused was, "What are you in for". The accused had answered," I made a terrible mistake and I'm in big trouble." Without any questioning the accused told the story of his involvement with the murdered woman over and over again.

The accused was convicted of second degree murder and appealed this conviction. The evidence of the statements the accused made to Constable R. were quite weighty and the Crown had the *Hebert*[5] decision by the Supreme Court of Canada as a threshold. In essence that Court had held that the undercover officer, who, of course, objectively is a person in authority, does not leave the suspect an informed alternative to speak or be silent. This had in the *Hebert* case not offended the right to counsel or the right to remain silent but had deprived Hebert of his rights to a process based on the principles of fundamental justice. Other binding decisions on this issue the defence depended on were involving circumstances where police could not get information

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[5] Please read **R. v. Hebert** a decision by the Supreme Court of Canada on this issue. Volume 37, page 16 of this publication - 57 C.C.C. (3d)

from an accused the formal way and gained it surreptitiously. These means were often merely a continuation of the original questioning of the accused. Some of these were not "cell mate" methods but sometimes other officers who processed the suspects through departmental booking procedures or who transported them to the Court house or to places for medical examinations.

The defence claimed that the *Hebert* decision, which was handed down after the accused's trial, caused the statements the accused made to Constable R. to be inadmissible and that the Court of Appeal should consider whether the conviction could stand without the evidence they contained. The defence also subtly suggested that there had been a strategy on the part of police to extract the information from him. The initial interview in that scheme would have been deliberately flawed, the second team played the "good guys" and laid the foundation for subsequent statements to be admissible. This would be akin to the old "good guy, bad guy" interview technique, but on a larger and more sophisticated scale. The defence claimed in addition that all statements were obtained by a continuation of the original interrogation.

The Court of Appeal for Ontario held that the original statements by the accused were inadmissible because at common law they were not voluntarily made and in addition, that they had to be excluded under section 24(2) of the Charter due to the accused's right to counsel having been violated. This, in law, made this case distinct from the *Hebert* case. Furthermore there was no link between the misconduct of the officers who conducted the first interview and the statements made to Constable R. in the cells some 10 days later. "Any taint had dissipated and was not operable on the day in question", said the Court. The original Charter breaches had been remedied and the aggregate of the police actions had not amounted to a stimulation technique for the accused to talk.

The Court of Appeal in essence found that the Supreme Court of Canada (S.C.C.) in its Herbert decision did not hold that the placing of an undercover officer with an accused in cells is per se a taboo, either at common law or under the Charter. The Court of Appeal reasoned that the S.C.C. had accepted the U.S. approach to the "cell mate" practice and that an accused must show that the agent took some action beyond merely listening, that was designed to deliberately elicit incriminating remarks. The simple "what are you in for," in response to the accused asking Constable R. the same question, was not an action to elicit information. Furthermore this case was distinct from the *Hebert* decision as the accused did not at any time indicate he did not want to talk to police. If such had been the case the argument that what could not be obtained in a formal way was gotten by trick would have arisen. In general the Courts have held that tricks are permitted but that dirty tricks are not. The latter are those which would shock a reasonable community.

In the absence of any casual or temporal nexus between the initial improprieties and the cell scene, the accused's statements made to Constable R. were admissible.

Accused's appeal dismissed
Conviction upheld

DEMAND FOR BLOOD SAMPLE MADE UPON ORDER OF SUPERIOR OFFICER - INVESTIGATING OFFICER DID NOT HAVE PREREQUISITE GROUND TO MAKE DEMAND

REGINA v. FOWLER - 61 C.C.C. (3d) 505 - Manitoba Court of Appeal

On a clear evening the accused with two passengers in his car, passed a trailer truck and collided head on with a motor cyclist going in the opposite direction. The motor cyclist was killed and the accused as well as his passengers were injured. As a consequence the accused was convicted of Criminal Negligence causing death and Impaired Driving causing bodily harm. He appealed the convictions to the Court of Appeal for Manitoba.

Three officers had attended the scene of the accident, one of which was senior in rank to the others. When a number of opened cans of beer were found in the car the senior officer had instructed the officer who attended at the hospital to obtain a blood sample from the accused. His instructions were that if the accused was not willing to give a sample voluntarily he was to make a demand for such sample. The accused agreed to giving blood for the purpose of analysis but the officer made a demand in addition. He said to have reasonable and probable grounds for believing that the accused's ability to drive was impaired by alcohol as a prelude to the actual demand. In testimony the officer said that there was nothing about the accused to suggest that he had been drinking and candidly admitted that this prelude to the demand did not reflect his belief about the accused's sobriety. Although the offer to give blood on the part of the accused did meet the superior officer's objective, the demand was made as well for reasons one can only speculate about. In any event, the making of the demand is a discretionary authority which is original to each peace officer and is hardly subject to an order from a superior ranking officer. This is particularly so where the officer who makes the demand does not have the prerequisite beliefs. However, no issue was made of this when the accused argued that the result of the analysis should not have been admitted in evidence during his trial.

It was conceded by the parties to the proceedings and the Court of Appeal that without the evidence of the accused's blood-alcohol content (150 mg), there was insufficient remaining evidence to substantiate guilt beyond a reasonable doubt.

If the officer had left well enough alone and had accepted the accused unhesitating willingness to voluntarily provide a sample of his blood, the analysis would have been admissible in evidence. However, the demand placed the issue in a totally different legal light. Firstly, the suspect (the accused) went from being a free man who volunteered to surrender evidence to a detained person who was compelled to supply the evidence. He needed to be informed of his right to counsel. The Crown became obligated to show the officer had the prerequisite reasonable and probable grounds to justify and validate the demand. The consent by the accused to allow blood to be taken had immediately upon the demand been superseded - it (the consent) simply had no significance any more. Finally, considering the officer's testimony that the accused showed no signs of having consumed any alcohol or drug, caused his preamble to the

demand he made (I have grounds to believe your ability to drive is impaired by alcohol...etc., or words to that effect) to be a falsehood. He, the officer, was simply following orders while the authority to make a demand was the officer's discretion and a power original to him. This caused the giving of the blood sample the Crown relied on to prove the accused's blood-alcohol level, a matter of coercion and an unreasonable search in the process in which the accused's right to counsel was infringed requiring a judicial consideration if the admissibility of that evidence would bring the administration of justice into disrepute. As this had not been considered the Manitoba Court of Appeal .....

Allowed the accused's appeal
and ordered a new trial

ENTRAPMENT OF PERSONS NOT UNDER INVESTIGATION IN A PLACE NOT KNOWN FOR DRUG ACTIVITIES - DERIVATIVE ENTRAPMENT

REGINA v. KENYON - Court of Appeal for BC - 61 C.C.C. (3d) 538 - November 1990

An undercover police officer approached W. in a pub and asked where and from who he might get some weed. W. pointed to the accused and did buy for the officer, $250.00 worth of Marijuana. The pub was not known to police as a place where drugs were sold neither were W. or the accused suspected of trafficking. In other words, there was random virtue testing. Neither W. nor the accused were under investigation and the pub was no house of ill repute in regards to drugs changing hands or being used. This meant that the accused was entrapped and was entitled when he was found guilty to have the proceedings stayed to avoid conviction. The trial judge did stay the proceedings and the Crown appealed claiming that the entrapment was derivative. The Crown reasoned that W. who gave the accused the opportunity to commit the offence, or perhaps, induced him to do so was unwittingly an instrument of the police officer. W. was not an agent of the police as he had no ideas that the person he was acting for was a police officer.

The Court of Appeal for BC held that in these circumstances there is no distinction between direct or derivative entrapment. The police were not conducting a bona fide investigation and had randomly tested the virtue of patrons of the pub. The accused had been entrapped.

Crown's Appeal dismissed
Stay of proceedings to be continued.

RIGHTS OF AN UNREPRESENTED ACCUSED BEFORE THE COURT

REGINA v. HARDY - Court of Appeal for Alberta - 62 C.C.C. (3d) 28, December 1990.

The accused was tried for assault and mischief. The matter arose from what appears a common law or like relationship between the accused and the victim of the assault. The accused represented himself and soon ran amok of the Court proceedings. His cross-examination of the victim tended to solicit irrelevant past history of their relationship. The way he did put his questions caused the trial judge to have to intervene and word the questions for him. The accused was convicted and had to come back for sentencing five weeks later. This time he was represented by counsel who submitted that the trial was unfair due to the Court having violated the accused's Charter rights; (1) not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice; (2) to be informed of right to counsel when detained; (3) to be presumed innocent until proven guilty.

The accused filed an affidavit with the Court of Appeal for Alberta to say that he was engaged to be married to the victim of the assault; that the victim had asked Crown Counsel not to prosecute the accused; that he was not prepared to go to trial and was unrepresented as he expected the Crown to withdraw the charges; that he was unaware that he was entitled to an adjournment to obtain the services of a lawyer. The transcript of the trial corroborates that the trial judge simply asked the accused, "You are representing yourself....?" and did not make the accused aware of any options he had in this regard.

The Alberta Court of Appeal held that it is the duty of the trial judge, where the person to be tried is unrepresented, to inform that person of - his right to counsel of the importance to be represented to ensure a full answer and defence to the charges -- to ascertain clearly that the person to be tried does not want to be represented. In other words there must be a clear waiver of right to counsel.

The Court mainly based its reasons for so holding on the content of s. 7 of the Charter. Although the Court did not say that an accused person is detained when he is before the Court, it implied that his position is akin to it. The issue is not what procedures a police officer is to follow when he detains a person but what is incumbent on a trial judge when an accused person is unrepresented.

He or she must ensure that an accused who does not wish to be represented knows that he makes an unwise decision. It is not necessary to make sure the accused knows the law in relation to the evidence that will be adduced or the consequences of a conviction.

Appeal was allowed and a new trial was ordered

POLICE RECOVERING PERSONAL PROPERTY OF ACCUSED UPON HIS REQUEST AND IN THE PROCESS STUMBLING ONTO WEIGHTY EVIDENCE. IF THERE WAS UNREASONABLE SEARCH AND SEIZURE IT WAS INADVERTENT -- EVIDENCE ADMISSIBLE

REGINA v. BLAIR - Court of Appeal for BC, Vancouver CA 010392 - March 1991

The accused shot and killed the man he shared a house with. He was charged with second degree murder. Police obtained a search warrant and searched the accused's home and sealed it off with yellow tape warning the public to stay out. Two weeks after the murder the accused's social worker asked police to turn some of the accused's personal property from the house over to him (the accused). A detective collected the requested material and went through it to make sure that it did not include some evidence that may have been missed during the search. A letter addressed to a Joanne was found which contained both evidence of intent and motive in relation to the murder. The letter was dated the day of the murder and in it the accused declares his love for Joanne and tells her that he is "gonna" avenge the victim for calling her a slut. Needless to say the letter (which the accused admitted writing on the date it bears) was weighty in terms of evidence and without it the outcome of the trial may have been different considering the remaining evidence. The accused was convicted as charged and appealed claiming that the letter was discovered by means of an unreasonable search and was consequently inadmissible.

The trial judge had agreed that the letter got in the hands of police by actions that violated the accused's right to be free of unreasonable search and seizure but concluded that the officer who complied with the accused's request had not consciously chosen this method of search. Consequently excluding the evidence would bring greater disrepute on the administration of justice than admitting it.

The Court of Appeal found that the Charter violation, despite its devastating results for the accused, was not a serious one. The breach was inadvertent and no investigation was specifically on course when it occurred.

The officer acted on the accused's request and these circumstances did not justify the obtaining of a search warrant. Technically another warrant should have been applied for. In the circumstances, police became aware after the fact, that a simple scrutiny of material to be turned over to a prisoner, did result in discovering important evidence.

The trial judge had balanced all relevant factors in an appropriate way whether the evidence should be suppressed or admitted. There was no improper conduct on the part of the police and if there was a Charter violation, it was committed inadvertently.

Accused's Appeal dismissed,
conviction upheld

INVESTIGATING OFFICER REFUSING TO INFORM DEFENCE COUNSEL OF HIS GROUNDS FOR DEMANDING BREATH SAMPLES OF SUSPECT

REGINA v. SHERWOOD - BC Supreme Court, Vancouver CC901371 - April 1991

The accused ran a red light and was stopped 100 metres from the intersection. The officer observed symptoms consistent with those of the consumption of alcohol and demanded breath samples. The warnings were given and apparently understood. At the police station the accused contacted the lawyer of his choice who testified at the accused's trial for failing to blow, (this was not the lawyer who acted for the accused at his trial or appeal).

The accused had told his lawyer over the phone from the police station that he had been stopped for running a traffic light and that he was under demand to give samples of breath. He requested legal advice on what to do. The lawyer had taken the position that he was in no position to give advice unless he knew the officers reasons and grounds for the demand. For this purpose he requested to speak to the officer. The officer had declined to come to the phone. The lawyer then asked his client to ask the officer for those reasons so they could be relayed to him by the accused. He had heard laughter in the background but failed to get the information he requested. Having taken the position that he was in no position to give proper legal advice without knowing the basis for the demand, he had told the accused to let his conscience be his guide. The accused had refused as a result.

The officer testified that he had refused to speak to the accused's counsel as the information required would be provided to Crown Counsel in a subsequent report.

At trial the defence counsel, argued that the officer's failure to speak to the lawyer or tell the accused what his grounds were for the demand had thereby infringed the accused's right to instruct counsel. The trial judge had acknowledged the importance to the advising counsel to be aware of the information he requested to render his advise valid. He was of the opinion, however, that the lawyer must render advise on the basis of the information his client gives him. Thus the constable was not obliged to give his reasons or grounds for the demand to counsel. There would have been nothing wrong with doing so, but it was up to the officer. The accused was convicted of refusing and appealed on the basis of this very point.

The B.C. Supreme Court referred to a decision by the Supreme Court of Canada[6] in 1989. Although the circumstances surrounding the right to counsel in that case are quite distinct from the ones in this case, our highest Court made some general statements about this right and used the predicament of counsel as they were in this case as an example. It held that s. 10 (a) of the

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[6] Black v. The Queen - Volume 36, page 5 of this publication - 70 C.R. (3d) 97.

Charter sets the tenor of the right to counsel. It provides the right for an arrested or detained person to be advised of the reasons for the detention. Unawareness of these reasons inhibits the detainee to instruct counsel in a meaningful way. Counsel in such circumstances can only advise his client that failure to comply is a criminal offence. This, said the Court, defeats the purpose of the right to instruct counsel totally. In others words, making the accused's counsel aware of the grounds and reasons for the demand is essential to ensure that the right to instruct counsel and receive legal advice is meaningful and effective.

The BC Supreme Court held that failure on the part of the officer to provide the accused's counsel with the reason and grounds for making the demand for breath samples, had deprived the accused's right to counsel and rendered it a mere ritual, without significant meaning. The accused was in immediate legal jeopardy and needed advise at that very moment whether or not to comply with the demand. Informing Crown Counsel, who would then in turn make additional information and details available to the defence is, in the circumstances, inadequate compliance with the obligation upon police to inform a detainee "promptly" of the reasons for the detention.

As well as suppressing the evidence of the accused's failure to comply with the officer's demand, the Supreme Court justice held that due to the infringement of the accused's right to counsel the accused had a reasonable excuse to refuse to blow. He was confident, that had the accused been provided with an opportunity to properly instruct counsel he would have complied with the demand. The information counsel requested from the officer was not merely important to render meaningful advice, but was due to the crucial point in time to decide whether to comply with the demand, essential and needed.

Accused's appeal allowed
Conviction quashed.

ADMISSIBILITY OF ACCUSED'S CASUAL CONVERSATION WITH A POLICE OFFICER

REGINA v. VAN HAARLEM - BC Court of Appeal, Vancouver CA011090 - May 1991

In a very remote area of BC, Mr. & Mrs. Bonnell lived in a cabin. They were involved in mining gold. One afternoon when the husband had gone to a far-away neighbour to watch a hockey game on TV. Mrs. Bonnell was visited by a masked gunman who demanded the gold he knew was hidden in the cabin. Mrs. Bonnell was tied up and physically abused to force her to tell where the gold was secreted. As this was to no avail the robber ransacked the cabin but did not find the gold. He took some other valuables including firearms and left after planting combustible material near the stove. The fire that resulted was extinguished by Mrs. Bonnell despite the fact she was tied up.

The police investigation did apparently not surface any suspect until two years later when the accused told a police informer (Mr. G.) that during an employment stint in the area where the robbery took place, he had met the toughest old lady of his life. Even though he had tried to break her fingers she had not told him where the gold was hidden. He also told how he had burnt her. This and other circumstantial evidence renewed the investigation and resulted in an arrest of the accused on charges of attempted murder, robbery, and unlawful confinement.

The accused was granted an interim judicial release. Among other conditions he was not to have direct or indirect contact with any of the witnesses at his preliminary hearing. A RCMP officer who had known the accused on a personal basis for some nine years, testified for the Crown at that hearing. When the accused and his lawyers travelled home, they by sheer coincidence stayed overnight in the hotel where the officer was also a guest. By chance the officer saw the accused sitting in the lobby and had inquired "how are things going". The accused made the officer aware of the condition of his release in regard to witnesses. The officer had replied, "Fine. We don't have to talk about the case". For some time the conversation was about personal things and the welfare of their respective families. This caused the officer to comment how difficult it was for him and his family to be apart for the duration of the preliminary hearing. The accused commented that he could have stayed home as his evidence had not been admitted. He then said that he would have entered a plea of guilty if it was not for the informer Mr. G. He just regretted putting Mrs. Bonnell through the stress of testifying. At the accused's trial this exchange was adduced by the Crown and its admissibility became the kernel issue.

The trial judge held that the officer lacked malicious intent in that his actions were not *mala fide*, and he unhesitatingly held that the statement was voluntarily given. However, he had considerable difficulty with the other aspects of the meeting of the officer and the accused and the statement that resulted. The contact and conversation were in view of the judicial condition of release simply unlawful. The right to counsel did not end until the conclusion of the trial and he found that this right had been infringed. The evidence was suppressed and the accused was

acquitted on all charges. The Crown appealed to the BC Court of Appeal claiming that in the circumstances there was no breach of the accused's right to counsel.

The Crown submitted that the trial judge had erred. The constable had in no way detained the accused and the issue of right to counsel simply did not come into play. Defence counsel agreed and said that his arguments during the trial were that the accused's right to silence had been violated. Upon the Crown conceding that this was the issue, the appeal proceeded on that basis. Defence counsel argued that in this case the Supreme Court of Canada decision in *R. v. Hebert*[7] applied.

In that case an undercover officer was placed in Hebert's cell after he clearly indicated to want to exercise his right to silence as he was advised to do so by his counsel. Inculpatory utterances were made to this agent provocateur and the Supreme Court of Canada held that this had violated Hebert's right to counsel. The accused's counsel argued that in principle this case was not distinct from Hebert. The accused had in essence clearly indicated that he did not wish to speak to the RCMP witness and yet their personal conversation had drifted to relevant evidentiary topics. The only difference between the two cases is that Hebert was detained where the accused was not under any restraints other than the binding condition of his release not to contact any witnesses.

Defence counsel emphasized that the constable should have reminded the accused of his right to silence and that due to the release condition the conversation was simply unlawful. The BC Court of Appeal disagreed with both points. The accused volunteered the information and the release condition was irrelevant to the right to silence. In other words the judicial imposition was in the circumstances not the equivalent to the advice of a lawyer who told his client to choose not to speak to authorities. The constable did not trick the accused nor did he actively solicit information relevant to the allegation against the accused. It was the accused who steered the conversation in the direction of his case and then he volunteered his views and what he would have done if it was not for the informer Mr. G.

This left the BC Court of Appeal to decide if a new trial should be ordered. This depended on whether the constable's evidence which was now admissible, could alter the verdict. Identification evidence, the essential element of the Crown's case, was weak. Mrs. Bonnell could not identify the accused due to his disguise at the time of the robbery and the informer Mr. G.'s credibility was such that he was labelled a questionable and unreliable witness. The constable's evidence directly relates to identify and is consistent with what the informer claimed the accused said to him. Consequently the officer's evidence was cogent and could (if it had been admitted) have been instrumental in the verdict being one of guilty.

Crown's appeal allowed
New trial ordered

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[7] R. v. Hebert - Volume 37, page 16 of this publication - (1990), 2 S.C.R. - 151.

Explanatory Notes:

In the Hebert decision the Supreme Court of Canada has attempted to explain some new rules in regard to evidence and particularly statements obtained from an accused.

The Court emphasized that the new rules are a compromise of the justifiable balance between the interest of the State in law enforcement and the interest and rights of the suspect. The Court pointed out that we have not adopted the absolute right to silence as is the case in some other democracies. The "absolute" approach calls for suppression of all statements made to persons in authority unless the right to silence has clearly been waived. The test whether the person the subject speaks to one in authority is an objective one, meaning that whether or not the suspect knew the status of the person he speaks to is irrelevant. If he in fact is a person in authority and the prosecution cannot establish waiver on the part of the suspect, the statements are inadmissible in evidence, this regardless of whether the officer is merely passive or elicits the statement. This includes overheard conversation with fellow prisoners through listening devices and other means of deliberate or inadvertent interceptions. The Supreme Court of Canada clearly rejected this absolute approach and advocated an objective rule for statements evidence.

The court made it clear that the rule applies only to "after detention". The new approach to "right to silence" does not extend to protection against police tricks in pre-detention periods. This is consistent with the right to counsel which only applies upon detention. In pre-detention undercover operations the person or suspect is not in the control of police. After detention police have the responsibility to ensure the detained person's rights are respected.

When a detained person has retained counsel and is aware of his right to silence there is nothing in our new rules preventing police from questioning the detainee in the absence of his lawyer or without the latter's knowledge.

In such circumstances:

> "Police persuasion, short of denying the suspect the right to choose [whether to speak or remain silent] or depriving him of an operating mind, does not breach the right to silence".

This, of course, does not include post-detention conversation in an undercover setting.

All through the reasons for judgment in *Hebert* the court emphasized that post-detention statements must be predicated on the suspect's right to choose freely whether or not to speak to authorities. However, this does not affect voluntary statements made to cell mates where the police have not subverted the suspect's right to choose not to make a statement to authorities. This, regardless of the cell mate's actual status, e.g.: a bona fide cell mate, a police agent or informer, or an undercover police officer.

The court explicitly made a distinction between the cell-mate undercover approach where the agent actively elicits information and where the agent passively listens to conversation or becomes the recipient of volunteered unsolicited statements by the suspect. In the former case, the suspect is clearly deprived of his right of choice whether to speak to authorities and this practice does violate his right to remain silent. Police thus elicit by subterfuge something they could not obtain by respecting the suspect's constitutional rights in a setting free of surreptition. In the absence of eliciting behaviour on the part of police, there is simply no violation of the accused's right to choose whether to speak to authorities.

In conclusion the Supreme Court of Canada was mindful of the kernel consideration for excluding evidence under s. 24(2) of the Charter. It held that the exclusionary rule is not absolute and reminded all concerned, that even where a violation of a detainee's right has been established suppression of the statement made to the "cell mate" should not then automatically be suppressed. The courts in addition must be satisfied that reception of the statement in evidence would bring the administration of Justice into disrepute.

Said the Supreme Court of Canada about such consideration:

> "Where the police have acted with due care for the accused's rights, it is unlikely that the statements they obtain will be held inadmissible".

ADMISSIBILITY IN EVIDENCE OF "ONE PARTY CONSENT" INTERCEPTION OF PRIVATE COMMUNICATION BETWEEN A POLICE SUPERVISOR AND A POLICE OFFICER UNDER INVESTIGATION

REGINA v. BOIVIN - BC Supreme Court, Vancouver CC900144 - April 1991

The accused, a police officer, was suspected of sexually assaulting women he encountered in the course of his work. After an intensive investigation, he was charged with sexual assault, robbery and unlawful confinement in relation to two women. The investigation methods consisted of all hours surveillance, clandestine execution of search warrants on his residence and police locker and the taping of telephone conversations the accused had with his supervisor. The risk the accused constituted to the public, "having power as he did to stop people on the pretext that the stopping had something to do with his police activities" caused the department to assign considerable resources to this investigation and to effect an arrest as early as was legally possible.

The accused had submitted a plan to investigate certain criminal activities he had become aware of through an informer he considered reliable. This project was suggested while the officer was under investigation. Approximately a week later the officer had a Ms. S. in his police car which was seen parked in an industrial area. Ms. S. was dropped off by the accused at her home, around 5:00 a.m. As the woman was about to enter the building the police supervisor, who was part of the surveillance team, approached her. He found her to be sobbing, frightened and confused. It was obvious to the supervisor that something traumatic had occurred to her. When he asked her if the accused had hurt her, she did not answer. The matter was turned over to the other officers to investigate what was assumed to be a sexual assault.

A couple of hours after Ms. S. was dropped off at her home by the accused, he phoned the supervisor to report on the progress of the proposed project. He reported to have spoken with his informer who had apparently not added much to the information police already had. As an aside, as it were, the accused told his supervisor that the informer had identified Ms. S. as a hooker who had now entered the pimping profession. She carried, according to the informer, a handgun belonging to either one of two policemen she regularly slept with. He suggested that the vice squad should have everything there was to know about her. The gun had been used to scare off competitive pimps and she had allegedly fired the gun once for that purpose. In a second recorded telephone conversation the accused was asked in a round about way about his activities the night before and what specifically he knew about Ms. S. He did say that he had not seen Ms. S. for some time while it was known that he was parked with her the night before and spent some considerable time with her. In general the account of his activities did not jibe with what was observed by the surveillance team. Needless to say, the Crown wanted the tape recorded telephone call accepted in evidence.

The accused claimed that the interception was an unreasonable search and seizure. The "one party consent" provision is questionable in terms of constitutional proprieties[8]; furthermore did the supervisor's conduct amount to a search or seizure of anything within the meaning of s. 8 of the Charter.

The Supreme Court trial Justice explored the provisions of the Criminal Code's "Invasion of Privacy" sections. The definition of "intercept" that applied in these circumstances is:, "Intercept includes ..... acquiring the substance meaning or purport thereof." The definition of "private communication" in this case,....."means any telecommunication made under circumstances in which it is for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it." The Court held that the telecommunications were neither private nor, in the circumstances were they intercepted.

The accused had phoned in relation to his "project". He was anxious for it to go forward as it meant, "a large feather in his cap" should it succeed. He was fully aware that the decision to proceed would be made by other superior officers and the members of the undercover team. Consequently the accused did not give information meant for the supervisor's ears only. He wanted it disseminated to the decision makers and the investigators. He wanted all to "acquire the substance meaning and purport of his communication". He therefore had no reasonable expectation that what he said would not be intercepted by any person other than the supervisor.

Tapes admitted in evidence

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[8] R. v. Duarte - Volume 36, page 1 of this publication and 53 C.C.C. (3d) 1.

THE "ONE-MAN LINE UP" CONDUCTED BY THE VICTIM'S MOTHER WITH POLICE ASSISTANCE - POLICE TRICK TO OBTAIN ADMISSION THAT INCRIMINATING PROPERTY IS OWNED BY THE ACCUSED

REGINA v. SWAN - BC Court of Appeal, Victoria CA V01045 - May 1991

The accused broke into a home during early morning hours and made a serious attempt to have intercourse with a teenage girl. He had forced himself on the victim who was asleep at the time he entered her room. She got away from the accused despite him holding scissors to her throat. She screamed, and woke up the rest of the family. The accused got away via patio doors. The police dog found a belt presumably owned by the assailant, near the edge of the property.

Approximately two weeks afterwards the girl's mother heard noises in the middle of the night which she assumed were made by a person who was trying to break in. When police searched around the house they found the accused lying under the window on the inside sill of which his prints were found. The mother called her daughter, (the victim of the sexual assault) and told her to take a look at the accused as he laid on the ground. She said, "Mom, it's him, it's him. Take me inside". The police had assisted in this one man line-up by shining their flashlights on the accused. The accused was then arrested.

The belt the dog found on the premises was placed among the accused's personal effects when he was released. Without hesitation he had put the belt on. He was then casually asked if that was his belt and he answered that it was.

A jury convicted the accused of break and enter and committing the indictable offence of sexual assault and with break and enter for the second occasion. This time with the intent to commit an indictable offence. He appealed both convictions claiming that the one-man-line-up was inadequate and inadmissible. He also claimed that the belt evidence was inadmissible as it had been obtained by a police trick.

The BC Court of Appeal agreed that the one-man-line-up was improper police procedure. Police should not have allowed the victim to look at the accused for the purpose of identifying the man who sexually assaulted her two weeks before. In the circumstances (the accused caught in the act of trying to break and enter into the home; mother waking the girl up to see if this is the man who assaulted her and the accused being in police custody), made her identification of this man not the most reliable. However, there was additional identification evidence. This coupled with the trial judge cautioning the jury about the danger of such identification practice, there was no need for the Court of Appeal to hold that the evidence was such that a jury was not entitled to find that identification had been proved beyond a reasonable doubt.

The evidence of the accused admitting that the belt was his, should have been suppressed according to the defence counsel. At the time the accused made the admission he was detained

and the statement was elicited from him. This according to the *Hebert* decision[9] by the Supreme Court of Canada, amounts to a breach of the detainee's right to remain silent. In essence counsel argued that the trick was in law the equivalent of the cell-mate approach to obtain evidence by questioning the accused without him having the choice whether to remain silent. Although it seems that this argument, considering the circumstances, may have failed, the Court did not rule on this "interesting issue". This due to other evidence that established the accused's ownership of the belt.

In relation to the second charge of break and enter, the Crown relied on the provision in the Criminal Code that in the absence of evidence to the contrary, it may be assumed that the person breaking in intends to commit an indictable offence. Drunkenness has been held to provide evidence to counter such intent. This had not been explored as no such instructions were given to the jury.

Accused's appeal on Count 1 was dismissed and conviction was upheld. Accused's appeal on Count 2 was allowed and new trial was ordered.

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[9] Volume 37, page 16 of this publication - 57 C.C.C. (3d), June 1990.

CONSTITUTIONAL VALIDITY OF VAGRANCY SECTION APPLICABLE TO CONVICTED SEX OFFENDERS - MEANING OF LOITERING - THE REQUISITE MENS REA

REGINA v. HEYWOOD - Supreme Court of BC, Victoria No. 52988-C, May 1991

The vagrancy section of the Criminal Code of Canada creates a summary conviction offence for convicted sex offenders to "loiter" in or near a school ground, playground, public park or bathing area. This includes sex offenders who have paid their debt to society. On the surface the section prohibits these persons from hanging idly about, moving slowly, or lingering in or near the above mentioned public places, even when their intentions in regard to their conduct is innocent. Despite the connotation in criminal law, loitering is something all of us do when we kill time for whatever reason. Our malls and parks are filled with loitering persons whose intent is precisely to do so. One can imagine the apparently valid arguments that can be raised to say that section 179 (1) (b) C.C. is inconsistent with our Charter and therefore without any force or effect. The section seems to blatantly violate s. 7 of the Charter the applicable portion of which guarantees us a right to "liberty" and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Another section of the Charter this loitering offence seems to run afoul of is the presumption of innocence [s. 11 (d)].

In 1978 the Supreme Court of Canada categorized or subdivided if you will, our offences created by Statutes[10] (there are in Canada no common law offences save contempt of court). In respect to offences that are criminal in nature, an essential element the Crown must prove beyond a reasonable doubt is that the criminal act was committed intentionally or recklessly. Does that mean that a convicted sex offender who knows that it is a crime for him to loiter in specified public places and does purposely do so, has now intentionally committed a criminal act? That would be the case if the offence was one of strict liability. There the Crown need not prove existence of *mens rea*. The defence to such an offence is reasonable care to avoid the event; or where there was reasonable belief in a mistaken set of facts which, if true, would render the act innocent.

The strict liability offence category is for regulatory measures mostly. Nearly all provincial offences are of strict liability unless the wording of the enactment indicates differently, e.g.: where the words like knowingly or wilfully are used to indicate the requisite mind set of the offender. Offences of strict liability are not found in the Criminal Code and all have *mens rea*, negligence (advertence) or recklessness as an essential element for the Crown to prove. That criminal intent must not be an intent to do something the law prohibits but to commit the gravamen of the offence; that is the unacceptable behaviour the law forbids. To enhance the attack on the constitutional validity of the vagrancy subsection, the defence argued that the offence is akin to one of strict liability as there is no criminal intent included in the essential

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[10] The Queen v. The Corporation of the City of Sault Ste. Marie (1978) S.C.R. 1299.

elements of the offence. If you are a convicted sex offender and you loiter in a public park to watch the ducks, then you have committed the offence. In July of 1988 a BC Provincial Court Judge[11] apparently interpreted the section that way and held that it offended s. 7 of the Charter in a way not demonstrably justified in a free and democratic society. Consequently he declared the section to be without force or effect.

The accused Heywood had previously been convicted of sexually assaulting two young female children. In June, 1989, he was spotted in Victoria's Beacon Hill Park on the children's playground taking pictures of young girls playing on the gym apparatus. A constable made him aware of the loitering offence under the vagrancy section. The accused did not take kindly to being accosted and said he was free to go where he pleased. The officer advised the accused to seek advice on the matter from his probation officer. This he did and the court was told that the probation officer had not been aware of any law preventing him from attending the park but had added, "Don't be stupid. Don't go in the middle of the playground and play with children".

A few weeks later the accused was back taking pictures of little girls. He was arrested for loitering and the content of his camera, photographs seized at the developer's, and those found at his home clearly indicated the accused's objective. All the pictures were of girl's crotches exposed when playing on the playground apparatus. Whatever else was in the pictures was of no significance to be the target of his lens. The accused, however, claimed that it was clear coincidence that the centre of each photograph was a girl's crotch. He claimed that photography used to be his hobby and he had taken candid photographs to capture the energy and vitality of these children. He had not intended any sexual connotations and had only now become aware of the coincidental indelicate positions in which he had captured these girls. He was not believed.

In the Provincial Court the accused raised the same issues as Alfons Graf. The accused's mere sauntering presence in a public park constitutes an offence for only people, like the accused, who have been convicted of a sex crime. This restriction upon them is not part of any sentence, but one imposed by statute. The defence counsel urged that the Provincial Court trial judge would hold like his colleague in the Graf case. Needless to say this decision was not binding on the trial judge and he obviously disagreed with it.

The trial judge held that there is a criminal gravamen to the loitering section. He found that innocent loitering was not included in the offence and that it required a "malevolent" intent; in other words a criminal intent is an essential mental element. The dictionary definition of loitering only defines the physical activities. That by itself is inadequate to give the section a remedial propose in regards to criminal behaviour. A Parliamentary committee when dealing with this section deliberately removed the word "wandering" and clearly indicated that it was cognizant of the pre-dispositions of sex offenders and the very high rate of re-offending.

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[11] R. v. Alfons Graf - unreported

Therefore, the *mens rea* (criminal intent) the previously convicted loiterer must have is one connected with that criminal pre-disposition. Loitering for the purpose of "watching the flowers grow or ducks swim" is inadequate.

The Crown had shown such malevolent behaviour on the part of the accused in this case. The trial judge held in addition that the section nonetheless violates s. 7 of the Charter but found that with *mens rea* as an essential element of the offence, it is "demonstrably justified in a free and democratic society" (s. 1 of the Charter).

The accused appealed his conviction for loitering to the BC Supreme Court and claimed for purposes explained above, that malevolent intent is not required. Should the Court reject this submission then he claimed that the trial judge erred in finding that the evidence showed malevolence. The Supreme Court rejected both arguments. The evidence clearly showed malevolence and due to medical expert evidence "as to the character traits, propensities and factors which trigger sexual activity on the part of those who have history of sexual offenses" Parliament had enacted the legislation for reasons demonstrably justified in our society despite it violating s. 7 of the Charter.

Accused's appeal dismissed
Conviction Upheld

Note: There are two additional interesting aspects to this case. The trial judge had allowed evidence from an official who conducted hearings across Canada for the Federal Justice Department and had advised the government on the legislation that included this loitering section. He explained the consideration that had been given this issue and why it was recommended for enactment. This to show the justification for this section under s. 1 of the Charter. Such "extensive material" for the purpose of consideration in constitutional adjudication are usually excluded or should not be given too much weight[12]. The Courts must determine the meaning and purpose of legislation by the wording of the enactments that clearly indicate their object. Law must not be vague and receive a broad and liberal interpretation to meet its object (Interpretation Act).

Secondly, quite contrary to the rules regarding adducing fresh evidence upon appeal the Supreme Court Justice allowed the accused (who had remained silent at his trial) to testify. This, the Court said, so evidentiary foundations for his constitutional arguments could be laid. The Court seemed anxious not to create a precedent in this regard. It seems likely that the Court also did bend the rules to get this somewhat pressing issue out of the way. However, the latter is total conjecture on my part.

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12 Supreme Court of Canada in Reference : s. 94(2) Motor Vehicle Act (1985) 24 DLR (4th) 536

THE DILEMMAS AND OBSCURITIES OF OBTAINING BLOOD SAMPLES FROM IMPAIRED AND/OR UNCONSCIOUS SUSPECTED IMPAIRED DRIVERS

THE QUEEN v. DYMENT - Supreme Court of Canada, December 1988[13]
REGINA v. LUNN - BC Court of Appeal, December 1990[14]
REGINA v. DERSCH - BC Court of Appeal, May 1991

Police frequently encounter circumstances where suspected impaired drivers have caused death or other devastation and did not escape injuries themselves. The Criminal Code of Canada provisions do not always fit the circumstances police encounter. This combined with misconceptions of these provisions and the conflicting interests between police objectives, ethics of the medical profession and the reasonable expectation of privacy on the part of the suspect, leaves a legal minefield for all concerned.

Mr. Dyment suffered head lacerations when he drove his car off the road. He was at all relevant times unconscious. Other than the familiar smell of alcoholic consumption there were, of course, no symptoms of impairment noticeable. The helpful and cooperative doctor caught some of the blood Mr. Dyment was spilling and turned the vial over to the investigating officer. The analysis supported a conviction of "over 80 mlg". This case, with all the legal issues imaginable ended up in the Supreme Court of Canada. It found for Mr. Dyment and held that the "seizure" of the blood was a violation of s. 8 of the Charter. Considering the sole objective of the hospital and the doctors, Dyment had an expectation of privacy, not only in respect to his person but also in relation to "information". The doctor had joined the "enforcement machinery" and had breached Dyment's privacy interest.

On the surface it seems that the Dyment decision slams the door on obtaining a blood sample other than by means of the statutory demand or warrant. The Chief Justice stated in his reasons that there had not been an urgency or any other pressing reason to take the blood from Mr. Dyment without first obtaining a warrant...."assuming, of course, that the police officer, after having spoken to the doctor, could bring himself within the conditions required for obtaining a valid warrant." Much had been made of medical ethics involved and it was the Court's view that information from hospitals and doctors ought not to be revealed to law enforcement agencies unless the reason is compelling and urgent because of necessity.

The Supreme Court of Canada held that the results of the analysis of the "caught" blood were inadmissible. Although there was no search involved there had been a seizure. Section 8 of the Charter protects us from unreasonable search or seizure. This had left the question of

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13 DYMENT - Volume 34, page 24 of this publictaion [1988], 2 S.C.R. 417

14 LUNN - Volume 38 page 25 of this publication - Not reported.

reasonableness. The Court held that Mr. Dyment, while in the hands of professional doctors is entitled to believe that whatever substance is taken from him is for his benefit and exclusively for medical purposes. Consequently the seizure had been unreasonable.

Mr. Lunn was apparently in a highly intoxicated condition when he sideswiped an oncoming car and slammed into a rockbluff. His wife was instantly killed. The investigating officer was under the impression that the demand for blood as well as the taking of the sample must be done within two hours from the time of driving. As it took some time to get Lunn out of the smashed vehicle, no demand was made. The blood sample for medical purposes was not taken until four hours after the accident.

The officer discovered from the pathologist that in compliance with hospital policy blood samples are kept for a period of seven days. Upon an elaborate deposition a search warrant was issued and the blood sample was seized. Analysis and calculations showed a blood-alcohol level of .33 at the time of the accident.

The doctor's role in the case had been no more than relating hospital policy to the police and that did not make him "an agent of the state" and incapable of violating any of the accused's Charter rights. Consequently the case is distinct from Dyment as in that case the officer had requested and accepted the blood sample the doctor "caught".

Defence argued that the "demand" route had been open to the officer from the beginning. In view of specificity of the law that was the only means available to him in the circumstances. Despite the officer's misconception of the law, which had caused this somewhat unusual procedure, there was nothing that would justify suppressing the evidence, held the BC Court of Appeal.

Mr. Dersch collided head-on with another car and caused death. He was taken to hospital by ambulance suffering from closed head injuries which caused him to slip in and out of consciousness. Before the officer got to see the accused the doctors attempted to take samples of his blood strictly for medical purposes. Dersch told them in the strongest language that he did not want any blood taken. The officer who subsequently made a demand of the accused for a blood sample was told in the crudest of language that he would not get any.

After the officer left the hospital and while the accused was unconscious, an "unsuspecting" surgeon happened by and he was asked by the officer to take some blood from the accused. He did. Later, upon the assurance that it was exclusively for medical purposes and that the officer had left, the "attending" doctor gained consent for more blood being taken.

A few days later the officer phoned the "unsuspecting" surgeon and, upon him confirming that he had blood from the accused, was told he had to testify to this at the accused's trial. Then the officer phoned the "attending" physician and made a "formal" request for the medical report. This doctor in the belief that he had to comply, handed over that report on the accused. This report and the officer's opinion, made for the grounds upon which a warrant was issued. Execution of this search warrant resulted in the seizure of three vials of blood which contained ample evidence to conclude the accused was impaired at the time of the accident. A jury convicted him of criminal negligence and impaired driving causing death. The accused appealed the conviction to the BC Court of Appeal.

The BC Court of Appeal ruled that in the circumstances neither one of the doctors was an agent of the State (See s. 32 Charter). Needless to say, the "attending" doctor's belief that he was obliged to comply with the police request for the medical report was wrong. As a matter of fact his action was contrary to the standard of ethics adopted by his own professional College, as well as that of the BC Health Association. The kernel question was whether the accused's right under s. 8 of the Charter (to be secure against unreasonable search or seizure) extends to his right to privacy with respect to the confidentiality of the contents of his medical records.

In principle, this case is not distinct from the Dyment decision. To say that the events were different as there was a warrantless seizure of blood in Dyment and the taking of a medical report in this Dersch case, would be wrong. In principle, in both cases something was taken inappropriately for the purpose of incriminating the accused.

Firstly, it should be noted that the Supreme Court of Canada did not say in Dyment that the hospital cannot give information to police. Said the Court of Appeal for BC:

> "....it is one thing to inform, quite another to supply material which, if used amounts ..... to conscripting the accused against himself."

In Dyment the S.C.C. said that <u>after having spoken to the doctor</u> the police could have brought themselves within the required conditions to obtain a warrant.

It was legally proper for the doctor to say (as he did) that a blood sample was taken and that it was still in possession of the hospital. That information together with the observations made by the officer about Dersch's lack of sobriety may have been sufficient to get the warrant to seize

that blood sample. However, the doctor's confidential report, was an important factor in the issuance of the warrant. That report was obtained by police through a breach of Dersch's right to be free from unreasonable seizure. It was not the doctor but the police who violated that right and it contaminated the validity of the warrant.

What further aggravated the issue, is that the ill-gained report also gave the Crown the necessary grounds for subpoenaing the doctor and the lab technicians.

The medical report was not part of the evidence against the accused but the evidentiary fruits from it was so used. As this evidence would have been available without infringing Dersch's right and would undoubtedly have been discovered in a properly conducted investigation and trial, the BC Court of Appeal was unanimously persuaded that admitting the evidence despite the infringement of Dersch's right, would not bring the administration of justice into disrepute.

Accused's appeal dismissed
Convictions upheld

FORCED ENTRY OF HOME TO EFFECT THREE ARRESTS AND PREVENT DESTRUCTION OF EVIDENCE - JUSTIFICATION AND PROPRIETY OF POLICE ACTION - ONE ACCUSED ACQUITTED IN PROVINCIAL COURT - APPLICATION OF "RES JUDICATA"

REGINA v. KASEL AND MERIDETH - BC Supreme Court, Vancouver No. C.C.901322, February, 1991

Police conducted a warrantless search of a residence they forcibly entered. There were three occupants. One was tried in Provincial Court for the resulting charges related to the cocaine found in the home and the other two persons selected trial by the Supreme Court. The Provincial Court found that the search was unreasonable and dismissed the charges against the one party. When the trial opened for the other two in Supreme Court defence counsel urged that the charges should be dismissed for them as well. After all, "What is justice for one shall be justice for all". The Crown opposed this motion and claimed that such a dismissal would be premature as the evidence against the two accused should be heard and tested to see if the findings of fact in their case would be different from those in Provincial Court. The Supreme Court Justice agreed with the Crown's position.

The original target of the police investigation had been a physician who had a police agent as his patient. This agent had previously purchased cocaine from him. When the agent upon instructions of police had attempted to buy cocaine again from the doctor, he had told his patient that he did not have any at this time but gave him the phone number of one "Leon" who could fill his order. The telephone book known as the cheater revealed that the number belonged to the accused Leon Kasel. A police officer was given a number of twenty and ten dollar bills which had been photocopied. He approached the accused Kasel pretending to be one of the doctor's patients. This was done by means of two telephone calls. The first one was answered by Kasel and the second by the accused Merideth. Both were identified by distinct voice intonations. The conversation had included jargon of the cocaine trade.

The officer kept the appointment at the accused's address for the purchase of cocaine. The officer was let into the home and the transaction took place. He paid with the photocopied bills.

The officer had an eerie feeling that the men in the house suspected him of being a police officer or agent and he reported this by radio to the investigative team that was on stand by in the vicinity of the house. He, of course, also reported that the purchase was completed as planned. Pretending to have left his pager somewhere in the house the officer attempted to be let in. The team was then to follow and conduct a search. This failed and fearing that evidence was being destroyed the front door was rammed open by team members, who then entered yelling "Police". The accused Merideth was immediately arrested in the hallway as well as Shabbits, who was tried in Provincial Court as mentioned above. The sound of a toilet flushing took police to the bathroom where they found the accused "Leon" Kasel standing over the toilet. As he was the one who the agent had been referred to by the doctor and who had apparently supplied Merideth

with the cocaine sold to the police officer, he was arrested for trafficking in a narcotic. His person was searched the photocopied money was found in Kasel's pocket along with a plastic bag containing 23 grams of cocaine. The house was then secured and a search warrant was obtained. The forceful entry without warrant had the exclusive purpose to effect the arrests and, of course, to prevent destruction of evidence, according to the police testimony.

Firstly, the Supreme Court held that it was not precluded to try the two accused and relevant issues as particularly the latter had already been adjudicated in the trial of Shabbits in Provincial Court. This not because that court is inferior to the Supreme Court but simply as the persons prosecuted were not the same person as the one prosecuted in Provincial Court. In other words, the trail of Merideth and Kasel was an original prosecution and the principle of *res judicata* (previously judicially decided) did not apply. Whether or not the ramming of the door caused an unlawful entry in the circumstances and if there was "an appalling lack of evidence" (according to the Provincial Court judge) needed to be decided on the basis of the evidence there was at the end of the trial in the Supreme Court.

The officers had, without doubt, the reasonable and probable grounds to arrest the accused for the indictable offence of trafficking in cocaine. The Court relied on the decision by the Supreme Court of Canada in 1986 regarding effecting an arrest without warrant in a dwelling house where police entered without invitation or judicial licence[15]. It also referred to the well known case on this issue, *Eccles v. Bourque*[16], which was a civil process where officers had entered a home without warrant in which they believed a wanted person was holed up. If the grounds for an arrest exist a home or other private property is no sanctuary.

Being aware that our law is zealous to protect citizens from unwarranted intrusions by police, it does not impose a blanket prohibition against warrantless entry. As the facts were in this case the entry and arrests were justified.

The defence also questioned the propriety of the search of Kasel and the seizure of the bait money and the cocaine he had on his person. The Court relied here on the recent decision by the Supreme Court of Canada[17] that a frisk search is incident to lawful arrest. Defence counsel argued further that a frisk search is just a patting down to ensure the prisoner is not armed. "In the name of common sense" a suspicious bulge authorizes the arresting officers to remove the object causing the bulge. The removal of the bait money and the cocaine from the accused's pocket was justified in the warrantless search responded the Supreme Court Justice.

Evidence was admitted and accused found guilty

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15 Regina v. Landry - Volume 23, Page 7, of the publication - 25 C.C.C. (3d) 1.

16 (1974) 19 C.C.C. (2d) 129.

17 Cloutier v. Langlois - Volume 37, page 5 of this publication - 53 C.C.C. (3d) 257.

DISTINCTION BETWEEN ASSAULT CAUSING BODILY HARM AND AGGRAVATED ASSAULT

The accused and her girlfriend were in a bar. The accused was physically harassed by a man. She had asked him to "smarten up" and had glared at him when he continued to bother her. The girlfriend sensed the tension and persuaded the accused to leave with her. On her way out the accused was again bothered by the man and she emptied a glass of water in his face. He countered by emptying his beer glass on her. The accused then struck the man with the empty water glass. The glass broke and cut his face. Twenty stitches and permanent scarring were the results. The accused was acquitted for lack of intent to commit an aggravated assault. Her action had been no more than a reflex that by accident caused wounding and disfiguration. The Crown appealed to the Court of Appeal for New Brunswick, which pointed out the distinction between assault causing bodily harm and aggravated assault (sections 267 and 268 respectively). Assault causing bodily harm only requires the Crown to show an intent to assault and that the bodily harm was a consequence of that assault. In other words the causing of bodily harm does not need to be intended. However, aggravated assault by means of which someone's life was endangered, or wounds, maiming or disfiguration was caused requires the Crown to prove intent, not only to assault but also to cause any of these consequences. The Court of Appeal agreed with the trial judge, that the accused had no intent to assault in a criminal sense. Consequently she could not be convicted either of the included offence of assault. Crown's appeal was dismissed.

Regina v. Parish - Court of Appeal for New Brunswick - 60 C.C.C. (3d) 350, September 1990.

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ONLY THE INTENT TO USE A KNIFE AS A WEAPON CAN TRANSFORM THIS BUTCHER'S IMPLEMENT INTO A WEAPON

Police officers investigating a break and entry, attended at a convenience store where they encountered the accused and a companion. The companion was arrested and articles (apparently proceeds of the break and entry) were seized from him. When attention was paid to the accused the blade of a knife was seen protruding from his jacket. The blade belonged to a large butcher knife that was covered by the accused's clothing. The officers also found a pair of gloves and a screwdriver on the accused. He was convicted of carrying a concealed weapon. The trial judge held that the knife could be used as a weapon and therefore was covered under s. C.C.'s definition of "weapon". The accused appealed his conviction to the Court of Appeal for Nova Scotia. It held that the trial judge's finding that the knife could be used as a weapon was inadequate to support the conviction. What had not been addressed was the essential element of the offence that the accused carried the knife with the intent to use it as a weapon when the occasion arose. In the circumstances such an inference may well be drawn. As the issue had not been resolved during the trial, a new trial was ordered.

Regina v. Roberts - Nova Scotia Court of Appeal 69 C.C.C. (3d) 509, November 1990.

OBSTRUCTING JUSTICE BY INTERVENING IN THE PROSECUTION OF A FRIEND

A lawyer was charged with shoplifting from "Superstore". The manager of the store's security was approached, among others, by the accused who claimed to be the lawyer's friend and business partner. There were several meetings between the two men. On one occasion both were wearing body-packs to record every word spoken. The accused offered $20,000.00 for not testifying against the friend, or better, seeing to it that the charge was dropped. The money could either go on behalf of the store to a charity or could be used for a promotion, suggested the accused. He assured the security manager that he was doing this without the knowledge of his friend and would not seek to be reimbursed by him. The accused had sought legal advice from a lawyer (not his friend) who had told him that what he did was not an offence, as long as the donation would go to charity not in the name of the Superstore. Despite the advice not to offer any payment to Superstore or any donation in the store's name the accused went ahead as related above. He was convicted of obstructing justice by intervening in his friend's prosecution by offering an inducement. He unsuccessfully appealed his conviction to the Court of Appeal for Alberta.

Regina v. Kotch - 61 C.C.C. (3d) 132. Alberta Court of Appeal, November 1990.

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PROTECTING IDENTITY OF INFORMER - CROWN STAYING PROCEEDINGS TO PREVENT OFFICER FROM HAVING TO ANSWER QUESTIONS ON IDENTITY

During the accused's trial for conspiracy to traffic in narcotics the investigating officer was questioned why a certain arrest had been effected. The answer to this question would inevitably have identified a police informer. The prosecutor objected but the trial judge allowed the question. Instead of allowing the officer to answer the Crown stayed the proceedings only to recommence them before another judge a short time later. The same line of questioning by defence counsel occurred. The second trial judge disallowed the question. The accused was convicted and appealed unsuccessfully to the Ontario Court of Appeal. He then went to the Supreme Court of Canada claiming that the Crown had abused the process of the Court. The S.C.C. (in a 5 to 4 decision) dismissed the appeal. What the Crown had done was not abusive. Police informers must not be identified.

Scott v. The Queen et al - 61 C.C.C. (3d) 300. December 1990.

POLICE OFFICERS ASKED TO "GET RID OF" HANDGUNS AND ACCEPTING THEM AS PERSONAL GIFTS - POSSESSION OF RESTRICTED WEAPON

Two police officers investigated a suicide. A family member of the deceased requested the officers to "get rid of" two handguns that were in the house, besides the carabine the deceased had used to end his life. The officers took one gun each and requested the family member to look for the requisition certificates. A check was made with the records department if the guns were stolen. When the results were negative the officers took the guns home. The following day the family member delivered a quantity of ammunition for theses guns to the police station. This is how the police authorities became aware of what had happened. Both officers were convicted of possession of a restricted weapon without have a registration certificate. They appealed this conviction to the Quebec Court of Appeal on grounds that they intended to register the weapons. They also submitted that their possession was "by operation of law" [s. 91 (4) C.C.] as well as by reason "for the purpose of his duties or employment" as peace officers [s. 92 (1) (b) C.C.]. The Quebec Court of Appeal held that the obligation to have a registration certificate arises when one comes into possession of the firearm and not afterwards. The other two grounds were also dismissed as the guns were a personal gift and had, in the circumstances, not been in their possession related to their office. Appeals were dismissed and convictions were upheld.

Regina v. Bibeau and Lemay - 61 C.C.C. (3d) 339. November 1990.

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"ASSAULT CAUSING BODILY HARM MAY BE AN INCLUDED OFFENCE TO ROBBERY"

The accused and companion robbed a Mr. F. and apparently did, before or after the robbery, "wound" their victim. The accused was simply charged with "robbery". The indictment did not mention the word "wound" neither was the means by which the robbery was perpetrated revealed in this count. Robbery can be committed in four different ways and the Crown is not obliged to include the means in its allegations. It must, of course, disclose the means it intends to prove, where an accused asks for additional information. In this case the Crown failed to prove that whatever happened amounted to robbery, but did prove that the accused wounded Mr. F. The robbery section that applies here defines robbery as stealing from another person and before or immediately after the theft wound that person. As one offence is included in another where the latter's statutory definition identifies the former as a means by which to commit the offence, the trial judge convicted the accused of assault causing bodily harm. The accused appealed his conviction to the BC Court of Appeal. The Court of Appeal found that "wounding" is inflicting bodily harm. Hence the offence of assault causing bodily harm is included in robbery. The evidence the Crown had adduced proved assault causing bodily harm. The accused's appeal was dismissed.

Regina v. Horsefall - 61 C.C.C. (3d) 245 - BC Court of Appeal, November 1990.

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DOES MAKING A DEMAND FOR BREATH SAMPLES AS WELL AS SUSPENDING THE SUSPECTS DRIVER'S LICENCE AMOUNT TO CRUEL OR UNUSUAL PUNISHMENT?

The accused came very close to causing a devastating accident while towing a trailer carrying a back hoe. This was witnessed by a police officer who made a demand for breath samples and suspended the accused's driver's licence for 24 hours under the provisions of the BC Motor Vehicle Act. This practice was one the officer applied where a suspected impaired driver holds a valid driver's licence. The accused argued that this subjected him to additional punishment or harsh treatment. The officer should have demanded breath samples or have suspended the driver's licence, but could not do both as this violated the accused's right under s. 12 of the Charter. The accused's argument had failed in Provincial Court and he was convicted. He appealed his conviction to the BC Supreme Court. His argument failed there as well. Although a suspension does not amount to punishment it is "treatment". It cannot be construed as "cruel and unusual" considering the accused's gross state of intoxication. However, the Court commented that the practice was unnecessary and overzealous.

A similar case[18] was taken to the BC Court of Appeal in which it was claimed that this practice amounts to double jeopardy and violates one's right under s. 11(b) of the Charter. The Court rejected this claim as imposing a roadside suspension does not amount to charging someone with an offence.

Regina v. Shaw - BC Supreme Court, Courtenay No. S0134 - February 1991.

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[18] R. v. Art - 7 MVR (2d) 132

POLICE COMMISSION PUBLIC INQUIRY INTO POLICE ACTION IS NOT A TRIAL AND NOT SUBJECT TO BE TRIED WITHIN A REASONABLE TIME.

Police officers allegedly assaulted a man they arrested. The Quebec Police Commission did not empanel an administrative tribunal to conduct a public inquiry into the complaint until two years after the incident occurred. The officers petitioned the Quebec Superior Court to order a stay of proceedings on the basis that their Charter right to a trial within a reasonable time would be infringed if the inquiry went ahead. The Court held that because the officers were not charged with an offence, they were not being tried and hence the Charter provision for a speedy trial was not applicable. However, the Court did grant the application on the basis of the common law right to undelayed justice. In the circumstances the delay was excessive.

The Quebec Police Commission successfully appealed. The Quebec Court of Appeal held that although common law applies to administrative tribunals, the common law that applies is natural justice does not provide that a person must be "investigated" within a reasonable time. The officers were not charged or tried. They were being investigated and would suffer no prejudice.

Desormeaux v. Cote - Quebec Court of Appeal - 61 C.C.C. (3d) 560, September 1990

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ENTERING HOTEL ROOM UNINVITED AND FINDING DRUGS IN CLEAR VIEW. PURPOSE FOR ENTERING UNRELATED TO THE DRUGS - ADMISSIBILITY OF EVIDENCE

A police officer received information from a reliable source that a "Billy" was prepared to swap a handgun for drugs. The information included the hotel Billy was staying in. This information was passed on to a superior who checked at the hotel and found a Billy R. (who was known to him) to be a registered guest. At 3:10 a.m. the Sergeant arrived at the door of Billy's room and found it ajar. He heard voices inside. His knocking caused the door to open wider. He entered without invitation and greeted Billy. Drugs and drug paraphernalia were in plain view as were the two accused. The Sergeant effected arrests and arranged for a search warrant to be obtained. Around 5:00 a.m. the warrant was executed and the contraband was seized. The Sergeant testified that his sole purpose was to have a conversation with Billy. He would not have entered uninvited had the door not been open and he would have left had he been asked to do so. All evidence that supported the obtaining of the warrant were discovered after he entered the room without permission. The defence argued that the evidence of the drugs should be suppressed as the accused's right to be secure against unreasonable search and seizure had been violated. Furthermore there was a serious but unintended inaccuracy in the information that led to the search warrant being issued. The Court found that the officers involved had not acted in good faith and that the Sergeant entering the room as he did was unlawful. The search was consequently unreasonable and admission of the evidence thereby obtained would bring the administration of justice into disrepute.

Regina v. Lowe and Godbout - Supreme Court of BC - Victoria No. 54013, Decmeber 1990.

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A GESTURE CAN AMOUNT TO A STATEMENT

The accused was convicted of impaired driving. An eye witness had identified him as the driver but had agreed with defence counsel that, "He's the best person in the room to fit the description of what you remember....". The witness conceded that if there was a similarly looking person in the courtroom, "I wouldn't bet my life on pinpointing him...". Additional identification evidence came from the investigating officer who had asked from two persons sitting on the curb, "Who's the driver of the BMW?" Without saying anything the accused had raised his hand. Without conducting a *voir dire* on this statement by the accused the trial judge had obviously found that identification had been proved beyond a reasonable doubt. Upon appeal by the accused the Supreme Court of BC held that a gesture can be a statement and in these circumstances it was. This statement should have been subjected to a trial within a trial to determine admissibility. Therefore, the appeal was allowed and new trial ordered.

Regina v. Derewenko - BC Supreme Court - Chilliwack No. 23591, April 1991.