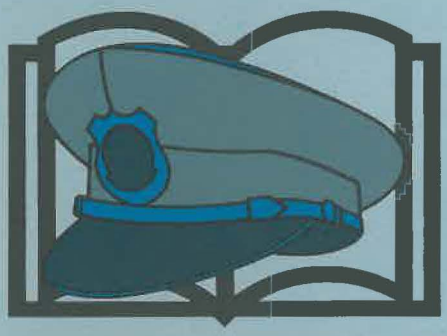

ISSUES OF INTEREST
VOLUME NO. 37

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

ISSUES OF INTEREST

VOLUME NO. 37

Written by John M. Post
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"MISLEADING - NONDISCLOSURE" IN APPLICATION FOR A SEARCH WARRANT CAUSING QUASHING OF SAME

REGINA v. SISMEY - BC Court of Appeal, 55 C.C.C. (3d) 281

A police officer attested in an application for a search warrant that:

1. the accused, according to a 15 year old informer, had drugs in his home;

2. the accused had, four years ago, been found to be in possession of narcotics; and

3. according to sources of unknown reliability, the accused was using narcotics.

A search warrant did issue. Execution resulted in evidence and a five count indictment.

During the trial the police officer who swore to the information conceded to know at the time he attested to the application that the allegations levied four years ago against the accused, had not resulted in a conviction. The accused had either been acquitted or the proceedings were stayed.

This non-disclosure was the ground for an unsuccessful petition to the BC Supreme Court to quash the warrant. Apart from this omission there were sufficient grounds for the Justice of the Peace acting judicially to issue the warrant. The accused appealed this decision to the BC Court of Appeal.

The highest Court of BC held also that there was misleading non-disclosure. This court was unanimous in recognizing search warrants to be judicially issued investigative tools, based on hearsay evidence. Inadvertent errors in the information or the text of the warrant itself will not necessarily justify the quashing of the warrant. Said the Court:

> ".....the proper question for the court to ask is whether, if the erroneous part were to be deleted, the information or warrant would stand by itself."

In this case nothing needed to be deleted; the information was simply inaccurate. The officiant (the officer who swore the information) conceded in cross-examination that he knew that the charges that arose from that incident had failed to result in a conviction. The court concluded that the information on that point was incomplete but did not find that the omission was deliberate with the intention of leaving an incorrect impression about the accused and thereby mislead the judicial officer who issued the warrant. If such was the case, the search warrant would have to be quashed. Nonetheless, the information was misleading by omission; sufficiently so that the proper judicial course was to quash the warrant.

Accused's appeal allowed
Search warrant quashed.

BODY SEARCH INCONSISTENT WITH REASON FOR ARREST
- ADMISSIBILITY OF EVIDENCE -

GREFFE v. THE QUEEN - Supreme Court of Canada, 55 C.C.C. (3d) 161

The police had reason to believe that the accused (appellant) was bringing heroin into Canada on a direct flight from Amsterdam to Calgary. He and his baggage were thoroughly searched but nothing was found. The police officer's evidence had been conflicting about what happened next, but the trial court concluded that the accused was arrested on a number of outstanding traffic warrants. He was not informed of his right to counsel and was taken to a hospital where a doctor found in his rectal canal two condoms with approximately $225,000 worth of heroin. The evidence was suppressed by the trial judge as: 1. The arrest had been a convenient artifice; 2. A search of the rectum when arrested for outstanding traffic warrants was unreasonable; and 3. The accused's right to counsel had been infringed.

The acquittal that followed the exclusion of the evidence was appealed and the Alberta Court of Appeal[1] reversed the verdict and convicted the accused. He then appealed that conviction to the Supreme Court of Canada.

The Alberta Court of Appeal had found by a majority judgment that the arrest on the traffic warrants had been a camouflage. It reasoned that the arrest was nonetheless lawful and that police had also reasonable and probable grounds to believe that the accused was importing a narcotic. The "right to counsel warning" was to seek release from detention but not to delay investigation and reasonable searches. The accused had been very much aware of the reason for the impending search. In terms of the rectal search being the ultimate of intrusion of one's privacy, the court had reasoned that the accused had profaned his own bodily integrity. Hence, the violations of the right to be informed of the reason for the arrest and the right to counsel were not such that suppressing the evidence under the Charter's exclusionary rule {s. 24 (2)} was called for. The Alberta Court of Appeal gave four reasons for this (two justices concurring and one dissenting).

1. The Charter violations did not create, or result in, evidence of the accused's guilt;

2. The admission of the evidence would not negatively reflect on adjudication fairness of the accused's trial;

3. There was no reason for the Court to disassociate itself from the conduct of the police; the search was a consequence of reasonable and probable grounds in believing in the existence of the offence, and the search did not arise under mere suspicion or capricious motivation; and

4. The alternative of the search of the rectum was not realistic. Waiting for the condoms to be passed naturally, ignored the fact that the unknown quantity of narcotics could accidentally disseminate and endanger the health of the accused.

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[1] See synopsis of reasons for judgment by Alberta Court of Appeal, in Volume 33 of this publication, page 13.

The Alberta court of Appeal found precedents for their reasons, the main one being the trendsetter of the exclusionary rule[2]. It rendered that judgment in February of 1988. In December of the same year the Supreme Court of Canada ruled on customs searches.[3] Consequently the Customs officers nor the Alberta Court of Appeal had the benefit of those cases.

In the *Collins* case the Supreme court of Canada had held that real evidence (as the condoms in the Greffe case) not obtained as a result of participation of the accused should rarely be excluded. The Crown argued that by applying the Collins test there was no reason for suppressing the evidence. However, the Supreme Court of Canada found that the prerequisite reasonable and probable grounds to the search were an issue. One officer testified that on the basis of confidential information received and background investigation, "I had grounds to believe that Greffe was going to be in possession of an unknown amount of heroin." That was inadequate and the Crown had at no point in the trial established that such grounds existed. What was the information received? What did the background investigation reveal? The officers believed.....and in retrospect they were right. That is no proof that there were grounds for the belief prior to the search and the contraband being found. The reasonable and probable grounds justifying the search are linked to the reasonableness of the search. The Crown had failed to satisfy the Court that such grounds existed and the body-cavity search was hardly conducted as incident to the arrest for traffic warrants. Therefore, the search was unreasonable and a very serious violation of Greffe's Charter rights, sufficiently grave to be an exception to the Collin's "real evidence" test. Said the Supreme Court of Canada:

> "In balancing the long-term consequences of regularly admitting the evidence in this case in the light of how it was obtained against the consequences of excluding it. I conclude that the balance tips in favour of exclusion."

The Crown failed to show that there were reasonable and probable grounds and consequently the court had no alternative but to find there were no such grounds. The rectal search was incident to the traffic warrant arrest. Condoning such a practice would bring considerable disrepute on the administration of our system of justice reasoned the court. Concluded the majority of the court:

> "Therefore, and not without great hesitation given the manifest culpability of the appellant, of a crime that I consider heinous, I conclude that the integrity of our criminal justice system and the respect owed our Charter are more important than the conviction of this offender."

Appeal allowed.
Acquittal was ordered restored.

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

[3] **R. v. Simmons & R. v. Jacoy** - volume 24, page 20 of this publication.

Note: Seven Justices heard this Greffe's appeal. The above synopsis is of the reasons for judgment authored by Mr. Justice Lamer, concurred in by three other Justices. The three remaining Justices dissented and found that considering the totality of the evidence there was no reason to draw the inference that there did not exist reasonable and probable grounds or that there was a "pattern of disregard" in the conduct of the authorities."

SEARCH AND CRIMINAL ASSAULT - RELIEF OF POLICE OFFICER (OR ANYONE) TO SEARCH A PRISONER LAWFULLY ARRESTED

CLOUTIER v. LANGLOIS - Supreme Court of Canada, 53 C.C.C. (3d) 257

Two constables witnessed Mr. D. Cloutier make an illegal right turn in his car. He was stopped and ticketed for this by-law infraction. Mr. Cloutier, a lawyer by profession, got into a heated discussion with the constables. When it was learnt that there was a warrant of committal outstanding for Mr. Cloutier for the unpaid traffic fine, an arrest was effected and a body search was conducted while Mr. Cloutier stood spread-eagle with his hands on the hood of the car. Mr. Cloutier was of the opinion that this "frisk" search amounted to an assault and he privately prosecuted the officers for this alleged Criminal Code offence.

The information was dismissed upon a trial. This was appealed to the Quebec Court of Appeal which entered a verdict of guilty. The officers appealed the convictions to the Supreme Court of Canada, which explored whether police officers at statute or common law have a right to search a person upon an arrest.

There was no doubt that the arrest was, due to the outstanding warrant, a lawful one - but was the search of Mr. Cloutier lawful.

The majority of the Quebec Court of Appeal held that the right to search a prisoner "only exists if the circumstances make such a search necessary to preserve evidence or to prevent escape or the commission of another offence by the person arrested." As these grounds had not occurred there was nothing that made any of these things reasonable or probable in the circumstances. Therefore, the search was a technical assault and a conviction was warranted.

The Supreme Court of Canada (S.C.C.) announced at the outset that this case is the first one, on the scope of power of the police to search a person who has been lawfully arrested. It also observed that the parties to this dispute did not raise issues in relation to s. 8 of the Charter in their respective submissions.

A lengthy review of British, US and interesting Canadian precedents followed on this common law issue. The S.C.C. concluded that a search of a prisoner lawfully arrested is incident to the arrest and does not require reasonable and probable grounds that the arrested person has anything on him that is evidence or something with which he can make good his escape. The Court considered it unnecessary to consider this aspect at greater length, but recognized the competing interest of the search incident to an arrest. These interests, of course, were the objects of law enforcement and the privacy of the arrested person. A "frisk" search is the least intrusive procedure to meet these objectives. Said the Court:

> "A 'frisk' search incident to a lawful arrest reconciles the public interest in the effective and safe enforcement of the Law on the one hand, and on the other its interest in ensuring the freedom and dignity of individuals."

However, the common law right to search upon arrest is not unlimited. Three prepositions can be derived from the common law in consideration of the underlying interests held the S.C.C.

1. The power to search is not a duty but a matter of discretion. Where the law "can be effectively and safely applied without a search" police do not have to conduct a search. Circumstances determine whether a search meets the underlying objectives.

2. A search must not be to intimidate, ridicule or pressure an arrested person to make any admissions. It must be to serve the ends of the administration of justice, such as the discovery of evidence, objects that may endanger the safety of the officers or anything with which the person may facilitate his escape.

3. The manner of the search must not be abusive and free of unnecessary physical or psychological constraints. Any of these must be proportionate to the objectives sought and the other circumstances of the situation.

A search outside these objectives are unjustified and unreasonable at common law. When within these objectives, a search is incapable of amounting to a criminal act such as assault.

The evidence adduced at the constables' trial for assault was that Mr. Cloutier had been "unpleasant and highly agitated and verbally abusive". Furthermore, there existed a departmental directive to search all arrested persons for weapons or any object potentially dangerous to arresting officers. The court held that the directive had absolutely no bearing on the case,

> "since the evidence of the officers who conducted the search was that they exercised this independent discretion taking into account all circumstances of this case."

The officers had simply considered that it was necessary to conduct the frisk search despite the fact that they had no reasonable and probable grounds that Cloutier had anything on him he could use as a weapon or that was evidence.

Held the Supreme Court of Canada:

> ".....the evidence showed to my satisfaction that the police searched the respondent in pursuit of a valid objective, here, police safety in making a lawful arrest."

Note: The Court's extensive review of the Canadian common law is worthwhile reading for any law enforcement officer. It contains the right to more intensive searches (strip and cavity) as well as what may be taken from prisoners. An interesting point is that in Britain the common law as akin to that of Canada (or perhaps vice versa) until 1984 when the Police and Criminal Evidence Act came into effect. Section 32 of that act stipulates that a search of a lawfully arrested person is authorized if "the constable has reasonable grounds (note the omission of "probable") for believing that the arrested person may present a danger to himself or others "or such grounds for believing" that the person has anything on him which he might use to escape or which might be evidence."

ADMISSIBILITY OF CONFESSIONS BASED ON VOLUNTARINESS AND CHARTER CONSIDERATIONS (VOIR DIRE)

REGINA v. BRUNEAU - BC Supreme Court, Prince Rupert 12933, May 1990

The following is the evidence adduced at a *voir dire* during the accused's trial for second degree murder. The issue was the admissibility of the accused's statements.

The finding of a woman's body caused a five month intensive police investigation and the arrest of the 29 year old accused.

The accused who had never been in trouble with the law before, still lived with his parents. He was described by police as pleasant, cooperative and remorseful. He only has a grade 8 education and is nearly illiterate. His vocabulary is limited although he is not considered to be of low intellect. He requires assistance from his family for nearly all of his personal administrative needs. He makes a living with various labour type jobs and playing in a rock band.

The accused was interviewed as a person who may be of assistance to the investigation. He was shown a composite drawing of the latent suspect but could not identify the person. He did acknowledge to have known the deceased woman. In the conversation the investigator had said to the accused that he thought the death was accidental. The officer conceded. The accused claimed that the officer had also said that if the person involved would come forward he was not likely to get more than a two or three year sentence.

Upon request the accused attended at the police station about a month after the first conversation he had with the investigators. He related his where-abouts on the night the woman met her death. The conversation was taped without his knowledge but with the consent of the officer.

The investigation subsequently to this interview revealed that the accused was the last person to have been with the deceased woman and that he had lied about his whereabouts at the time of the murder.

The investigating officers spotted the accused on the highway one late afternoon on his way home from work. They stopped and arrested him for the murder of the woman. He was warned and "chartered" and indicated clearly to understand. On the way to the police station he inquired, "How did you know it was me?" This was not explained to him at that time. He was asked to wait until they go to the Detachment where he upon arrival was booked. In the booking facilities there was a telephone and posters in French and English advising prisoners of their right to counsel. The accused was then taken to an interview room where after being "chartered" again, he confessed to have killed the woman. He signed the confession. The interview was intercepted and recorded in an adjacent room with the consent of one of the arresting officers. A transcript of this interview was introduced in evidence. At no time had the accused requested to contact a lawyer nor did the officer specifically ask him if he wanted to use a telephone for this or any other purpose.

An undercover officer was placed in the accused's cell under the guise that he was detained for a drug offence. The communications between the accused and this officer were also intercepted with the officer's consent. Due to poor quality of the tape, no transcript was possible. The accused had told the officer that he accidentally caused the death of the woman and that he had not intended to kill her. The officer testified that he believed the accused.

The following morning the accused had cooperated in a video taped re-enactment of the events surrounding the death of this woman.

Evidence showed that at every stage of this investigation that included the accused, he had been warned and "chartered".

Upon instruction of the watch commander at the Detachment the accused was not to communicate with anyone without the Commander's permission. The guards were also to minimize their communications with the accused.

When the accused did not show up at home for dinner at 5:00 p.m., his mother phoned a co-worker and was told that he had seen police pick up the accused on the highway. She then phoned the police but was told that no information could be released neither was she permitted to visit. She then attended, with her husband, at the police station, but not told of the reason why the accused was held and she was refused access to him. The family then phoned a relative in Ottawa who is a member of the RCMP. The relative phoned the watch-commander but he was also unsuccessful in gaining any pertinent information. Later in the evening the investigators attended at the accused's home and his brother spoke with them. He was told that the accused was charged with murder and was given some of the circumstances.

The following morning (the accused was slated to appear in Court at 1:30 p.m. that day) the brother consulted the family lawyer who made a phone call to the watch-commander and said he was asked by the family to act for the accused. He was told that the accused was an adult and had not asked for a lawyer. Consequently he did allow the lawyer to speak to the accused. The officer took the position that he would immediately have allowed the accused to speak to counsel had the request come from the accused. He conceded that he did not want the lawyer to interfere and advised the accused to remain silent. At least, when it was suggested to the watch-commander in cross-examination that, that was his reason for not allowing the lawyer to speak to the accused he replied, "That could be possible, yes..."

The accused also testified during the *voir dire*. He said he had understood that whatever he told police could be used in evidence against him. However, he had not understood his right to counsel. Police evidence supported the accused's claim that not at anytime was the word "lawyer" used when he was made aware of this right. His understanding of "counsel" was that it meant a person who counsels persons for personal problems such as alcoholism and the like.

Defence counsel argued that the statements the accused made when he voluntarily attended at the police station and the one he made when he arrived at the police detachment after his arrest were inadmissible due to inducement. The officer's statements that the death was believed to be accidental and would not result in more than a minimal sentence was the inducement.

He also argued that the warrantless arrests effected on the highway was without reasonable and probable grounds. In other words, at that stage of their investigation the officers did not have enough evidence to make the arrest. Consequently he had been arbitrarily detained

contrary to section 9 of the Charter. It was also submitted that the accused was aware that whatever he said could be adduced in evidence, but he was unaware that he could remain silent. Defence counsel claimed that S. 7 of the Charter (the right to life, liberty and security of the person) compels police to ensure that a person is aware of that right.

Another Charter argument was, of course, the infringement of the accused's right to counsel. Firstly as he had not understood the meaning of what he was told about that right and secondly that the accused was held "incommunicado" by the watch-commander.

Defence counsel also submitted on the basis of the recent *Duarte* decision by the Supreme Court of Canada[4] (as well as *Wiggens*) that the accused's right to be secure against unreasonable search and seizure had been infringed when police without his knowledge had intercepted and recorded his communication during the interviews.

The Court's Rulings:

In regard to the inducement, the Court held that the Crown had not proved beyond a reasonable doubt that what the accused told the officer at their first meeting was not induced by the officer's statement that he thought the death to be accidental and to result in a light sentence for whomever was responsible. However, the Court held that the inducement had not tainted the second pre-arrest interview of the accused at the police station, the time he attended upon invitation and lied about his where-abouts on the night the death occurred.

The confessions and statements the accused made after being arrested and booked were also excluded. The accused had only understood that whatever he said could be used as evidence. He had not understood that he had a right to remain silent. The defence claimed that authorities are obligated to make a person aware of this right under section 7 of the Charter (right to life, liberty and security of the person). The Court found that the BC Court of Appeal settled this issue recently in *R. v. Van Den Meersche*[5]. That Court held that the argument that failure to give the standard police warning advising a person of his right to remain silent had to be rejected as a breach of section 7 of the Charter. The Court also rejected that the police did not have the prerequisite grounds to effect the arrest and that therefore the confession was the result of arbitrary detention. The police did have adequate grounds to arrest the accused, furthermore, an arrest that falls short of relevant Criminal Code provisions is not consequently arbitrary. An arbitrary arrest is unlawful, but not all unlawful arrests are necessarily arbitrary.

However, the argument that the accused's right to counsel had been violated was valid. Said the Court:

> "The failure of someone in the accused's situation to equate counsel with lawyer is perhaps not as implausible as it might at first seem to persons familiar with the law."

The accused's right was to be made to understand that he had a right to legal assistance. The burden to prove that (that this was adequately conveyed so there was such understanding) is on the Crown. Here the Court found that it was "more probable than not" that the accused did not

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[4] See Volume 36, page 1 of this publication.

[5] (1989) 74 C.R. (3d) 161.

understand the meaning of what he was told by the officers. Therefore, by not asking for counsel the accused had not explicitly or implied the waiving of his right to counsel. How could he waive something he did not understand?

Furthermore, the watch commanders' action had caused an incommunicado detention. Even before the Charter came into effect it was well established that refusing outsiders (family, etc.) from having access to a detained person is in the absence of legitimate circumstances unjustified.[6] Concluded the Ontario Court of Appeal in 1957:

> "That right ought to be recognized and given effect in all cases, and care should be exercised by police authorities to see that it is not wholly disregarded."

The denial of access to the lawyer retained by the family without the knowledge of the accused did bear considerable weight to hold that the accused's right to counsel had been infringed to an extent that all statements the accused made after his arrest were excluded from evidence. Exempted from this exclusion were the statements made to the undercover officer who shared a cell with the accused and a statement he made to the investigating officer while in the cell block.

Comment: The defence arguments that the statements should fail as admissible evidence due to the taping of the conversations amount to unreasonable search and seizure were rejected. This Court held that if the practice amounted to unreasonable search and seizure, the officers had acted in good faith. After all at the time they did it (1988) the practice was an acceptable means of securing accurate records. The Supreme Court of Canada did not hold that the practice infringed a person's right to be secure against unreasonable search and seizure until January of 1990.[7] However, Crown Counsel advanced an interesting argument. He submitted that this case was distinct from Duarte and Wiggens. In those trend-setting cases the accused had spoken to undercover police personnel or an informer. In this case Bruneau had talked to persons he knew to be police officers. He therefore had no expectation of any privacy. After all, he conceded to have understood at the time he had made the statements that they could be used as evidence against him. This Court declined to rule on this submission as it was academic. If the Court would reject the argument it would not be capable of changing its impact on the admissibility of the evidence. If the unreasonableness of the seizure had been the only defence the evidence would be admissible just the same due to the "good faith" doctrine.

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[6] **Koechlin v. Waugh** (1957) 11 D.L.R. (2d) 447

[7] **R. v. Duarte** - Volume 36, page 1 of this publication. Also *R. v. Wiggen* in this Volume.

TAKING OF BLOOD FROM AN UNCONSCIOUS DRINKING / DRIVER SUSPECT - FLAWED SEARCH WARRANT TO SEIZE BLOOD TAKEN IN HOSPITAL

REGINA v. COCHRANE - County Court of Yale - Kelowna CR89/93. July 1990

In an interior town of BC a car with a driver and one passenger slammed into a bridge. The passenger was fatally injured and the driver (accused) was taken to hospital in a state of unconsciousness. Only one officer was on duty and he was at the scene in nine minutes. He determined who the driver was and he therefore was the logical person to attend at the hospital in case a demand for a breath or blood sample needed to be made. Officers who were called out from home to assist took over on the scene. This juggle and the fact that the officer attended a domestic call on his way to the hospital caused delay. There were consequently only minutes left of the two hour time period in which a demand could be made when the officer arrived at the hospital. The accused was then still unconscious and being attended to by a physician. The officer attempted after the necessary preliminaries to obtain a tele-warrant but was refused due to the two hour time expiration.

A number of vials of blood were taken from the accused for medical purpose. However, one grey capped vial was filled with blood for the purpose of determining the accused's blood/alcohol level. Before this quantity of blood was extracted from the accused the attending physician was told that the tele-warrant had been refused due "to a glitch or technicality". Some 8 hours later another Justice of the Peace did issue a search warrant for blood test from the accused for "hospital purposes". This Justice was not told that the tele-warrant had been refused or that the grey capped vial that was consequently seized, actually contained blood taken for forensic purposes.

During a *voir dire* to determine the admissibility in evidence of the results of the analysis of this blood during the accused's trial for a drinking/driving related offences, the physician testified. He said that when a patient is unconscious in circumstances as they were, blood alcohol level is important to determine whether the patient's condition is due to inebriation or head injuries. The candid and "well meaning doctor" told the Court of the carnage alcohol related accidents caused in that community. He candidly admitted that despite it being medically advantageous, he took the grey capped vial of blood so it would be available to the police if there was some legal way for them to obtain it. The doctor said to have been prepared to do whatever was within his power to assist in the prosecution of a drinking driver. This caused the Court to conclude that the analyzed blood had been taken for forensic rather than medical reasons and that the warrant used to seize it was flawed.

The Court also held that consequently the accused's right to be secure against unreasonable search and seizure had been flagrantly infringed and that the evidence of the accused's blood/alcohol content must be excluded.

ENTRAPMENT AND CROWN PRIVILEGE REGARDING EVIDENCE OF SIMULATED INGESTION OF COCAINE BY UNDERCOVER OFFICER

REGINA v. MEUCKON - BC Court of Appeal - Vancouver, CA 006779, July 1990

In considering the appeal of Mr. Meuckon, our BC Court of Appeal had the opportunity to give its interpretation of the entrapment decisions[8] by the Supreme Court of Canada. In terms of definition and practice the BC Court of Appeal did simply quote from the Supreme Court of Canada's decisions. However, some procedural contingencies were interesting and did shed some light on matters that were yet unexplored.

The issue of entrapment can only be raised by the defence after the Crown has proved guilt beyond a reasonable doubt. The defence can then move that the process of the Court has been abused due to the accused having been entrapped. The judge (not the jury) must then decide upon adduced evidence if there was entrapment. The burden of proving entrapment is on the accused, on the balance of probabilities.

Should an accused plead guilty subject to a consideration for a judicial stay of proceeding based on a claim of entrapment then the defence must lead evidence (without there being any burden on the Crown to prove absence of entrapment) of entrapment. If there is a plea of not guilty then the defence is permitted to cross-examine during the trial, any witnesses on issues related to entrapment even though the issue is irrelevant to the substantive charge.

An interesting issue of Crown Privilege arose in this case. The investigating officer who was claimed to have been involved in entrapping the accused had "simulated" an ingestion of cocaine, he testified. Counsel for the defence claimed that this could not effectively be done and he questioned the officer how this was done. The Crown claimed privilege and submitted that it was an issue of public interest. In other words the defence was attempting to show that the officer had ingested cocaine and that his claim simulation was a fabrication that consequentially affected his credibility shedding doubt on all of his evidence. The Crown objected to the officer explaining how the simulation was done as this would endanger undercover personnel that practised this method. The trial judge had agreed with the Crown's position and disallowed the question. This, the defence claimed, was erroneous in law.

The Crown's objection was not related to the answer revealing the identity of an informer, consequently s. 37 of the Canada Evidence Act governs this issue. The Crown therefore was obligated to certify orally or in writing that revealing the requested information affected "specific public interest". A Court is obligated to hear the submissions where necessary in the absence of the public and parties to the proceedings. The court may then order that the information not be disclosed or placed restrictions on disclosure where it "concludes, that in the circumstances of the case, the public interest in disclosure outweighs in importance the specific public interest." (Note that only Courts of Superior jurisdiction can adjudicate such a conflict).

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[8] **Mack v. The Queen and Showman v. The Queen** - Page 48 of Volume 33 of this publication.

The main matter to be considered is whether nondisclosure could affect the outcome of the trial. In other words, is the accused person by not disclosing the information deprived from making a full answer and defence. If the Court concludes that such is the case then the judge must give the Crown the opportunity to withdraw the claim of privilege or enter a stay of proceedings. Should the Crown decline to do so, then the judge must allow the introduction of the evidence. As this matter was apparently inadequately pursued ....

The appeal was allowed and a new trial was ordered

MUST THE PERSON WHO REFUSES TO GIVE A SAMPLE OF BREATH OFFER HIS/HER REASONABLE EXCUSE AT THE TIME OF REFUSAL?

REGINA v. OSBORNE - The County Court of Vancouver, C.C. 891689 - June 1990

The accused was under demand to provide breath samples. He called three lawyers and left a message for his own lawyer to call him. As the end of the two hour period approached he was requested to blow. Without any explanation as to why, he refused to do so. At his trial for refusing, a doctor testified that the rib injuries the accused suffered on account of a bar room brawl, three months prior to the date of the offence, were capable of causing him discomfort when breathing deeply. This he claimed, was his "reasonable excuse". The trial judge held that the accused should have offered his excuse to the officer at the time of refusal and he was convicted. He appealed the conviction to the County Court.

The defence was that the accused was made aware of his right to remain silent. He had exercised that right and it turned out to be a trap to have done so. He had shown that he had a reasonable excuse and he should not have been convicted.

The defence pointed out that the right to remain silent is deeply rooted in our legal tradition. It applies at the investigative as well as at the trial process stages and no adverse inferences may be drawn from an accused person not having given an explanation even where it could have explained his criminal actions. It was conceded that the law stipulates that refusing without a reasonable excuse is a crime, but it fails to say that the excuse must be offered at the investigative stage. As a matter of fact, if a suspect is compelled to disclose his excuse to the police then the warning that he has a right to remain silent is rendered meaningless, or worse, it becomes a trap.

At this trial the judge had followed a precedent established by the BC Court of Appeal[9] in the *Ferron* case. Ferron had been unable to contact his lawyer and failed to explain this when police told him to blow. This had given the officer a right to assume that Fellon had refused. The lack of an explanation also deprive police from establishing the grounds for a refusal, where this is possible. This means that remaining silent in such circumstances can result in consequences adverse to the interest of the person who exercised that constitutional right. The dissenting reasons for judgment reads as follows on this point:

> "I regret to say that I think counsel for the accused is right. If an accused is, as was found here to be the fact, attempting without delay to exercise his right under the Charter, to say that he does not have a 'reasonable excuse' for his refusal, would make a mockery of the Charter. His right is not the less a right because it has not been infringed by the police" ..... "....I cannot read in s. 238 (5) as if it said: without reasonable excuse disclosed to the peace officer."

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[9] **R. v. Ferron** 49 C.C.C. (3d) 432

It seems that the County Court judge reviewing this Osborne's conviction leaned toward the dissenting view in the Ferron decision. However, he was bound by the decision of the majority of the BC Court of Appeal. The trial judge had been entitled to take note of and ascribe weight to the fact that the accused advanced his reasonable excuse at trial only and not at the time he refused to blow.

Accused's appeal dismissed
Conviction upheld

THE AGENT PROVOCATEUR AS A "CELL-MATE"
CONSTITUTIONALITY OF THIS INVESTIGATIVE PRACTICE
RIGHTS OF DETAINED PERSON

REGINA v. HEBERT - Supreme court of Canada, 57 C.C.C. (3d), June 1990

When voluntariness was merely the single prerequisite to the admissibility in evidence of an accused's statement made to a person in authority, the practice of placing an agent provocateur in the cell with the accused to obtain some inculpatory evidence did not inhibit that evidence from being admitted. The Courts applied a subjective test as to the state of mind of the accused. He did not know that from an objective point of a view the agent was a person in authority. Consequently, no voluntariness needed to be proved and the statements so obtained are admissible. Since the advent of the Charter of Rights and Freedom as part of our 1982 entrenched constitution, the practice has been tested continuously in light of the right to remain silent. This issue reached the Supreme Court of Canada in June of this year when Hebert appealed an order by the BC Court of Appeal[10] (sitting as the Yukon Court of Appeal) to stand trial again on a charge of robbery.

After a lengthy investigation the accused was arrested on reasonable and probable grounds for believing that he had robbed the desk clerk at an inn. He was given an opportunity to speak to his lawyer who told him not to say anything. The accused complied and was placed in cells. Unbeknown to him his cell-mate was an agent-provocateur to whom the accused made incriminating statements. The admissibility of these statements became the kernel issue of the trial and appeals. Perhaps to shed as much light on this issue surrounding a police practice approved at common law[11], the synopsis of the reasons for judgment by the BC Court of Appeal may be helpful:

> The BC Court of Appeal dealt firstly with the right to counsel argument and what lawyer/client relations are involved. It reviewed pre and post Charter cases where casual conversations with persons in authority had become a contentious matter in terms of propriety and inclusion in the Crown's case. Pre-Charter cases establish that obtaining a statement by subterfuge and deception is acceptable and it seems from the post-Charter cases that this is left unchanged. However, distinction is made between trickery in the official interrogation setting and surreptitious setting such as using an agent provocateur.
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> In some cases the impropriety had been int he interview method where, for instance, a suspect was tricked or psychologically manipulated to respond to questions and/or suggestions after he clearly indicated to want to remain silent. silent. The casual conversation a police driver (who ferried a suspect to the courthouse) had with the suspect that was calculated to be a continuation of an unsuccessful questioning of the suspect, was a means of circumventing ethics as well as the right to counsel.

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[10] See Volume 32, page 5 of this publication.

[11] See **Regina v. Rothman** (1981) 59 C.C.C. (2d) 30.

Said one superior court justice:

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

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

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

The Supreme Court of Canada said in the trend setting Manninen[12] decision very much the same things although at the time Manninen made his utterances he had not received legal advice but had clearly stated he wanted to exercise his right to remain silent.

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

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

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

In relation to the undercover operation being a breach of the right to the principles of fundamental justice, the B.C. Court of Appeal did not see things in the defence counsel's light. Quoting from a U.S. judgement on the point the court ruled that judges are not to use the exclusionary rule to govern police conduct even if they find the conduct unfortunate, distasteful or inappropriate. The only time police practices in these circumstances are within their purview

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[12] See Volume 28, page 1 of this publication.

for exclusion is when the conduct is so inappropriate or repulsive that the community would be shocked; and this would only be the case if there is a clear connection between that conduct and the obtaining of the statement.

Defence counsel had apparently argued that these views were contrary to the precedent set by the Supreme Court of Canada.[13] However, the court reiterated in conclusion that these cases deal with the regular interrogation process and do not purport to deal with the issues and circumstances as they are in this case. Consequently the BC Court of Appeal allowed the Crown's Appeal and ordered a new trial. As stated above, the accused appealed this decision.

The Supreme Court of Canada (S.C.C.)

All nine Justices of the highest Court of the land heard the accused's appeal and they were unanimous in overturning the order for the accused to be tried again. The following is a synopsis of reasons for judgment reflecting the opinion of seven of the Justices.

The issues were simple and straight-forward:

1. Did the "cell-mate" practice cause the accused's right to remain silent to be infringed? He had been informed of that right by the same authorities who then by deception extracted inculpatory evidence from the accused.
2. Did the cell mate practice, in circumstances like these, violate the accused's right to counsel?

The S.C.C. held that the two questions and their underlying rights, were intertwined. It is not a question of how far is the reach of right to counsel or right to remain silent. The issue is one of application of the principles of fundamental justice.

When the Charter come into effect in April of 1982, it was not the law-makers' intent to anchor the law as it then was. It was clearly intended that the application of the entrenched rights and freedoms were to be applied broader and more general then the rigid rules as they were prior to the Charter. Therefore, the "confession rules" (at common law) must be considered in light of"the principles of fundamental justice". Furthermore the rights of a person must not be considered in isolation of one another. For instance, the right to remain silent must at all times be compatible with the right against self incrimination, the right not to testify and the right to counsel.

The confession rules had two underlying theories, each capable of a Court rejecting a pre-trial utterance made by an accused. If the statement was induced by a person in authority and adduced in evidence to prove the truth of its content, it should be rejected for being untrustworthy. The other dictum that could cause rejection of a statement is: "no one is bound to betray himself". Inducement by authorities received the objective test to determine if the accused person had made the statement in hope of advantage due to a promise or out of fear because of threat. He needed not to be told of any rights he had or to be aware of any of his options. The "confession rules" as they were, only extended the right not to be tortured or coerced.

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[13] **R. v. Clarkson** - Volume 24 - Page 36 of this publication
R. v. Manninen - Volume 28 - Page 1 of this publication

The absence of these and the accused's knowledge that he was speaking to a person who may effect the path of prosecution (a person in authority) rendered the statement to have been voluntarily made, the single prerequisite to admission in evidence.

The S.C.C. held:

> "The absence of violence, threats and promises by the authorities does not necessarily mean that the resulting statement is voluntary, if the necessary mental element of deciding between alternatives is absent." (emphasis added)

To cause the presence of that mental element the Crown will have to show that the accused was at the time he made the statement, aware of the alternatives. In other words, knowledge on the part of the accused, that he had a choice to speak or be silent is relevant to the voluntariness with which he made his statement.

Furthermore, there is a right not to have to incriminate oneself. Does this right only apply to trial procedures? If this right has no application at pre-trial stages, it is a mere illusion, reasoned the S.C.C. During trial an accused person has a clear and informed choice whether to testify. It should similarly apply at pre-trial and investigative stages. Said the Court:

> "The philosophie and practical relationship between the privilege against self-incrimination and the right of the suspect to silence prior to trial suggests that the same right of choice should prevail at the earlier phase of the criminal process". (emphasis added)

Then there is the relevant right to counsel. Said the S.C.C.:

> "The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to authorities. To assist in that choice, the suspect is given the right to counsel." (emphasis added)

> "The Charter ..... seeks to ensure that the suspect is in a position to make an informed choice by giving him the right to counsel." (emphasis added)

This does not mean that the suspect needs to have understanding of the legal implications involved, but must possess an operating mind when making the choices he has.

Section 7 to 14 of our Charter strikes a balance between the state's superior resources and a detainee by establishing the latter's rights. To trick a detained person into making a statement after he has exercised the right of conferring with counsel and declined to say anything to the authorities, violates that person's right to remain silent. Admitting evidence from a "cell-mate" operation is allowing police to do something indirectly they are prohibited from doing directly. This cannot be in line with the Charter, concluded the S.C.C. Any evidence resulting from pre-trial interrogation must have as a prerequisite to admission a meaningful choice on the part of the detained person whether he wants to speak to the authorities.

Does this mean that there is an absolute right to silence the Crown must prove was waived by the detainee, before it can be considered for admission in evidence? A waiver is subjective concept, consequently the detainee must know he is speaking to a person in authority. It would

then follow that where the detained person made pre-trial statements he would have to know that the person is an authority before the Crown can establish waiver. That would practically eliminate all statements made to nearly anyone. There is nothing in the Charter or the confession rules that suggest that the right to silence should be extended that for.

Instead the S.C.C. held that our Courts must have the power to correct abuses of power against individuals. It must be empowered to strike the precarious balance between the interest of police and the rights of the person "while allowing them to nevertheless admit evidence under s. 24(2) where, despite a Charter violation, the admission would not bring the administration of justice into disrepute."

The S.C.C. emphasized that their decisions in the case only applied to most-detention investigation practices. "Undercover operations prior to detention do not raise the same considerations". During pre-detention periods of investigation these rights doe not apply or affect evidence obtained by trickery. Seeking information by deceptive means (save entrapment) from a person who is not detained is entirely different.

It was also boldly stated that questioning a detained person in the absence of counsel after he retained and consulted counsel, is not prohibited by the rule. Presumably, counsel will inform the detainee to remain silent. As long as police at this stage are not posing as undercover officers and the accused chooses to volunteer information, there is no violation of the Charter. "Police persuasion, short of denying him the right to choose whether to talk to the authorities or depriving him of an operating mind, does not breach the right to silence."

The undercover cell-mate deprives the accused of the right to choose whether or not to speak to the authorities. However, should the accused speak freely to a bona fide cell-mate, such evidence does not affect the rights of the accused and whatever he said to that cell mate may be admissible in evidence. (It is implied that an informer who is a bona fide prisoner but planted with the accused to extract such information will be considered to infringe the accused's rights of choice).

There is a difference between deceptively observing a suspect or by similar means to actively illicit information from him. The latter would amount to deprivation of the right to choice to remain silent. If, by deceptive means police interrogate a detained person after he has indicated his wish to remain silent they illicit information they were unable to obtain without violating the accused's right to silence. Outside of eliciting behaviour on the part of the police, there is no violation of the accused's rights.

To put all of this into perspective the S.C.C. used a U.S. case[14] as an example. The police sent an undercover agent into the cell-block to listen to the conversations of the accused with other prisoners. He did happen to make inculpatory statements to his cell mates and the agent testified at his trial. The US Supreme Court held that the defence needed to show that the agent took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. About this, our Canadian Supreme Court said:

> "If the suspect speaks, it is by his or her choice, and he or she must be taken to have accepted the risk that the recipient may inform the police."

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[14] **Kuhlmann v. Wilson** - 477 U.S. 436 (1986)

In such cases the instructions to the agent are important evidence to support admissibility. In one Canadian case[15] where police did apparently anticipate problems with the conventional "cell-mate" approach the agent testified that his instructions were not to initiate any conversation with thea accused person; not to ask any leading questions if conversation did occur or do anything in attempt to gather information from his other than what he may say to *bona fide* ceil-mates.

When the accused in this Hebert case spoke to the undercover agent, he had not reversed his previous decision not to speak to the police. He wanted to speak to a fellow prisoner which is quite to a fellow prisoner which is quite a different matter. The trick to negate the accused's decision violated his rights. The admission of the evidence resulting from the deception would render the trial unfair and bring the administration of justice into disrepute.

Accused's appeal allowed
Acquittal restored

Synopsis of history regarding statements:

When one relates the utterances of another person in testimony, he can rarely vouch for the truth of the content of that statement. Consequently where such statement is adduced to prove the truth of its content the evidence is hearsay and is only allowed as an exception to the hearsay rule. Abhorrence and cruel excesses of the inquisition old, the ecclesiastical courts and the Star Chamber caused procedural protection to be put in place, "against the overwhelming power of the state".

Already in 1740 (when an accused person was not allowed to testify and could not rebut or clarify his statement) statements made to a person in authority under inducement or fear were considered unreliable.

To ensure reliability of such hearsay evidence the Court held in 1914[16] that only statements that were voluntarily given were admissible in evidence. This pretty well meant that all statements were admissible unless induced by threats, promises or violence.

It should be understood that the statement we refer to here were only inculpatory statements such as confessions or admissions. It was reasoned that exculpatory statements could be admitted as they favoured the accused. This was so until June of 1979 when the Supreme Court of Canada held that the rule applied to all statements. Mrs. Piche, the accused, allegedly murdered her husband and had given a statement to the police. That statement was exculpatory (denial of guilt) but the crown adduced it in evidence to destroy the accused's credibility should she decide to testify. The statement was an obvious lie. Due to the Crown's intention the Court held that the statement was akin to an inculpatory utterance and conducted a *voir dire*. The statement was held to have been involuntarily given and was suppressed. Mrs. Piche then

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[15] **Regina v. Logan** - (1988) 46 C.C.C. (3d) 354

[16] **Ibraham v. The King** - (1914) A.C. 559

testified and the Crown was blocked from cross examining her on the basis of the inadmissible statement. She was acquitted and the Crown appealed, saying that the exclusion of the exculpatory statement had caused an acquittal. The Supreme Court of Canada held that the trial judge had been correct. No statement made by an accused to a person in authority whether inculpatory or exculpatory, may be admitted into evidence unless the Crown proves that it was voluntarily given.

In the same year (1970) the Supreme Court of Canada handed down a controversial decision in an appeal by the Crown in *Regina v. Wray*. Wray had confessed to a murder and included in that statement where he discarded the murder weapon. Consequently the weapon was retrieved and a ballistics test proved that it indeed was the murder weapon like the trend of the fifties and sixties the judiciary were suppressing statements for reasons other than involuntariness to maintain a balance between fundamental rights and the evidentiary value of the statement or where they felt that admitting a statement would render the trial unfair. The trial judge in the Wray case had ruled that the confession was not voluntarily given and he disallowed the statement as well as the murder weapon and the results of the ballistics test. They were derivatives of the inadmissible statements he reasoned and that real evidence was also suppressed. Some authorise claim that motivated by the fact that a person who was factually guilty would legally be innocent, the Supreme Court of Canada did in fact remove all judicial discretion to disallow evidence derived from an inadmissible statement. Reliability become the sole issue. The confession itself could not be relied upon but the "subsequent facts" (the rifle and the ballistic test results) were reliable. After all, evidence <u>was</u> evidence regardless how it was obtained. While in other nations within the Commonwealth the judiciary encouraged the approach of the trial judge in this Wray case the Canadian system stopped the Canadian trend towards a more liberal "confession rule" and left our judges without discretion to reject statements on the ground they were unfairly obtained. After all, not only was the real evidence admissible but also that portion of the inadmissible statement that referred to that evidence. This strict rule remained in existence until new consideration had to be given to that issue after the exclusionary rule became entrenched law in our Constitution Act of 1982.

The trendsetting case in relation to our exclusionary rule was *R. v. Collins*[17], decided by our Supreme Court of Canada in April of 1987. The Court held in that case that <u>real</u> evidence should rarely be excluded just because there was a violation of a right. However, in Wray, the evidence was discovered not because of an unreasonable search but as a consequence of self-incriminating utterances by the accused and would not have been discovered if it was not for him making the statement. There may be a distinction between the consideration whether to admit that evidence. Needless to say that post-Charter cases have shed an entirely different light on these rules. This Hebert will cause a quantum change although the Supreme Court of Canada considered the consequences of their ruling to be minor. The found comfort in their opinion that in countries where similar confession rules operate the police are not inhibited from adequately investigating crimes.

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[17] See Volume 27, page 1 of this publication.

RANDOMLY STOPPING A MOTOR VEHICLE
ARBITRARY DETENTION

REGINA v. LADOUCEUR[18] - Supreme Court of Canada. May 1990 [1900] 1 R.C.S. 1257

Police Officers stopped the accused while driving his car on a city street for the sole purpose of checking the documents and licenses. When asked in cross examination if the stop was at random, the officer replied, "Pretty well, yes."

This random stop resulted in the officer discovering that the accused license had been suspended. The accused had already been convicted three time for driving whilst under suspension within the last five months. The stop occurred 10 days after the Charter came into effect and the accused claimed that he had been arbitrarily detained; that his right to be secure against unreasonable search and seizure had been infringed; that his right to security of the person and liberty had been violated; that the provincial Highway Traffic Act provisions that authorized police to stop him without articulable cause or as part of a well publicized law enforcement program is inconsistent with the rights mentioned above and was therefore without any force or effect. All these arguments failed at trial and appeal levels. The accused then appealed his conviction to the Supreme Court of Canada.

This was the third time in a decade that the issue of police randomly stopping cars came before the Supreme Court of Canada (S.C.C.). Before our Charter was proclaimed a Mr. Dedman[19] was stopped as part of a police program to fight the drinking-driver problem. There was nothing about his driving or his car that caused police to stop him. The S.C.C. did an incredibly interesting review of the common law authority for police to preserve life, protect property and ferret out crimes. It held that police had a common law right to stop cars randomly, "for the purpose contemplated by the programme".

In post-Charter days a Mr. Hufsky[20] was stopped by police for no apparent reason. It was found that he had been drinking and he refused to give a sample of breathe for a "road-side" breath test. The stopping was not part of a publicized program as in the Dedman case, but was part of a "road check" action by police. The S.C.C. held that the stop as well as the demand had separately constituted detention and Hufsky had been entitled to be informed of his right to counsel (which was not done). However as this would render the Highway Traffic Act provision for such a stop and the Criminal Code enactments providing for a road side breath analysis ineffective. The Court held that these laws and their operational requirements were in view of the carnage caused by irresponsible and drinking drivers, justifiable limits to the rights and freedoms set out in the Charter. It also held that inspecting documents required for driving, insurance and registration of a motor vehicle did not amount to search.

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[18] See Volume 30, page 19 of this publication and 3 C.C.C. (3d) 240 (Ontario Court of Appeal)

[19] **Dedman v. The Queen [1985] 2 S.C.R.** - Volume 22, page 17 of this publication

[20] Volume 31, page 10 of this publication.

In this Ladouceur case there was no publicized programme or a road check action by police involved. There were just two constables on patrol who randomly and capriciously stopped the accused. There simply was no articulable reason for the stop. The accused consequently claimed that his situation was distinct from those of Dedman and Hufsky.

The S.C.C. again reflected on the statistics of over 1000 persons killed on Ontario highways in a period of four years as well as a near 100,000 persons who were injured. Also property damage had amounted to a half a billion dollars. Those statistics [21] also clearly indicated that unlicensed and uninsured drivers had caused more of these accidents than those licensed and insured. The severity of the accidents caused by the former category exceeded those that involved the latter group. With regard to driving under the influence of alcohol or a drug the statistics were very clear. Thirty one percent of all fatal accidents involved drivers under such influence.

The S.C.C. reasoned that finding unconstitutional the provisions in provincial traffic statutes, that provide for police randomly stopping motorists, is not in the public interest. The primary objective of the provisions is traffic safety and not apprehending offenders. To discover after someone has been killed or victimized that the driver or vehicle was unsafe is an unthinkable alternative. Driving is a privilege and a licensed activity.

Again, it was pointed out that mechanical defects, driver inabilities or, particularly, the abuse of insurance or license do not manifest themselves while a vehicle is being driven down a road. To hold that the prerequisite to a stop must be suspicion, reasonable cause or some other articulable reason would cause these provisions in law to be reactive rather than preventative as they are designed to be. The infringement of the right not to be arbitrarily detained is in this case outweighed by the legislative objectives to minimize our slaughter on the highway. The probability of being apprehended is an effective deterrent, concluded the Court. In the absence of intrusive searches or other police practices that would exceed the minimal inconvenience a normal spot check is intended to be, the impairment of the right not to be arbitrarily detained is demonstrably justified under s. 1 of the Charter. The accused's other constitutional arguments were similarly rejected.

Appeal dismissed

Note: One Justice, who agreed with the majority of the Court, observed that police had to exercise this power to stop motorist at their whim responsibly. A Charter infringement may well occur if the reason for stopping a motorist is due to racism, age or discriminatory factors.

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[21] Ontario Motor Vehicle Accident Facts; 1984.

LEGAL TID-BITS

CROWN'S CONFLICT OF INTEREST - RELEVANCE OF "BASEBALL BAT" EVIDENCE IN THE DRUG TRADE

The accused was charged with drug offences and was prosecuted. Crown Counsel was "ad hoc", a lawyer who had some six years ago defended the accused when he was charged with possession of narcotics and a weapon. Another lawyer of the same firm, was at the time representing the accused regarding some auto insurance dispute. The accused's current counsel was made aware of all this by the Crown lawyer and a specific consent was given; at least Crown counsel was assured that no objections would be taken. When the trial resulted in a conviction the accused appealed claiming that his right to a fair trial had been infringed (11(d) Charter). The Quebec Court of Appeal rejected the grounds for appeal. The lawyer for the Crown had conducted himself appropriately and there was nothing to indicate that he had been in any conflict. No information the lawyer may have had about the case six years ago was used. By specifically consenting the accused had also specifically waived any objections to the lawyer acting for the Crown during his trial. Another issue was that the accused had been apprehended mid-March while driving his car, which contained a cellular phone, a baseball bat and a fish-club. These items were not entered as exhibits but the find had been included in testimony. For the accused who had no visible means of support, the cellular phone seemed a superfluous item while the bat and club are useful items of defence or aggression in the drug trade. The accused argued the Crown had failed to show any relevance of these items to the alleged offences. Baseball was out of season as was fishing and the presence of the items appeared to be linked to the allegations. Appeal was dismissed.

Regina v. Joyal - 55 C.C.C. (3d) 233.

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PRELIMINARY INVESTIGATIVE QUESTIONS - WHEN DOES DETENTION BEGIN?

The accused was in hospital as a result of injuries sustained in a motor vehicle accident. Shortly after the accident the investigating officer attended at his bedside. In the presence of the accused's wife, the officer made some inquiries from how he felt to how much he had to drink and when his last drink had been consumed. The answers resulted in a demand for a blood test which the wife suggested he should get over with. The right to counsel warning accompanied the demand. This, it was claimed was too late as the accused was detained from the time the officer began his questions. The BC Court of Appeal disagreed with this position. Depending on circumstances of course, the asking of some questions at the outset of an investigation from a person who may turn out to be involved in a criminal act does not cause the person being questioned to be detained. In this case detention started when the demand for a blood sample was made. Conviction of "over .08" was upheld.

Regina v. Kay - 53 C.C.C. (3d) 500.

CONSTITUTIONALITY OF INTERCEPTING PRIVATE COMMUNICATIONS WITH CONSENT. UNREASONABLE SEARCH AND SEIZURE

The accused requested a police informer to invest in his operation of importing narcotics. Police provided the informer with money to make the investment and equipped him with a body-pack when he interviewed the accused about his operation. Police intercepted and recorded the conversation with the consent of the informer. The accused appealed his conviction of conspiracy to import narcotics to the Supreme Court of Canada. He did, of course attack the admissibility of the recording claiming that the interception by police had infringed his right to be secure against unreasonable search and seizure[22]. The Court reiterated that the provision in the Criminal Code of Canada that renders such interception with the consent of one party, lawful is not unconstitutional. However, when police make such a "participant electronic surveillance" it does violate the Charter Right of the party who did not consent to the interception. However, the accused had failed to show that admitting the evidence would bring the administration of justice into disrepute. Conviction upheld.

Regina v. Wiggens[23] - 53 C.C.C. (3d) 476

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AWARENESS OF DIFFICULTY WITH STEERING MECHANISM ACCIDENT CAUSED WHILE DRIVING NORMALLY - CRIMINAL NEGLIGENCE CAUSING DEATH

The accused drove a 1972 vehicle that was generally in poor shape. For three days prior to a collision that caused two deaths the accused was aware that the steering on his vehicle was acting up. He drove normally when according to the accused " the steering gave", with the accident as a consequence. The accused, who was not a mechanic, had checked the front end of his car and installed new shocks and "ties". However this did not remedy the "acting up", and the accused said to have postponed any further adjustments or repairs until his brother would come and assist him. The trial judge had held that this evidence was inadequate to support a charge of criminal negligence. The Crown appealed this verdict to the BC Court of Appeal. The acquittal of the accused had followed a motion of "no-evidence". The BC Court of Appeal found this to be erroneous and found that there was substantial evidence. Wilful blindness to risk can support criminal negligence.

Crown's appeal allowed, new trial ordered

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[22] See **R. v. Duarte** - Volume 36, page 1 of this publication

[23] **R. v. Wiggens** - Volume 30, page 15, BC Supreme Court (trial)
- Volume 32, page 30, BC Court of Appeal

RIGHT TO COUNSEL AND AFFORDABILITY
POLICE TO INFORM SUSPECT OF LEGAL AID

The accused was arrested and interrogated by Alberta police personnel in Manitoba. He was informed of his right to counsel and given plenty of opportunity to contact a lawyer to advise him on the second degree murder allegation against him. The accused inquired if Legal Aid was available in Manitoba. He indicated not being able to afford a private lawyer. The Alberta officers told him that they assumed that there was such a service but asked him if he thought there was reason for him to speak to a lawyer. "Not right now, no", replied the accused. The interview continued and the accused made some statements after which he stopped speaking to the officers other than to request Legal Aid. Police got the accused a Legal Aid lawyer who advised him not to give any more information to police. The trial judge held that the accused's initial inquiries about Legal Aid and Police not assisting him then to contact that service, amounted to an infringement of the accused's right to counsel. The statements the accused had made were consequently suppressed and he was acquitted. The Alberta Court of Appeal disagreed with the trial judge and ordered a new trial. The accused appealed to the Supreme Court of Canada which allowed his appeal and restored the acquittal. Although it found that the conduct of the officers had not been flagrant or blatant, they had seriously erred when they failed to inform the accused (or discover for themselves) that a Legal Aid duty counsel was available. The accused had been left with the impression that financial inability to afford a lawyer prevented him from exercising his Charter right to counsel.

Regina v. Brydges - Supreme Court of Canada [1990] 1. S.C.R. 190, February 1990.

A SUPERFLUOUS APPEAL

A lawyer's BMW was clocked in 1987 by a Multinova at 81 K.P.H. in a 60 K.P.H. zone. The lawyer was charged with speeding as the registered owners of the car under the vicarious liability clause of the Motor Vehicle Act of BC. This clause was extensively amended in 1988 in an apparent attempt to bring it in line with the Charter of Rights and Freedoms. The accused was convicted and the conviction was upheld by the County Court. The accused then appealed to the BC Court of Appeal which found that the vicarious liability clause in 1987 was unconstitutional. This resulted in the appeal being allowed and the conviction was set aside. Needless to say the litigation was superfluous in terms of setting a precedent. The provision of the Motor Vehicle Act the Court had to review was obsolete. This caused the Court of Appeal to comment that the thousands of dollars of taxpayers money it took to exhaust the appeal system had a single benefit. It saved the owner of the BMW a $75.00 fine. One Justice of the Court of Appeal wrote a separate judgment in the form of a reprimand. After having summed up the incredible waste, he wrote:

> "Thirdly, whatever happened to the precept that one should take one's punishment like a man? Somebody who had possession of the vehicle, a BMW, with the appellant's consent drove it considerably over the speed limit on the Stanley Park causeway in rush hour and the appellant, a lawyer, should have been man enough to take the punishment for letting such a person drive, i.e. pay the sum of $75.00 which does not seem to be beyond the financial capacity of the owner of such a motor vehicle, even if the driver, whoever he or she was, was not prepared to reimburse him"....."I cannot but express my regret at this result....."

Regina v. Geraghty - BC Court of Appeal, N0 CA010262 Vancouver, April 1990.

CONSTITUTIONAL VALIDITY OF PROVISION THAT CONSENT IS NO DEFENCE FOR SEXUAL ASSAULT WHERE THE COMPLAINANT IS UNDER THE AGE OF FOURTEEN AND THE ACCUSED IS MORE THAN THREE YEARS THE VICTIM'S SENIOR

At the age of twenty-one years the accused had sexual intercourse with a thirteen year old girl. Due to the provisions contained in S. 150.1 C.C. the accused was deprived of raising the defence of consent. The section stipulates that where the complainant of sexual assault is under the age of fourteen an accused cannot raise consent as a defence if he is more than three years older than the complainant. The essential element of assault is the touching without consent, consequently the section removes that element from the offence's definition, placing a lesser burden of proof on the Crown. This discrimination is one exclusively on the basis of age and therefore contrary to s. 15 of the Charter. The Supreme Court of Prince Edward Island found that s. 150.1 C.C. cannot withstand the test under s. 1 of the Charter as being demonstrably justified in a free and democratic society. The Court held that the section is without force or effect in so far as it is inconsistent with the Charter. This, of course, meant that the accused could raise the defence of consent.

Regina v. R.S.M. - 57 C.C.C. (3d) 182.