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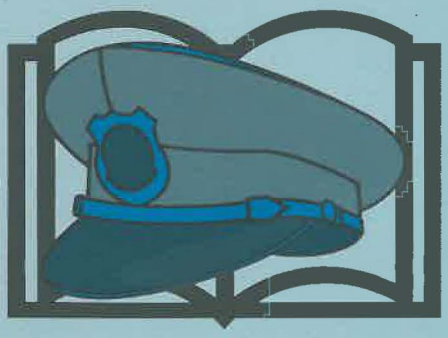
ISSUES OF INTEREST
VOLUME NO. 40



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ISSUES OF INTEREST

VOLUME NO. 40

Written by John M. Post
February 1992

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CONSTITUTIONALITY OF ROADSIDE SOBRIETY TEST TO GAIN REASONABLE AND PROBABLE GROUNDS FOR DEMAND FOR SAMPLES OF BREATH

REGINA v. KREUTZER - Supreme Court of BC, Vancouver No. CC901652, May 1991

In November of 1987 the BC Court of Appeal held that having a suspected impaired driver perform basic sobriety tests at the scene amounts to detention and requires the investigating officer to make the suspect aware of his right to counsel[1].

In January of 1989, a rare five person (usually three) division of the BC Court of Appeal reversed this decision and joined other Courts of Appeal in saying that though the suspect is detained while performing the test the suspension of Right to Counsel until the demand is made is justified. The investigating police officers must have some means to elevate their suspicion to reasonable and probable grounds[2]. The defence had also argued that the rules of evidence respecting statements apply to the roadside sobriety test. After all one is not obliged to carry out the test and it should be voluntary. The BC Court of Appeal rejected this notion.

In June of 1990 the Supreme Court of Canada decided a case where Mr. Hebert, a robbery suspect, decided to remain silent after he spoke to his lawyer. An undercover cellmate did get an inculpatory statement from him[3]. The Supreme Court of Canada held the State was obliged to allow Hebert to make an informed choice whether or not to speak to authorities. Objectively the undercover officer was a person in authority. The State therefore obtained surreptitiously what it could not obtain openly. Hebert had thereby been deprived of this right to choose whether or not to give the State self incriminating evidence. The evidence obtained by means of the cell mate approach, was ruled to be inadmissible. This ruling, according to Kreutzer's defence counsel, links the rules of evidence respecting statements with any police action (including a roadside sobriety test) where a person is asked to criminate himself and is not aware that he in fact has a choice. This unawareness, he argued, deprives a person who is subjected to a roadside sobriety test of the right to choose as much as Hebert was deprived of that choice when he unknowingly spoke to a person in authority. In other words, not all of the Bonin decision did survive the Hebert case.

Ms. Kreutzer, the accused, was stopped by police and was told of her right to counsel. Without the "usual police warning" that she could remain silent she was made to (asked to?) perform a roadside sobriety test. Then a demand was made of her to supply samples of her breath and she subsequently refused to blow. The trial judge dismissed the charges of refusing and impaired

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[1] R. v. Bonogofki - Volume 29, page 1 of this publication.

[2] R. v. Bonin - Volume 34, page 1 of this publication.

[3] R. v. Hebert - Volume 37, page 16 of this publication - 57 C.C.C. (3d)

driving holding that the Hebert decision overshadows the Bonin case. The lack of awareness that she had a choice, caused the suppression of the evidence of the roadside test which gave the officer the grounds to make the demand and was part of his evidence of impaired driving. The Crown appealed the acquittal claiming that the trial judge was wrong to hold:

1. That absence of the police warning that the accused was not obliged to say or do anything was a violation of s. 7 of the Charter;

2. that the statement by means of which the accused refused to blow, were part of the prohibited act (refusal) and should be included in the evidence that was suppressed; and

3. that the wrong test was used to determine if there was enough evidence to prove impaired driving.

Firstly, the BC Supreme Court Justice held that there is a considerable difference between a person saying, "I did it" and a person under demand saying, "I won't blow". The former is a confession where voluntariness is one of the prerequisites to admission in evidence and the latter is the gravamen, the very act that is the offence of refusing. Voluntariness simply plays no part.

The Court did acknowledge the apparent broad scope of the Hebert decision but was seemingly reluctant to hold that the defence's version, that the roadside sobriety test is in law indistinguishable from statements respecting principles of justice regarding incrimination. He also found that no warning of voluntariness needs to precede a roadside sobriety test. *(see R. v. Heal*[4]*)*.

If the Supreme Court of Canada decision overruled the decisions by the BC Court of Appeal, it is for them (B.C.C.A.) to say so.

Crown's appeal was allowed
New trial was ordered

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[4] R. v. Heal - Volume 35, page 18 of this publication.

IS THE CROWN, IN A CRIMINAL PROSECUTION ALLOWED TO INTRODUCE IN EVIDENCE THE STATEMENT AN ACCUSED WAS COMPELLED TO MAKE TO AN I.C.B.C. ADJUSTER?

REGINA v. SPYKER - Supreme Court of BC, 63 C.C.C. (3d) 125, November 1990

The accused was involved in an accident and was consequently charged with dangerous driving causing death. In compliance with the Insurance Motor Vehicle Act he gave an I.C.B.C. adjuster a statement that apparently was helpful to the Crown in prosecuting the accused for the dangerous driving charge. Without an explanation how this statement (despite statutory provisions that such statement may not be made public) came in possession of Crown Counsel, it was adduced in evidence via the subpoenaed adjuster. The accused claimed that the Crown could not introduce the statement into evidence. The question of law that arose, appeared to be not whether or not the statement was admissible but whether it could be introduced. "The accused ..... was obliged by law to give the statement. Can it now be used against him?"

The evidence (the statement) had not been obtained in a manner that violated the Charter, consequently the exclusionary rule (s. 42(2) Charter) did not apply. Neither did the provisions of s. 11 of the Charter, as they only apply where a person has been charged with a criminal offence. At the time the accused gave a statement he had not been charged. Yet the actions of the Crown are clearly within the authority of Government and consequently the Charter does apply (see s. 32 Charter).

The Court found that if the Crown would be allowed to adduce the statement into evidence the accused (who was by statute compelled to make the statement), in essence, was conscripted to provide testimony against himself. That would violate s. 7 of the Charter as such practice is contrary to the principles of fundamental justice. That one is compelled to make a statement for insurance purposes is appropriate, but to then use that statement in a criminal prosecution is inappropriate for reasons stated above. This balancing of interests should be provided by the Courts under s. 24 (1) of the Charter as a remedy that is fair and just. The Court consequently ruled, not that the statement was inadmissible but that the Crown is prevented from introducing the statement into evidence.

DOES THE "BUY AND BUST" OPERATION AMOUNT TO ENTRAPMENT?

REGINA v. BARNES[5] - Supreme Court of Canada, 63 C.C.C. (3d) 1. February 1991

Statistics showed that 25% of all drug related charges were committed in a six block stretch of a pedestrian mall in Vancouver. Consequently police launched a "buy and bust" operation. The accused had been approached by an undercover policewoman and was asked, "Got any weed?". The accused's answer was "No". Encouraging remarks from his companion made her ask again. She was refused once more but then provided with $16.00 worth of Hash. The accused was arrested and his "stock" was seized.

The trial judge had found that the accused had committed the offence of trafficking but stayed the proceedings, thereby preventing a conviction. The policewoman did not know the accused and had only selected him as a target on "a hunch, a feeling ....." based on demeanour and appearance of the accused. This had amounted to random virtue testing[6] amounting to entrapment, held the trial judge.

The Crown successfully appealed the trial judge's decision to the Court of Appeal for BC. It ordered a new trial holding that the issue was not one of random virtue testing but whether the policewoman had induced the commission of the crime by having gone beyond providing him an opportunity to do so. She had not. The accused appealed this decision to the Supreme Court of Canada.

In a majority (7 to 2) decision the Supreme Court of Canada (S.C.C.) held that the accused had not been entrapped. Entrapment (an aspect of abuse of the process of the Court) is viable where the accused shows that the authorities provided him with an opportunity to commit an offence without acting on a reasonable suspicion that he was already engaged in criminal activity or where the authorities were engaged in a *bona fide* inquiry. It can not be said that the policewoman had a reasonable suspicion that the accused was already engaged in drug related criminal activities. The question remaining was whether the policewoman had extended the accused an opportunity to sell her cannabis while engaged in a *bona fide* inquiry.

The rule, basic to entrapment, is that the police may only give persons an opportunity to commit an offence if they have a reasonable suspicion that they are already engaged in that particular criminal activity. However, of self explanatory necessity, there is an exception to that rule where police conduct a *bona fide* investigation in an area where it is reasonably suspected that

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[5] See R. v. Barnes - Volume 36, page 23 of this publication.

[6] See Mack v. The Queen - Volume 33 page 48 of this publication.

criminal activity is taking place. When such an area has been adequately defined, then police may extend an opportunity to anyone found within that area to commit the criminal activity they have identified is occurring there.

Mr. Justice MacIntyre (as he then was) wrote the reasons for judgment in the landmark Mack decision that allowed the judiciary to stay proceedings as an aspect of the abuse of the process of the Court, where it was established by plea or trial that an accused had committed the offence alleged against him, but had been entrapped. He gave a down to earth example that befits the circumstances of the Barnes case. If police would put a purse at a bus station to see if anyone will steal it, is random virtue testing and amounts to entrapment. However, if purse or baggage thefts were occurring at that bus depot and if the placing of the purse was consequently part of a *bona fide* investigation, then the providing of the opportunity to steal that purse does not amount to entrapment.

In this case statistics showed that police had cause to repress the drug trade in that pedestrian mall. Hence they were involved in a *bona fide* inquiry in an area where those offences were occurring and were entitled to give anyone found in that mall the opportunity to commit a drug trade offence.

As this decision rendered the BC Court of Appeal reasons for ordering a new trial superfluous, the Crown suggested the S.C.C. set aside the order and convict the accused.

The S.C.C. held it had no jurisdiction to do so. It was the accused's appeal with the objective that the "new trial order" be quashed. The S.C.C. could only allow that appeal or reject it. This means that the accused must, despite the issue of entrapment being settled, be tried again despite the fact that guilt was already established at the conclusion of his first trial.

Accused's trial dismissed
Order for new trial upheld

ACCUSED PROMPTLY REFUSING TO BLOW UPON DEMAND. WAS REFUSAL CONDITIONAL TO HAVING CONTACT WITH COUNSEL? SHOULD OFFICER HAVE REPEATED OR REMINDED ACCUSED OF THE DEMAND?

REGINA v. SULLIVAN - Court of Appeal for BC, Vancouver CA011073, June 1991

According to the accused the accident he was involved in was not his fault due to the driver of the car he collided with being of the opposite sex and of a descent (a visible minority) that should not be allowed on the road. Consequently he advised the constable who demanded a breath sample from him, that he was not giving any such samples. Furthermore, the accused had "the best lawyer around" for a brother-in-law. He implied that remedial legal action would follow upon this brother-in-law hearing about this.

This statement by the accused took place on route to the police station. The officer responded, "Are you refusing to provide me with a sample of your breath now, Sir?" The accused answered, "You got that right, I'm not blowing".

Upon arrival at the police station the accused spoke for at least fifteen minutes to his lawyer. At the end of that conversation the officer upon request of the accused, spoke to the lawyer. Consequent to this the accused was issued an appearance notice for refusing to provide breath samples. The whole procedure at the police station had taken approximately 30 minutes and the accused was not asked again nor was given an opportunity to provide samples of his breath. The accused had not at any time indicated that he had changed his mind about his refusal to blow.

An interesting issue was raised in the accused's appeal from his conviction for refusing. His counsel submitted that the initial refusal in the police car was conditional. The tenor of what the accused had said to the officer was, "I'm not doing anything until I talk to my lawyer". That was part of his right to counsel and his refusal at this stage did not make the offence of refusal complete. He had not waived that right and did exercise it. If the officer had reminded him of the demand after the consultation with the lawyer and had then refused, the offence would have been completed. To accept his refusal when he wanted still to consult counsel amounts to a violation of the accused's right to counsel, he argued. At the time he refused he did so to firstly gain legal advice. Considering his rights he had a reasonable excuse to refuse at the time he did so.

The Court of Appeal for BC said that there had to be proof that the accused had refused by the time he left the police building upon his release. His conviction had been based on that premise. Indeed, the offence of refusal was not complete when he told the officer in the police car that he would not blow.

There was no doubt that a proper demand had been made. This demand continued in full force and effect from the time it was made at least until the officer released him on an Appearance

Notice. Said the Court:

> "Once the demand has been made, the accused cannot either by the words he speaks or tight-lipped silence, thrust upon the peace officer any further obligation to speak."

After the accused had spoken to his lawyer and did not make himself (of his own initiative) available to fulfil the obligation the demand had placed on him, the refusal he uttered did convert from a conditional to a non-conditional refusal.

The evidence did not reveal the officer/lawyer conversation - not even a glimpse of its tenor. It may well have confirmed the accused's refusal and caused the officer not to extend a reminder, invitation or even a renewed demand (with the information that refusing constitutes an offence) to the accused. The BC Court of Appeal rejected the suggestion that the officer was in the circumstances obliged to do so. Instead the accused should have disabused the officer of her view that the refusal was non-conditional and stood. The common sense thing to do would have been for the accused to say, "Okay, where do I go to blow." Then if the officer would have said, "Too late" his defence arguments would have been valid.

The closing words of the Court on these issues were:

> "He did not do the perfectly obvious and common-sense thing. Why should he be heard to complain about an imagined violation of rights? Complaints of Charter violations must still have an air of reality about them. In these circumstances, there is none".

Appeal dismissed
Conviction upheld

INTERCEPTION OF PRIVATE COMMUNICATION
ACCESS TO SEALED PACKET - VALIDITY OF AUTHORIZATION
PROTECTION OF INFORMERS - EDITING - CROSS EXAMINATION
OF AFFIANT

REGINA v. GAROFOLI - Supreme Court of Canada, [1990] 9 S.C.R. 1421, November 1990.

Garofoli and four others were convicted of conspiracy to import cocaine from Florida. There were four authorizations to intercept Garofoli's and the private communications of others. The admissibility of the evidence obtained by means of these judicial licences to listen in, was at the heart of the grounds for appealing Garofoli's conviction to the Supreme Court of Canada (S.C.C.).

During Garofoli's trial a *voir dire* was conducted to determine the admissibility of the wiretap evidence. The trial judge refused to open the "packet"; disallowed cross-examination of the affiant and held that the evidence was admissible. The next day, Garofoli did not show up for the continuation of his trial. He was no where to be found. Crown evidence showed that, "he voluntarily absented himself from his trial for the purpose of frustrating or avoiding its consequences". The trial judge then ordered continuation of the trial. Garofoli was convicted and sentenced in absentia with his lawyer conceding at the latter stage that Garofoli indeed had absconded. S.C.C. found no fault with what the trial judge did in this regard.

All but one of Garofoli's grounds for appeal were dismissed. The S.C.C. granted him a new trial as it found that he should have been permitted to cross examine the applicant for the authorizations.

This, and some other cases recently heard by the S.C.C. shed considerable light on post-charter and post-amendment interpretations of the Invasion of Privacy Act contained in the Criminal Code of Canada.

The issues addressed are:

1. What is the entitlement of an accused person to the content of the sealed packet?
2. Upon what grounds and in what Court can an accused person challenge an authorization for a wiretap?
3. If errors, flaws or improprieties have occurred, then what is the appropriate remedy?
4. When the information relied upon to obtain an authorization, comes from an informer, then what special requirements apply?
5. What procedure and what principles apply to the editing of the sealed pack content?
6. Is an accused person entitled to cross examine on the affidavit upon which the authorization was granted?
7. If the authorization does not contain a minimization clause, does it then amount to a judicial licence to conduct an unreasonable search and seizure (s. 8 Charter).

Question 1: Access to sealed packet.

The S.C.C. held that all the precedents restricting access to the content of the sealed packet no longer apply. An accused is, due to the provisions of s. 7 and 8 of the Charter, entitled to have the packet opened and, subject to editing, have its content produced. It is a principle of fundamental justice that an accused person be enabled to give a full answer and defence to criminal allegations.

Question 2: Grounds for challenging authorization - What Court has jurisdiction?

The S.C.C. conceded that the law to test admissibility of wiretap evidence has become a procedural quagmire. At least three different procedures have been developed with jurisdiction varying from the issuing judge to the trial judge with variations depending on the issues.

Consolidation of these cases is necessary held the S.C.C. However, the court was prevented from streamlining it as much as they wanted to, due to Parliament's enactments. It seems that if the S.C.C. could have its way, it would hold that any judge competent to preside over the criminal proceedings in which authorizations are challenged, should have jurisdiction to open the sealed packet, edit its content, disclose it to the defence, and deal with the admissibility of the evidence. However, only designated or an issuing judge may open the packet (this does not include reviewing the content) according to the C.C. But, the Charter being part of the supreme law, provides a clear alternative basis for resort to the court and with it the appropriate grounds for determination whether there has been a breach of s. 8 of the Charter (unreasonable search and seizure). Consequently applications for review of the content of the packet for this purpose must be made to the trial judge, leaving the determination of the admissibility of the evidence thereby obtained to that judge. Although this gives in some circumstances, the appearance that a judge of an inferior court reviews an authorization issued by a superior court, it in essence is not so. According to s. 24 of the Charter the trial court is. A court of competent jurisdiction to determine the admissibility of evidence.

Question 3: What are the appropriate remedies if flaws, or improprieties have occurred.

In 1983, in *Wilson v. The Queen*[7] the Supreme Court of Canada held, that unless it was shown that the application for an authorization had been obtained by misleading the designated judge, by fraud or lack of total disclosure, a trial judge is precluded from reviewing the authorization. Since then the S.C.C. has held that the interception of a private communication is a search and seizure. To examine if a search is reasonable a trial judge must determine if the Code requirements have been satisfied. This, since the statutory conditions are identical to the requirements under s. 8 of the Charter. When the trial judge concludes that, based on the record, the authorizing judge could have granted the authorization, then he should not interfere.

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[7] Wilson v. The Queen - [1983] 2 S.C.R. 594

If the trial judge finds that the interception is unlawful, then due to the strict exclusionary provision contained in the invasion of privacy laws of the Code, the evidence thereby obtained is inadmissible. The conditional exclusionary provision in s. 24(2) of the Charter cannot have the effect of making the evidence admissible because it would not bring the administration of justice into disrepute. Accordingly an accused who has invoked s. 24 of the Charter and establishes that an authorization was unlawfully obtained is entitled to have the evidence excluded under the strict exclusionary rule of the Privacy Act [s. 189 (1) C.C.].

Question 4: What special requirements apply if the information in an application comes from an informer?

The S.C.C. acknowledged that information from an informer can provide the reasonable and probable grounds for a search (interception of private communication). However, by itself such information is incapable to provide such grounds unless the reliability is assessed considering all the circumstances. The fact that the search proves that the informer's tip was reliable (what was discovered by the search proved the informer's tip to be accurate) cannot be used as evidence to show reliability of that information at the time the application for the authorization in question was made.

Question 5: What procedures and principles apply to the editing of the sealed packets?

Due to the Court having inherent jurisdiction to supervise and exercise "protecting" powers over their own records, the judges are authorized to edit the content of the sealed packet. One of the main objectives in editing the application depositions is compliance with the rule against disclosure of the identity of police informers save where such disclosure can show innocence on the part of an accused. This creates a balancing act in each case, weighing the revealing of the informer's identity to the accused, against the prejudice to the informer and public interest in law enforcement.[8]

Question 6: Is the defence entitled to cross examine the applicant of an authorization?

The S.C.C. adhered to its consistent protection of the right to cross examine. It reiterated however, its equally consistent stance on protecting police informers. It held that there simply is no right to cross-examine police informers as they are not witnesses (as long as their activities did not make them "agents" of the police) unless such disclosure could show innocence on the part of the accused. This, of course, eliminates from the cross-examination, probing questions, the answers to which would directly or indirectly divulge that identity.

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[8] See Bisaillon v. Keable et al - 7 C.C.C (3d) 385 [1983 2 C.S.R. 60] and Volume 15, page 3 of this publication, on protection of police informers - Supreme Court of Canada.

Leave to cross-examine is at the discretion of the trial judge, who may impose limitation on its scope. He or she must be satisfied that cross-examination is essential to afford the accused person to make a full answer and defence and only where the accused has established that the cross-examination will assail one of the prerequisites for the authorization. In this Garofoli case the trial judge had not allowed cross-examination of the affiant while the police had to a large degree relied on the tips they received from their informer. In view of the S.C.C.'s response to question 4 above, credibility of the informer is established by the police assessing the reliability of the information they received from the informer, as a precondition to the authorization. The accused was consequently entitled to discover by cross-examination if adequate assessment by police had taken place, for the Court to determine if that information was capable to serve as a precondition to the authorization. For this reason alone the accused is entitled to a new trial, held the S.C.C.

Question 7: Does an authorization without a minimization clause, amount to a judicial licence to conduct an unreasonable search or seizure?

The defence had argued that the authorization licensed police to intercept all private communications on the accused's telephone, whether or not they were relevant to the police investigation. Such openendedness amounts to an unreasonable search, the defence argued, and invalidates the authorization. The S.C.C., responded that the minimization clause the defence claimed to be an essential element of a valid authorization would force police to "live monitor" all interceptions. Such an absolute requirement would simply cause an unreasonable and too heavy a burden on law enforcement officials. The Court reiterated that live monitoring and visual confirmation is generally appropriate where police is authorized to intercept telephone calls made by using public pay phones. The S.C.C was of the view that the same considerations do not apply to telephones in the private residence of a person named in the authorization. Unless the defence can show special circumstances for live monitoring of residence or private office telephones, the absence of a minimization clause does not affect the validity of an authorization.

Accused's appeal allowed.
New trial ordered.

Note: The S.C.C. judgment was lengthy and thorough and a wide range of complex issues were considered. These few pages are a more synopsis, in which I have attempted to extract what I perceived to be issues of interest to law enforcement officers.

PROTECTING IDENTITY OF INFORMER

REGINA v. SCOTT - Supreme Court of Canada - [1990] 5 S.C.R. 979, December 1990.

The accused, while in custody for other matters, was tried for possession of narcotics for the purpose of trafficking. When police testified, defence counsel, in cross-examination posed a question the answer to which would have revealed the identity of an informer. Instead of taking a chance on the response from the trial judge on this issue, Crown Counsel stayed the proceedings and commenced a new trial a short time later. Defence Counsel unsuccessfully moved for a judicial stay of proceedings claiming that the Crown's manoeuvring amounted to an abuse of the process of the court. Defence counsel did again pose the same question to the investigating officer submitting that it was relevant to the matter of entrapment. As there had been no evidence of any kind that suggested that entrapment was involved, the question was in compliance with binding precedents[9] disallowed.

Upon the Crown closing its case, the accused was granted an adjournment to locate and subpoena a defence witness. This witness was served but failed to show when the trial continued. The trial judge refused to issue a warrant apparently as the defence failed to show that this witness (possibly the person the defence suspected to be the police informer) was likely to give material evidence. When the Crown and defence had finished their submissions and the trial was coming to a close, the witness entered the courtroom. A defence motion to re-open the proceedings so the witness could testify, was unsuccessful. This, again, as no foundation had been laid for entrapment. The accused was convicted of five narcotic charges and his appeal to the Ontario Court of Appeal was dismissed.

The accused then took his plight to the Supreme Court of Canada (S.C.C.) claiming the following:

1. The Crown had abused the process of the Court by staying proceedings exclusively for the purpose of avoiding an unfavourable ruling by the Court that could have compelled the police witness to reveal the identity of his informer;
2. The delay caused by the stay had prejudiced the accused;
3. The judicial ruling during the continuation of the trial, that the defence question that jeopardized the identity of the informer was improper and disallowed, is erroneous;
4. The trial judge erred in refusing to issue a material witness warrant;
5. The trial judge erred in disallowing the procedures to be re-opened to accommodate the late arriving defence witness to testify.

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[9] Bisaillon v. Keable - [1983] 2. S.C.R. 60; also Volume 15, page 3 of this publication.

The Supreme Court of Canada answered respectively:

1. The Crown had acted properly to protect the identity of the informer. It re-opened proceedings at the first reasonable opportunity. This is a Crown prerogative and does not amount to (in the circumstances) an abuse of the process of the Court;
2. The accused was in custody and the delay had not prejudiced him in any way;
3. No exemption to the stringent rules that protect the identity of informers, did apply. The accused had not shown that revealing the identity of or testimony by the informer would render him innocent of the charges or lay a foundation to the issue of entrapment;
4. The defence failed to show that the witness's evidence would be material;
5. As no explanation was given to the Court in what way the testimony of the witness would be relevant and as it was the judge's obligation that the trial was expeditious and orderly it was at her discretion whether to re-open the proceedings.

The evidence made it clear that the accused could not show on the balance of probabilities that he had been entrapped. That burden of proof was on him.

Accused's Appeal Dismissed
Convictions upheld

Note: There were two judgments rendered. One supported by five Justices and a dissenting judgment supported by the remaining four Justices. The dissenting Justices thought that the Crown had acted inappropriately by staying the proceedings only to re-open the trial later only to avoid a possible adverse ruling on an issue. This constituted an abuse of the process of the Court, they said. The proper procedure would have been for the Crown to call no further evidence and then appeal the resulting acquittal in the hope that the contentious issue would be answered and a new trial is ordered. Legalities aside, the latter seems a far more cumbersome process than staying the proceedings and re-opening the trial. It also appears that this is the least inconvenient for the accused.

Comment: There are two interesting matters involved in this case; one arises from the majority judgment and the other from the dissenting one. Entrapment is not a defence[10] and has only received an extraordinary process to discover if an accused had been entrapped. Entrapment does not infringe a Charter right but is an aspect of the abuse of the process of the Court that may result in a judicial stay of proceedings when and if an entrapped accused is found guilty of the offence alleged. This stay will prevent a conviction if an accused can show (after the verdict of guilty) on the balance of probabilities, that he had been entrapped. Only for the purpose of an appeal, such a stay is the equivalent of acquittal.

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[10] R. v. Mack [1988] 2 S.C.R. 903, Also see Volume 33, page 48 of this publication.

Despite the fact that the entrapment issue cannot be tried until after a verdict of guilty, the defence may lay the foundation for entrapment during the trial proper. Usually this is done by means of cross-examination of the Crown witnesses. It seems that the issue of entrapment was dismissed before a verdict in this case. It is not clear whether the defence was prevented from having the matter tried after the verdict due to not having laid that foundation. If so, the trial judge did not follow the stringent rules established in the Mack decision.

The other issue of interest is that the dissenting Justices seem to suggest that parties to criminal proceedings can withdraw their witnesses in the middle of cross-examination - or, at least, the Crown can. The Crown adduced evidence by means of the investigating officer. When, in cross-examination, a question was put that jeopardized the Crown's interest (the identity of the informer), the dissenting Justices seem to suggest that at that point the Crown could have announced not to call any further evidence. This would have resulted in an acquittal the Crown could have appealed. That appeal process is the means of correcting judicial errors. The disputed question had been put and the Crown objected. Rather than waiting for a ruling the Crown entered a stay. One wonders, that if the Crown had the right to have its witness step down at this point, as part of its decision not to call further evidence, what grounds that would produce for an appeal. One supposes, the error of allowing the question to be put to the witness. After all, the ruling that could have jeopardized the informer's anonymity, was not whether the question should have been put, but whether the witness was compelled to answer it.

DOGMASTER INTERPRETING AND DRAWING CONCLUSIONS FROM HIS DOG'S BEHAVIOUR - ADMISSIBILITY AND WEIGHT OF SUCH EVIDENCE

REGINA v. PAWLUK - Supreme Court of BC, Vancouver 20236DC, October 1991

The accused testified at his trial for breaking into a restaurant. He told how he and his friends had been celebrating his birthday for several days. The party came to an end in the early morning hours and the accused (who had consumed quite a bit of liquor and had smoked narcotics during the festivities) was walking in the dark at 5:30 a.m. towards a transit station to take a train home. A van entered the street at a high speed. Right in front of the accused the occupants had jumped out and scattered. Immediately after the police were on the scene. The accused had a record for break and enter and at the time there were criminal warrants with his name on them, outstanding in Alberta. The accused did not want to face the charges in Alberta and felt that talking to the police in these circumstances would make an arrest on these warrants a distinct possibility. He therefore went a distance of about 50 metres and hid under some shrubs. Everything would have been fine if it was not for Brutus a nosy police dog.

The van had been used in the break-in of a restaurant about 15 minutes before. It was seen backed to a door of the premises. The driver had stayed behind the wheel while two men loaded the van. Police had been alerted by a witness and the van was spotted a short distance from the scene of the crime. After a chase the van had slowed and two men had jumped out and ran. The driver had continued for a short distance and then jumped out of the van leaving it to continue on its own until it came to rest up against a concrete wall. The driver had fled in the opposite direction from his companions.

Shortly after this, Brutus and his master arrived on the scene. The dog was familiarized with the scent around the driver's seat in the van and an "area search" was commenced rather than a "tracking" mode search. This as the van had travelled an estimated distance of 25 metres after the driver exited. Brutus was to pick up the scent at the point of exit and then switch to tracking. The demeanour of the dog indicated to his master that he found the scent some distance from where the van had come to rest and from there on stayed on that scent until he found the accused under the bushes. Needless to say, the defence to the charge of break and enter was one of identity.

The issue, of course, was the credibility of the evidence given by the dogmaster. Was the dogmaster's interpretation of Brutus' demeanour accurate and sufficiently reliable to prove beyond a reasonable doubt that the accused was an occupant of the van which was involved in the break and enter and contained the proceeds of that crime.

The first hurdle was the admissibility of the dogmaster's interpretation of his dog's conduct and behaviour. Old Brutus is the only Crown witness who knows for sure if the accused was in the

van. He told his master by means of his conduct that this was so. At best his master's testimony was an interpretation of perked ears and erect tail. In essence defence counsel advocated a hearsay approach to the dogmaster's evidence.

The BC Supreme Court held that the evidence of Brutus' handler was admissible. He had testified about the training of the dog and how he consistently reacts to given scenarios and situations. Each time the dog's reactions were identical not just in circumstances encountered in practice but also where, in exercises, the events and settings were controlled. The dog had proven to be reliable and accurate. Such evidence is weighty and allows conclusions of facts to be drawn from it.

In this case the performance of the dog was the only identification evidence against the accused. Defence counsel took the position that although the evidence is admissible it is unsafe to convict the accused on that evidence alone. Brutus is only an animal and could have been distracted by other scents, or, due to the accused's high level of anxiety had zeroed in on the strong human scent that results. This scent may have been stronger than the scent the dog was familiarized with at the outset of the search. This, at least, raises a reasonable doubt, argued counsel for the defence.

The Court had not believed the accused and held that the absence of any other person in the area was sufficiently corroborative of Brutus having found the driver of the van when he located the accused under the bushes.

Accused convicted

VALIDITY OF PREVENTATIVE LEGISLATION
"WHERE INJURY OR DAMAGE IS FEARED"

CHESTER v. THE QUEEN - Supreme Court of BC

A complainant swore an information under s. 810 C.C. claiming that she had reason to fear that Mr. Chester would inflict personal injuries on her. A warrant did issue and Mr. Chester was arrested. Upon a hearing the Provincial Court Judge imposed conditions and an undertaking from him to prevent further threats or harm to come to the complainant.

The preventative intent of s. 810 C.C. is derived from the common law which used to give the judiciary jurisdiction to prevent breaches of the peace where circumstances and events gave someone reasonable grounds to believe that harm would befall him or her. The section actually is a codified version of that common law. Obviously it has been difficult for the drafters of this legislation to fit this oddity into a penal code. The person who is the threat is not an accused as the section does not define or create an offence. Nor are the consequences of being a threat to the safety and comforts of privacy of the complainant a penalty or punishment. It in essence is a means of saying to that person, "Don't do that anymore and if you do not want to promise to cease and desist you can be imprisoned for a period not exceeding a year". This procedure is as out of place in our criminal procedures as a canoe in a yacht club. It cannot be said that the person complained about is not in jeopardy of consequences akin to criminal sanctions and there should be some safeguards and provisions of natural justices that apply. This was accomplished originally by providing that procedural provisions for compelling the appearance of an accused and those of a preliminary hearings apply to procedures under this section *mutatis mutandis* (with the necessary minor changes). The Courts held in 1983[11] that since there is no "accused" and "no offence" involved *"mutatis mutandis"* is inadequate to hold that a warrant can be issued for the person complained about or that the adoption of criminal hearing procedures apply. The Ontario Court of Appeal was a couple of years later of the opposite opinion[12].

Mr. Chester asked the BC Supreme Court to review the order imposed on him by the Provincial Court judge. He claimed that his arrest had been unlawful as is the order for him to be of good behaviour towards the complainant. There simply was no jurisdiction for the issuance of the warrant or to impose conditions upon him by having him enter into a recognizance.

Since the cases cited above, were decided, the words *mutatis mutandis* were removed from the impugned section and the words, "with such modifications as the circumstances require" were

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[11] R. v. Forrest (NO: S.C.100 1983) BC Supreme Court

[12] R. v. Allen - 18 C.C.C. (3d) 156

substituted. The Supreme Court of BC held that this had changed nothing and had not remedied the reasons for which the legal validity of this legislation is and was attacked. He saw no difference between the meaning of the latin words and the phrase substituted.

Yet the Supreme Court of BC held that the section and its adopted procedures as well as the mode of that adaptation are adequate and proper.

Mr. Chester's application was dismissed

VALIDITY OF DETENTION FOR INVESTIGATIVE PURPOSES - WARRANTLESS SEARCH OF A CAR - ADMISSIBILITY OF REAL EVIDENCE

REGINA v. KLIMCHUK - Court of Appeal for BC, Victoria VO1083 - October 1991.

A service station attendant arrived at work very early in the morning while it was still dark. He saw a car on the station lot with a person behind the wheel and spotted another person running behind the office booth. He went to a telephone at a nearby coffee shop and reported the incident. While on the phone he saw the car leave and reported what he saw and gave police the direction of travel.

A constable attended and checked around. He spotted a car of similar description parked in a McDonald's parking lot. The accused was behind the wheel apparently asleep. The officer established the accused's identity and learned from the dispatcher that the accused was suspected of raiding vending machines. When asked what he was up to, the accused said to be waiting for the restaurant to open for business so he could get a cup of coffee. The officer who did not believe to have the grounds for searching the car told the accused where a little further up the road, he could get coffee and told him to move on. After the accused left the officer learned from a person who was inside the McDonald's restaurant that there had been another person in the car who had gone behind a hedge at the rear of the parking lot. A search resulted in finding a bag with $186.00 in change.

The officer went to the coffee shop he had told the accused about and found him and the car at that location. He was of the opinion that the information he received from the dispatcher and the bag of coins he found were not sufficient for him to arrest the accused. Apparently, he could not say that the car seen at the service station and the one the accused had in his possession were one and the same. Furthermore, the officer had found "nothing of interest" at the service station. He did therefore, not effect "an outright arrest" but instead detained the accused for "investigation into stolen monies".

The officer requested a colleague to search the accused's car on the coffee shop's parking lot while he took the accused to the police station. The other officer did find vending machine keys in a heater vent of a kind that would have given access to the cash boxes in the machines at the service station. He also found loose coins and coin wrappers.

The trial judge had agreed with the defence's position that, the "arrest" had been unlawful and the accused's detention arbitrary and that the warrantless search of the car had been unreasonable. He held however, that the "real" evidence that had resulted should not be suppressed as admitting it would not bring the administration of justice into disrepute. Consequently the accused was convicted of having in his possession instruments suitable for breaking into a coin operated device in circumstances from which it can be inferred that they had been or were intended to be used. He appealed his conviction to the Court of Appeal for BC claiming the trial judge had erred. The Crown also claimed that the trial judge had been

wrong. It argued that in the circumstances the accused's Charter rights had not been infringed. The detention was not arbitrary and the search was incidental to a lawful arrest and therefore not unreasonable. The Crown took the position that the police had common law powers to search the accused's car and consequently the evidence of the keys was not subject to exclusion.

In the trend setting case on unreasonable search and seizure (Hunter v. Southam Inc.) the Supreme Court of Canada gave a simple definition of "reasonable search":

> "A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable".

The Supreme Court of Canada also reiterated (in Cloutier v. Langlous et al) that police incidental to a lawful arrest, have the common law power to conduct a primary search of the arrested person (a frisk search) to preserve evidence, or detect any object which might be used to make good his escape or endanger the safety of the prisoner or endanger the safety of the arresting officer and personnel who will subsequently be responsible for his custody. This common law does not only empower police to frisk the prisoner but also to search the motor vehicle from which he emerged at or shortly before the time of his arrest. This means that if the officer had lawfully arrested the accused the search of the car was lawful and likely reasonable.

The officer had testified that he had been doubtful about having sufficient grounds to effect an arrest. At the time he did not know about the vending machine keys and only had the information as explained above. He felt he was not in a position to arrest the accused, neither did he want to let him go. He therefore chose some middle road and detained the accused for "investigation into stolen monies". The Courts and the Crown agreed with the defence position that there is in law no provision for detention for the purpose of investigation. This is simply a prevailing misconception that has various sources, some of which are misinterpretations of Criminal Code provisions. For instance, it used to be a popular but erroneous belief that the "24 hour" limit to have an arrested person appear before a justice was an indirect authorization to hold a person for investigative purposes.

The Crown argued, however, that although the officer testified that he had a reasonable belief and suspicion that the accused had committed an indictable offence and apparently believed he was therefore empowered to detain the accused for investigative purposes, this should not be determinative of the issue whether the detention was lawful. The Court should apply an objective test to determine the lawfulness of the detention. In other words, if the circumstances were such that the officer could have effected a lawful arrest (if the circumstances amounted to reasonable and probable grounds for him to believe the accused had committed an indictable offence) then the detention was lawful.

The Court of Appeal for BC agreed with the Crown's position and held that the status of the accused or his detention did not depend on the label the officer attached to it. It held that the

distinctions between detention and arrest were subtle and matters of semantics. Since these issues were not argued at trial or before this Court of Appeal it was prepared to assume, "for the purpose of the argument only" that in fact the officer had arrested the accused and it then explored the propriety of that arrest.

The Court zeroed in on the part of s. 495 (1)(a) C.C. it deemed applicable:

> "A peace officer may arrest without warrant a person.....who on reasonable and probable grounds he believes has committed or is about to commit an indictable offence".

When in Court proceedings the lawfulness of a warrantless arrest is in question, the existence of the prerequisite grounds must be objectively established, meaning:

> "....a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest".

However, when the peace officer effects the arrest, he or she must subjectively have reasonable and probable grounds on which to base the arrest.

The latter was the threshold the Crown had to overcome. According to the arresting officer's testimony he did not subjectively believe that the accused had committed or was about to commit an indictable offence. Had he believed that there were such grounds, the Court could then determine by means of the objective test described above, if by what the officer knew there were in fact such grounds. Therefore the "assumed" arrest of the accused was unlawful, and consequently there were no ancillary common law powers for a warrantless search of the accused's car.

The Court of Appeal for BC explored if a reasonable warrantless search of the accused's car could be demonstrated in any other way. The Court observed that even where statutes authorize warrantless searches, they are unreasonable where the Crown fails to show that circumstances made it impractical to obtain a search warrant. After reviewing numerous cases on this point the Court concluded that there simply is no common law power (other than incident to a lawful arrest) for a warrantless search of a motor vehicle in circumstances where it is not feasible for an investigating officer to obtain prior authorization in the form of a warrant. At best, the Court seems to say, where evidence is found by means of a warrantless search of a motor vehicle where it was impractical to firstly obtain a search warrant, it may well serve as a consideration whether excluding the proceeds of the unreasonable seizure of evidence would bring the administration of justice into disrepute. In this case, however, the presumption that a warrantless search is *prima facie* unreasonable had not been rebutted by the Crown.

On the issue of a distinction, if any, between an unlawful and arbitrary detention the Court declined to respond. Needless to say the one is a matter of statute law and the latter is an infringement of an entrenched right. Does this mean that the two are mutually inclusive? The trial judge had without the matter having been specifically argued, held that the accused had been arbitrarily detained (s. 9 Charter). The defence nor the Crown had presented cogent arguments on this point, hence the Court's reluctance to answer this question.

The evidence of the keys was "real" and was obtained "without having compelled or instigated any conduct on the part of the accused". In R. v. Collins, the Supreme Court of Canada said that in such circumstances there is rarely reason to exclude real evidence, particularly evidence that existed already. Furthermore, had the officer acted in good faith? Another matter that must be considered for the evidence of the keys to be admitted is whether it would effect the fairness of the trial.

As the evidence of the keys existed irrespective of the accused's Charter rights the fairness of his trial would not be affected by admitting them into evidence. However, the Court held that the violation of the accused's right to be secure against unreasonable search or seizure was deliberate in that it was the product of a prevailing policy adhered to by both investigating officers. They had admittedly acted upon suspicion only, and there was in the circumstances nothing that made the obtaining of a search warrant impractical. They knew that a search warrant was obtainable in terms of what they were aware of and that a Justice of the Peace was available. This meant that police did not act in good faith. The violation was also serious in that they on mere suspicion had invaded the privacy of the accused.

The absence of good faith does not connote bad faith or that the actions of the police were prompted by unworthy or unlawful motives. Good faith usually applies where an officer does something that at the time, was a lawful practice despite the fact that at the time of trial it has been found to be constitutionally unacceptable or invalid. That simply was not the case here. The officer had acted on an erroneous belief that a search warrant was "at the time" not required. In essence the Court warned that police officers should be aware of the evolution of law in as far as it affects their investigative practices. Reasonable search was defined and explained by the Supreme Court of Canada some years ago. Said the Court:

> "Even if Constable C and his colleagues did not know of or understand, those principles, they cannot now be heard to say that they relied upon an honest but mistaken belief in the legal requirements of a reasonable search".

The crime alleged against the accused is at the lower end of the spectrum of severity. The entire Crown's case depended on the admission of the keys in evidence. No conviction was possible without that real evidence. The Supreme Court of Canada also said in Collins, that to admit real evidence despite it being obtained by means of a Charter violation requires to weigh the balance between the severity of the crime alleged and the damage admitting the evidence may do to the reputation of the administration of justice.

Said the Court:

> For the sake of the community at large, it is both desirable and important that the police have every reasonable opportunity to investigate crime and apprehend criminals. But for the sake of each of us, who collectively are that community, it is equally important that they achieve that goal in a manner consistent with constitutional values, indeed, it is the very essence of the social contract that they do so. To countenance the long-term wilful disregard of those values in the name of effective law enforcement would not just bring the administration of justice into disrepute, it would render the Charter meaningless:

The evidence of the keys, was inadmissible.

Accused's appeal allowed
Conviction set aside and
acquittal substituted

Main cases referred to:

1. Hunter v. Southam inc. [1984] 2 S.C.R. - Volume 18, page 12 of this publication
2. R. v. Collins [1987] 1 S.C.C. - Volume 27, page 1 of this publication
3. R. v. McComber [1988] 44 C.C.C. (3d) 241
4. R. v. Dyment [1988] 2 S.C.R. 417 - Volume 34, page 24 of this publication
5. R. v. De Bot [1988] 2 S.C.R. 1140 - Volume 36, page 27 of this publication
6. R. v. Kokesch [1990] 61 C.C.C. (3d) 207 - Volume 39 of this publication
7. Cloutier v. Langlois et al [1990] S.C.R. 158 - Volume 37, page 5 of this publication
8. R. v. Young (unreported) - Volume 36, page 25 of this publication
9. R. v. Genest [1989] 1 S.C.R. 59 - Volume 34, page 12 of this publication
10. R. v. Greffe [1990] 1 S.C.R. 755 - Volume 37, page 2 of this publication
11. R. v. Jones 44 C.C.C. (3d) 248 - Volume 34, page 5 of this publication

Comment:

At one stage in these reasons for judgment the Court of Appeal for BC commented on persistent police practices despite Court rulings which have clearly indicated that they were no longer valid and acceptable in law. It implied unawareness on the part of the police and hence the list of cases above in which these issues were explored. One example of this was the practice of the "roadside sobriety test and right to counsel" issue. In the fall of 1987 the BC Court of Appeal held in R. v. Bonogofski, that the test triggered detention and that there was full right to counsel before the test was conducted. Any infringement of that right could cause the reasonable and probable grounds for a demand for breath samples gained by the test, to be inadmissible. Judging by the numerous cases in the wake of that decision clearly indicated that there was an unawareness of this case in the police community. About two years later the BC Court of Appeal changed its mind in the R. v. Bonin decision (Volume 34, page 1 of this publication) and the problem with this issue simply faded away. It seems that this investigative practice continued from before Bonogofski, to Bonin and due to the latter cancelling the former the whole matter, for many, passed by unnoticed.

POSSESSION - "ACTUAL" VIS A VIS "CONSTRUCTIVE"

REGINA v. SAMARDZICH - Court of Appeal for BC - Vancouver CA013028, July 1991

The accused leased a house and occupied it. The previous tenant had left (with the accused's consent) some of his possessions in the house until he would find a place to store it. Four months after the accused moved in he was arrested in the home, for an outstanding warrant in Ontario. Police found a Mr. C. sleeping in one bedroom and from evidence concluded that a couple used another bedroom.

Instant to the arrest police found approximately a quarter of a million dollars worth of US $20.00 counterfeit bills in the bedroom in which Mr. C. was napping. Acting upon directions by the accused, police found a handgun and silencer in the same bedroom. They also found the accused's wallet and his cheque book in that room.

The accused was convicted of possessing the counterfeit currency. He appealed arguing that the trial judge had convicted him on the basis of constructive possession while the Crown relied on actual possession.

Where a person has something on his person or by other means in his "personal possession" then he actually does possess that something. However, where he with his knowledge (not only knows the whereabouts but also what it is) has given it to another to have joint custody or custody exclusively on behalf of himself or has that "something" any place (whether or not he knows or occupies that place) then he "constructively" possesses that something. The essential elements of constructive possession are, of course, knowledge, consent and a measure of control.

The trial judge had concluded that the arrangements in the house with the previous tenant and apparent other occupants was such that there was a reasonable doubt that the accused possessed the handgun and silencer. However, he found that "the accused must have known that the counterfeit money was on the premises". He had knowledge and possession the judge concluded from the circumstances.

There was no doubt held the Court of Appeal for BC, that the Crown adduced evidence of and relied on "actual possession". That is what the accused was to respond to at trial. The trial judge reached beyond that and convicted him because of "constructive possession".

Appeal Allowed
New trial ordered

CREDIBILITY OF INFORMATION SERVING AS REASONABLE AND PROBABLE GROUNDS FOR SEARCHING A CAR

REGINA v. FEE - Supreme Court of BC, Victoria 58862, June 1991.

A police officer received a phone call from an informer that the accused driving a certain car containing narcotics would board a ferry. The informer said the accused was a courier for a group of traffickers. The officer had previously received three tips from this informer and, when he acted on the information, had found it to be accurate in detail and reliable in each instance.

The officer and a partner did find the accused in the line-up to board the ferry. The car he drove matched in detail the description the informer gave the officer.

The officers placed the accused under arrest for reasonable and probable grounds that he was in possession of narcotics. He was given his rights and notice that they were going to search the car under the provisions of the Narcotic Control Act. The search yielded a considerable amount of "white chunky substance". At trial the admissibility of this substance and its analysis became an issue.

The defence claimed that there were no reasonable and probable grounds for conducting the search as the officer had not investigated the reliability of the information. Therefore the grounds were those of the informer and not the officers.[13] The Supreme Court of Canada held recently that police must through investigation corroborate the reliability of tips they receive before they can claim to have the prerequisite grounds to exercise their authority. However, the Court also observed that the totality of circumstances can meet the standard of reasonableness.

The trial judge found that in this case the circumstances were such that the totality of it gave the officers the grounds required to lawfully conduct the search. Besides the reliability of the informer, the details of the information he supplied matched the facts they found, before conducting the search i.e.: the very ferry to be taken by the accused; the detailed description of the car he would drive (colour, model, year and licence number) all matched. The search was reasonable and the results of the analysis of the substance seized from the accused was admitted in evidence.

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[13] Regina v. Debot - 52 C.C.C. (3d) 193 - Also see Volume 36, page 27 of this publication.

PROHIBITED WEAPONS - APPLICATION OF DEFINITION OF "WEAPON" NOT APPLICABLE - POSSESSION IS OFFENCE REQUIRING *MENS REA*

REGINA v. A.K. (Young Offenders Act) - Court of Appeal for BC, Vancouver CA011638, October 1991.

Under the authority of the Narcotic Control Act the accused youth was searched on a public street. Nunchaku sticks were found concealed under his jacket. He told police he was unaware that the sticks were a prohibited weapon. He was aware, that if correctly used they can cause serious harm to a person. However, he said that he used the sticks as an exercise apparatus to increase forearm strength and hand-eye coordination. He said he never had used them as a weapon and had no intentions to do so in the future.

The Provincial Court trial judge acquitted the youth of possessing a prohibited weapon as the Crown failed to show that the possession was for a criminal purpose or included a criminal intent. The trial judge had believed the accused and held that the possession was for recreational purposes only. He held that the offence alleged amounts to a crime and therefore *mens rea* is an essential element of the offence.

The Crown appealed this decision to the Supreme Court of BC. The Justice of that Court held....

> "....that the offence of possession of a prohibited weapon involves absolute liability."[14]

This means that there is no requirement to show criminal intent on the part of the possessor. Consequently the Supreme Court ordered a new trial.

The accused youth appealed that order to the Court of Appeal for BC which considered this confusing issue apparently important enough to assign five judges to the division of that Court to hear this appeal. (This Court's divisions nearly always consist of three judges). One can nearly say that there are as many judicial interpretations of the weapon provisions in our Criminal Code as there have been appeals on the numerous issues that surround the lawmakers' efforts to control an ever increasing desire in our society to be armed.

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[14] For the definition of these criminal liabilities see page 32 of Volume 39 and *The Queen v. The Corporation of the City of Sault St. Marie* [1978] S.C.R. 1299.

The Court of Appeal for BC reviewed numerous decisions by Courts of superior jurisdiction and only agreed with some of them but rejected pretty well the legal reasoning by which they arrived at a verdict[15]. Some of these cases are in outright conflict with one another.

In this case the Crown proved that the accused youth was in possession of a prohibited weapon and that he knew it was capable of causing serious bodily harm. That the youth did not realize that it was unlawful to possess this weapon and that he had no intention to use it as a weapon were no excuses or defence for possessing a prohibited weapon.

In s. 84 (1) Parliament defined, "prohibited weapon" and enacted that silencers, switchblade knives, automatic firearms, sawed-off rifles or shotguns are such weapons. It then went on to authorize the executive branch of government (the Cabinet and the Governor General) to declare "a weapon of any kind" a prohibited weapon. This leads one to believe that only implements that fit the definition of weapon found in s. 2 C.C. are subject to be declared a prohibited weapon by such order of the Governor in Council.

The applicable portion of the definition of "weapon" is s. 2 C.C. is "anything intended for use in causing death or injury to persons whether designed for the purpose or not".

By means of Order of the Governor in Council No. 2 "any instrument or device commonly known as 'nunchaku', being two hard non-flexible sticks, clubs, pipes, or rods connected by a rope cord, wire or chain" was declared to be a prohibited weapon.

This construction of the applicable law is truly troublesome. If only a weapon as defined in s. 2 C.C. may be declared a prohibited weapon, then intent seems to be a kernel element. The first portion of that definition seems to connote that it is the intent of the manufacturer that determines whether the instrument is a weapon (intended for use...etc.). However, the last portion of the definition seems to dispel that notion (whether designed for the purpose or not). That seems to mean that the intent of the possessor is referred to. Oddly enough, the definition of the nunchaku fits the description of the home-made device used by the meticulous gardener who insists that his rows of beans are straight. The definition has the apparent intent to capture anything a person will arm himself with to cause injury to another, whether that is a kitchen chair or a wrench. If the legislation is applied by the means described above anything may be declared a prohibited weapon, provided of course, the possessor intended to use it to cause death or injury with it. One cannot imagine that that was the intent of the lawmaker.

The Court of Appeal for BC held that there is no necessity to consider the definition of "weapon" in s. 2 C.C. The Federal Interpretation Act states that where a statute contains a definition of something, then that definition shall be applicable to all of the content of that

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[15] R. v. Murray (1985) 24 C.C.C. (3d) 568 - Volume 24, page 50 of this publication is an example

Statute "unless a contrary intention" is apparent. If only instruments that fit the definition of "weapon" in s. 2 C.C. are subject to be declared "prohibited weapons" then for obvious reasons the jurisdiction given to the Governor in Council is rendered restrictively useless or excessive, depending on the interpretation one give to the "weapon" definition in s. 2 C.C.

Said the Court of Appeal for BC on this issue:

> "It is our opinion that those three words <u>of any kind</u> indicate an intention to the contrary justifying an interpretation of that word weapon as something broader and different from the defined term in s. 2."

The Court held that the normal, everyday meaning of the word "weapon" was intended when Parliament used the words, "<u>weapon of any kind</u>". Consequently the Order in Council declaring nunchaku a prohibited weapon is valid. This as the authority Parliament granted the Governor in Council is to declare any instrument a prohibited weapon "that can on occasion be used to inflict injury, harm or death to a person whether used offensively or defensively."

For these reasons, and <u>not</u> those given by the Supreme Court of BC,

The order for a new trial was upheld

VOIR DIRE
ADMISSIBILITY OF A VARIETY OF EVIDENCE UTTERED IN THE INVESTIGATION OF A MURDER - STATEMENTS, REENACTMENTS - REAL EVIDENCE AND BLOOD SAMPLE

REGINA v. ROBERT - Supreme Court of BC, Nanaimo CR 4191, August 1991.

The dead body of a woman was found in a hotel room on January 25. In another room of that hotel a red jacket was found containing the papers of a car owned by the accused. Two members of the local detachment attended in the afternoon of January 26 at the accused's home to make inquiries about an impaired driving incident involving the accused's car. The accused was not then a suspect in relation to the murder of the woman. He was asked some questions about the jacket, and being aware of the murder investigation, they also attempted to get some possible leads. The accused would not offer explanations about the jacket or the documents. The trial judge held, the accused was not detained; there were no violations of his rights and the statements he made were voluntary and admissible.

On January 27, two investigators of the Serious Crime Section attended at the accused's home and they again questioned the accused to gain some leads. They asked him who was with him on January 25 when he was stopped in a town some 60 km. away. He identified the person. He was asked again about the jacket and the papers and could not offer an explanation other than that he had had two red jackets and had lost both of them. He was then asked if he would accompany the officers to the detachment to look at the jacket and see if it is one he lost. He agreed and voluntarily went along. He, in the process, gave an account of his whereabouts on the evening in question. Again the Court found that the accused was not a suspect at the time; was not detained; there were no infringements of his rights and what he said was voluntary. His statements were admissible in evidence.

After they arrived at the detachment there was a 36 minute interview that was taped with the accused's consent. He was not warned or made aware of his rights to counsel. Five minutes into the interview things changed. One officer passed a note to his partner, the text of which was, "His shoes are almost perfect" (referring to prints found at the murder scene). The partner crossed out the word "almost" and returned the note. The accused was then asked to give police his shoes and he complied. Due to questioning resulting in inconsistent replies and inquiries about cuts on his hands the accused's attitude changed. The accused commented, "You are scoring me". Eighteen minutes into the interview the accused was told of his right to silence and counsel. This came 13 minutes ($\pm$) after he had changed his status, from witness to suspect. The accused then inquired if he was under arrest. He was told, "Not at this point." Despite the fact that the officers testified that the accused was not a suspect in the murder as they assumed that the perpetrator had left the jacket in the hotel and had an injured hand, the Court held that the accused had been detained from the time the note was written about the footwear. The accused had not been told that he was a suspect and was not made aware of his

rights until 13 minutes after he reached that status. The Court held that any statement made by the accused after the "point of demarcation" (the note) was obtained as a result of a breach of the accused's rights and was inadmissible.

About 20 minutes after the interview ended the accused was formally arrested for the murder and again told of his rights. He said he understood. He made no requests to consult a lawyer and made no further statements.

Approximately two hours after he was arrested two other officers conducted a tape-recorded interview of the accused. Nearly all questions put to him remained unanswered and very few pleadings for an explanation resulted in a reply. At one point one of the officers said, "Do I have to get on my knees and beg you to talk to me?" The accused wrote a note to the officers, "I feel I would rather have a lawyer." This ended that interview. The accused by his demeanour demonstrated clearly reluctance to talk to the officers and to want to exercise his right to remain silent.[16] They should have ceased questioning him when this became apparent early in the interview and they should have given him then (and not upon receiving the note) a reasonable opportunity to exercise his right to counsel. Their assistance in this regard was too late and too little. The conduct of the officers was not inadvertent, consequently all of this interview was inadmissible.

When the accused indicated he wanted the assistance of a lawyer, the tape recorder was turned off, he was given a phone and phone book and offered total privacy. The accused said he wanted to contact a B.G. He was told that this person was not a lawyer but that he could speak to him if he wished. With that the accused said, "No" and closed the phone book. This the Court held was not a waiver to the accused's right to counsel.[17]

After the tape recorder was turned off, the two officers had an "unrecorded" conversation with the accused for two and a half hours. Much was made of the reasons beneficial to the accused for not recording this lengthy session. It was believed by the officers that the taping intimidated the accused and that he would feel more at ease knowing not every word was forever on record.

This questioning in terms of investigative probing had no better results than when the tape recorder was on. The officers then appealed to the accused's emotions and conscience. They asked him to consider the pain the deceased's parents endured; that writing them an apology could possibly ease his conscience; that his motives for killing her were possibly only to take her possessions; "Don't you believe in a supreme being"; and "All we want is the truth", etc.

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[16] R. v. Manninen (1987) 58 C.R. 97 - Also Volume 28, page 1 of this publication.

[17] Clarkson v. The Queen (1986) 25 C.C.C. (3d) 207. Also Volume 24, page 38 of this publication.

The only admission that resulted from this interview was that the accused conceded that he had taken the wallet of an occupant of a room across from the deceased's room. This admission placed the accused at the scene.

Approximately one hour and fifty minutes into this interview one of the officers raised his voice and indicated to have lost his patience. He said, he had no alternative but to get a warrant and search the accused's home. "If that's the way you want your wife to find to out, fine", said the officer. The accused asked the officers not to get a warrant and promised to tell what happened in the 'deceased's room. He then gave a recorded 50 minute statement as to why and how he caused the death of the deceased. Considering the evidence found on the scene the accused undoubtedly told the truth.

The Supreme Court decided to consider as one statement utterances by the accused in the interview that started about two hours after having been officially arrested till the end of his confession. Police knew the accused wished to remain silent. He made this abundantly clear in words and demeanour. Yet an aura of oppression was created. Consequently all utterances were made involuntarily, and made it unnecessary to deal with the issue of right to counsel.

Of the four isolated issues cited by the Court, one stood out as the most important. That was the threat of telling the accused's wife when attending at his home with a search warrant. The other three points are somewhat surprising in view of binding precedents in regard to this issue of voluntariness. In any event, the statements were held to be inadmissible due to the cumulative effect of suggestions by police.

The exclusion of evidence included the videotaped re-enactment by the accused of the events of what occurred at the hotel on the night in question. It was a direct consequence and continuation of his verbal confession.

The evidence of the accused's shoes and the results of the forensic evidence of the comparison of those shoes and the prints found at the scene were admissible. The shoes were physical evidence in plain view of police when they were seized.

After his confession police requested the accused to put a pin in his finger and smear the resulting drop of blood on a piece of paper. This conscripted him to give evidence against himself and therefore it and its analysis were inadmissible in evidence.

The accused also took police to some bushes behind the hotel and pointed to where he had discarded the deceased's wallet. The Court quoted the Supreme Court of Canada on this issue:

> "....Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone."[18]
>
> and
>
> "....that those portions of an inadmissible confession proven true by the acquisition of derivative evidence are rendered admissible...."[19]

On the basis of these precedents by our highest court the wallet was admitted in evidence.

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

[19] R. v. Hebert (1990)- Supreme Court of Canada - Volume 37, page 16 of this publication.

DOES S. 214 M.V.A. APPLY WHEN CAR OF SUSPECT IS INOPERABLE?

REGINA v. BERLIN - Supreme Court of BC, Quesnel No. 14482, August 1991.

The accused was involved in a single vehicle accident. He was identified as the driver and only occupant of the truck involved. The attending officer testified that the accused was standing on the side of the road uttering profanities and being a little unsteady on his feet. The officer asked the accused to blow in his face and also to follow the light of his flashlight. He respectively detected a slight smell of alcoholic beverage and very slow eye movement. Where the officer had suspicion about the accused's sobriety before the tests, he had reasonable and probable grounds that the accused's ability to drive was impaired by alcohol after the tests. He made a demand the accused was charged with "over 80" and acquitted. The Crown appealed the acquittal to the Supreme Court of BC.

In *R. v. Bonogofski*[20] the BC Court of Appeal decided that a person is detained when subjected to a roadside sobriety test. In *R. v. Bonin*[21] reiterated the custody aspect of such a test but held that at that stage a suspect need not to be informed of his right to counsel "as a reasonable limit demonstrably justified in a free and democratic society" (s. 1 Charter).

The trial judge had found that the Bonin decision was not applicable in the circumstances as they were in this case. The Court of Appeal for BC held in the Bonin decision that s. 214 of the BC Motor Vehicle Act and section 27 (2) of the Interpretation Act authorize a peace officer to elevate his/her suspicion to reasonable and probable grounds by means of a roadside sobriety test. This to prevent the endangering of lives and property. To do so s. 214 M.V.A. stipulates that a driver must stop, pull over to the side of the road, etc. etc.... Needless to say, the accused had done his damage for that evening, furthermore his pick-up truck was upside down in the middle of the road. Consequently s. 214 M.V.A. was hardly applicable and it followed, held the trial judge, that the Bonin decision did not apply. The accused was detained and without having been made aware of his right to counsel, was subjected to a sobriety test which yielded the grounds the officer needed to make his demand.

The Supreme Court of BC bluntly stated that the trial judge had erred in his reasoning. Section 214 M.V.A. is as applicable to drivers whose vehicles are inoperable for whatever reason as it is to cars that are operated on the public roads and stopped by police for whatever reason. The

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[20] R. v. Bonogofski - Volume 29, page 1 of this publication - (1987) 19 B.C.L.R. (2d) 360

[21] R. v. Bonin - Volume 34, page 1 of this publication - (1989) 47 C.C.C. (3d) 320

section is designed to keep impaired drivers off the roads so they will not harm others or themselves". It is for the same reason that the Courts have held that being in charge or control of an inoperable vehicle is no defence to an allegation of "impaired care or control".

Crown's appeal was allowed.
Acquittal set aside and new trial ordered

LACK OF EVIDENTIAL COHESIVENESS CAUSING LACK OF GROUNDS TO EFFECT AN ARREST - ORDERING A SUBORDINATE TO MAKE A DEMAND

REGINA v. LULU - Supreme Court of BC, Kamloops 37428, August 1991

A police supervisor attended a major motor vehicle accident. He searched the cab of a big truck that was involved, and went into a field upon being told by a witness that another citizen was there somewhere pursuing a person who fled the accident scene. He did find the accused pinned to a fence and being detained. However, in what sequence the search and the pursuit occurred was not in evidence. The officer observed that the detained person was under the influence of alcohol and he arrested him for impaired driving. The arrest was solely made on the basis that someone at the scene told the officer that the driver of the truck had fled. He therefore seemed to have assumed that the person he found detained was the driver. Then he ordered a constable to demand breath samples of the accused, a discretionary authority that was original to the constable. You simply can't order another officer to make a demand regardless of your superior rank. The officer making the demand must have the grounds to do so.

The supervisor had found either before or after the pursuit of the fleeing man, (the accused), a partially filled bottle of booze in the cab of the truck. In the circumstances it added no weight to the evidence. The necessary links to make all of these snatches of evidence a whole event that not only gave the supervisor the reasonable and probable grounds to effect the arrest but also to make a demand for breath samples (or inform the subordinate of all of the grounds he had so he was in a position to consider making the demand) were simply not there. For some reason the bottle added nothing to the evidence as it was not connected to anything.

Accused's appeal for conviction of our "80 mlg" allowed. Conviction set aside.

USE OF SIMILAR FACT EVIDENCE IN SEX RELATED CRIMES

REGINA v. A - Court of Appeal for BC, Vancouver, CA011662

The accused appealed his convictions of sexual assault against two girls in their early teens. Both girls testified that the accused insisted on them committing fellatio and that they swallow his seminal fluid. To lend strength to the victims' evidence the wife of the accused (who was the mother of one of the victims) testified. She told the jury that the accused had become obsessed with oral sex shortly before the period during which he committed the alleged offences. She also had to commit fellatio and swallow semen. The accused argued that allowing this similar fact evidence to be admitted had been so prejudicial to him that it outweighed its probative value.

The accused was tried by a Judge and Jury. The trial judge told the jury that oral sex between married persons was neither immoral, illegal nor criminal and therefore should not be seen by them that the accused was by his wife's evidence exposed as a person who had the disposition to commit crime or abuse young girls. The purpose of the evidence was to support the girls' credibility. They said their sexual relations to the accused had been forced acts of fellatio and indeed, according to his own wife, oral sex was an obsession for the accused. The evidence was only to show the accused's predisposition to oral sex; in other words if he did have sexual relations with the complainants his preference would be the oral kind. The evidence was not before the jury for them to conclude that the accused is an immoral person who is likely to commit the crime alleged.

The accused argued that no warning to a jury about these legal niceties and finite distinctions, would prevent prejudicial impressions on the part of jury members who consider oral sex morally repugnant. They are likely to reason that where a person is stooping this low, sexually abusing young teenagers is within the same moral scope. He argued that consequently the jury's verdict could not be relied upon as one that was based on proper legal considerations.

About six months <u>after</u> the accused's trial the Supreme Court of Canada dealt with a similar case[22] where a father sexually abused his daughter. Like in this "A" case the single issue was whether to believe the complainants ("A" had testified at his trial and categorically denied that any of the things the complainants alleged, ever occurred). The complainant in the "B" case testified that the accused progressed his sexual involvement from fondling at first, to oral sex, and then intercourse. The daughter of a previous common-law wife of the accused testified that she had very similar experiences with the accused when she was in a father-daughter relationship with him. The progression had been identical. Whether or not this was admissible as similar fact evidence was the very question put to the Supreme Court of Canada. It reiterated (once

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[22] R. v. B. (C.R.) [1990] 1 S.C.R. 717, April 1990

again) that the evidence of this kind can never be used to show a propensity or disposition on the part of the accused. It is only to show a similar *modus operandi*, thus assisting the Crown in evidence of identification. This is allowed as an exception to the general rule of evidence, provided that the value of this evidence to the Crown does not outweigh its prejudicial effect. The Supreme Court of Canada observed that the more the similar fact evidence sought to be admitted is of a morally repugnant act the greater the chances that it will prejudice the accused to an extent where only very valuable similar fact evidence could supersede that prejudice.

The Supreme Court of Canada held that similar fact evidence can be adduced for assistance to the Crown for three different purposes; identity, intent or corroboration. In this "A" as well as the "B" case, there was no need for evidence of identity. It simply was not a matter of "who done it", but whether or not it did happen. Could the complainants in view of the denials of the accused be believed. If that was proven, nothing in regards to intent needed to be addressed. Hence credibility of the complainants was the single issue. Consequently the similar fact evidence was solely adduced for the purpose of corroboration.

The facts were similar in terms of B's pattern of behaviour. His relationship with the girls and the similar fact evidence would be admissible should its probative value outweigh the prejudicial effect. Considering the wide discretion of trial judges on this matter, the Supreme Court of Canada held they had not seen any reason for interfering in the conclusion of the trial judge. The evidence had been appropriately admitted.

With this Supreme Court of Canada decision as a guide, the Court of Appeal for BC considered A's appeal. Comparing the experiences of A's wife and that of the girls, there were similarities. The acts he expected from them, that is that they swallow his semen, were also similar. Hence there was a distinctiveness attributable to the accused. Despite the fact that the evidence, particularly the unusual and repugnant aspects of his behaviour, could prejudice the jury against the accused, it cannot be said that it was so unfair that the jury should not have heard the evidence to resolve their difficult task to decide on the credibility of the complainants.

The appeal was dismissed.
Conviction Upheld

IS THE CARELESS HANDLING OF A FIREARM AN OFFENCE INCLUDED IN POINTING A FIREARM?

REGINA v. MORRISON - Court of Appeal for BC, Vancouver CA013197, August 1991

After a domestic argument the accused told his common-law wife that he was going to kill her. He picked up a rifle, (the wife knew it was not loaded) and started to wave it around doing damage to a window and fixtures. During the struggle that ensued the wife tried to get the rifle away from the accused. It was only during this struggle that the rifle was pointed at her. She implied in her testimony that the pointing was inadvertent. This lack of criminal intent caused the accused to appeal his conviction for "pointing" in Provincial Court. The Supreme Court Justice agreed with the accused there was no proof of *mens rea* and that the conviction could not stand. However, he held that the accused had been careless in his handling of the firearm and although he was not charged with that offence, he convicted him of "careless handling". The Supreme Court justice reasoned that "careless handling" was an offence included in "pointing". According to the criminal law, a person charged with an offence may be convicted (where the offence was not proved) of any lesser and included offence, provided, of course, that the lesser and included offence was made out.

The Criminal Code of Canada provides that there are two ways in which one offence may be included in an indictable offence and the common-law adds a third.

All offences are defined in the criminal law. This definition may include a lesser offence. For example, Criminal negligent driving causing death. If the Crown fails to prove that there was a casual link between the driving and the death, the accused may be convicted of the lesser offence of criminal negligent driving.

If a person is for instance, charged with attempting to murder John Doe, then regardless what the Crown proves there is no included offence as the definition of attempted murder only includes murder itself. Needless to say that is not a "lesser" offence. However, the Crown may include in the indictment the means by which the accused allegedly attempted to take the life of John Doe. For example, by wounding him, by administering a poisonous substance, etc. If these means are an offence (needless to say they are in this example) then a Court may convict of the offence included in the indictment.

The common-law provision is where the lesser offence is included due to it being a matter of logic and necessity, like theft and possession of stolen property.

The accused appealed his conviction of careless use of a firearm claiming that this offence was not included in the offence alleged against him (pointing a firearm). He argued that the lesser offence is not included in the enactment; was not included (and probably could not have been)

in the indictment; and that pointing a firearm does not of necessity include the careless handling of it.

The Court of Appeal for BC held that it simply could not find that a person who points a firearm of necessity uses or handles that firearm in a careless manner. This despite the Crown's position that pointing is so inherently dangerous that to do so is inescapably careless. He argued that the word "careless" was only omitted from the section to avoid the implication that as long as you point carefully, it is not an offence.

Another logical question was, how could there be carelessness, which infers an element of negligence or recklessness, where both parties present knew the gun was not loaded. (When charged with pointing, the fact that the gun is not loaded is no defence). On the question whether careless handling of a firearm is included in pointing a firearm, the Court held that when one reads the "pointing" definition, one would not be fairly informed that he would also have to meet careless handling. Pointing a firearm at someone does not of necessity or by adding apt words to the offence section include careless handling.

Accused's appeal allowed
Conviction set aside and acquittal ordered

WHY OUR "RAPE SHIELD LAW" WAS FOUND WANTING AND THE SUPREME COURT OF CANADA'S SUBSTITUTION

REGINA v. SEABOYER and REGINA v. GAYME - Supreme Court of Canada, 66 C.C.C. (3d) 321, August 1991

Seaboyer met a woman in a bar. They did some drinking together and had a sexual encounter afterwards. The woman complained that she had been sexually assaulted. At the preliminary hearing the Crown introduced evidence of the complainant's physical condition which would tend to corroborate that she had not consented to the sex act. The accused sought to cross-examine the complainant about her other sexual activities that may have caused the bruises and marks the Crown had put in evidence. The accused ran at this stage amok of the "rape shield law", sections 276 and 277 of the Criminal Code. Seaboyer was committed for trial.

Gayme also ran afoul of these sections when he at this preliminary hearing wanted to cross-examine his 15 year old prior girlfriend who complained that Gayme had sexually assaulted her at school. Gayme claimed that she had been the sexual aggressor and that he had an honest belief that she consented. He sought to adduce evidence and cross-examine the complainant about her prior and subsequent sex acts. This he claimed would show why he had an honest belief the complainant consented. Gayme was also committed to stand trial.

Both accused claimed that the shield law prevented them from presenting a full answer and defence to the serious allegations against them. This they submitted is contrary to sections 7 and 11(d) of the Charter in that the Criminal Code sections deprived them of a trial based on the fundamental principles of justice and to be presumed innocent until proven guilty. Provincial Court judges when conducting a preliminary hearing are not a court of competent jurisdiction to declare enactments to be without force or effect. Thus the issue of the constitutional validity of the sections went up the hierarchical judicial ladder and ended up in the Supreme Court of Canada (S.C.C.).

The questions asked of the S.C.C. were as follows: (as far as they apply to this synopsis)

1. Does the "Rape Shield Laws" infringe s. 7 and 11 (d) of the Charter?
2. If the two sections of the C.C. are invalid, then what is the law?

The S.C.C. recognized the sensitivity of this challenged legislation in that s. 276 (1) amounts to an exclusionary rule applicable to the defence only. It does stipulate that "no evidence shall be adduced by or on behalf of the accused concerning sexual activity of the complainant with any other person than the accused." That prohibition is capable of stifling an accused in making a full answer and defence.

The impugned section provides for only three exemptions to this exclusionary rule applicable

to the defence. The first is where the Crown has opened the door by adducing evidence of the complainant's sexual activity or absence thereof. The defence may then present evidence of sexual activity on the part of the complainant with a person other than the accused to rebut such evidence adduced by the Crown.

The second exemption is where the defence by adducing specific instances of the complainant's sexual activity may tend to establish that it was not the accused but some other person who had sexual contact with the complainant on the occasion set out in the charge.

The third exemption is where there is evidence of sexual activity that took place on the same occasion as the sexual activity that lead to the charge of sexual assault against the accused, provided that evidence is relevant to the consent the accused claims he believes was given by the complainant.

Needless to say that considering the circumstances of the offences as outlined above, none of the exemptions were available to the accused. They argued that they were as much in need as an accused to whom the exceptions do apply. Gayme argued that his ex-girlfriend's sexual activity is evidence that relates to him believing there was consent for the sexual contact. Yet s. 276 (1) (c) C.C. does not include him in the exemption provided by the subsection.

Seaboyer saw no distinction between his need for an exemption to make a full answer and defence and an accused to whom subsection (b) of section 276 (1) applies. He claimed to have a need to show that the marks and bruises the Crown alleged he caused the complainant to have sustained, were the results of a sexual encounter subsequent to his sexual contact with the complainant.

In addition the defence as well as the S.C.C., identified a few more examples were the need for delving into a complainant's sexual activity is as essential to meet the rights under s. 7 of the Charter as in the exemptions provided in section 276 (1) C.C. For instance: 1) Evidence of sexual conduct on the part of the complainant which tends to prove bias or a reason to fabricate; 2) Evidence of a pattern of sexual conduct so closely resembling the accused version of the sexual encounter with the complainant that it tends to prove that she consented or that the accused reasonably believed that there was consent; 3) Evidence that the complainant has made false allegations of sexual assault.

The S.C.C. recognized that s. 276 (1) C.C. places procedural limitations on the defence that make possible the conviction of persons who by the most fundamental principles of justice and law are innocent. S. 276 deprives the trier of facts from getting at the truth by excluding crucial and relevant evidence. This runs amok of what a fair trial has to have as essential elements. A fundamental one of these is the rights of an accused person to call evidence in his or her defence. In other words, s. 276 (1) C.C. is a "shield" for the complainant but a "sword" for an accused person.

An example was given of the imbalance the shield law creates:

A woman (A) claims she was raped by a man (B). B. claims A is a prostitute who agreed to give him sexual gratification for $20.00. When the service was completed A. demanded $100.00. Non compliance would result in a complaint of rape against B. He refused and she charged him with rape and he counter charged her with extortion. In the extortion trial evidence of her sexual conduct and her *modus operandi* to extort a bonus, may be adduced by the Crown. In the prosecution of B. for sexual assault evidence that she used the same methods to booster her price for sexual services, with others, is inadmissible. Yet the facts are the same in both cases. His sexual behaviour with persons other than B. is as essential an issue to determine if B. is a rapist as it is to decide if A. is an extortionist. "If the woman's sexual behaviour is relevant enough to be admitted against her when she is a defendant, then certainly it is relevant enough to be admitted in a trial at which she is merely a witness.

The S.C.C. considered various remedial alternatives to declaring s. 276(1) C.C. without any force or effect but decided that these would be inappropriate. The Court applauded parliament's attempt to abolish the outmoded, sexist based use of sexual conduct evidence by defence lawyers. However, Parliament did "overshoot the mark" and closed the door to evidence essential to a legitimate defence to eliminate the possibility that a judge and jury may draw an illegitimate inference from such sexist based evidence. Said the Court:

> "The price is simply too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent."

The Court saw it as its responsibility to strike down s. 276 (1) C.C. and found that two suggested alternative means to deal with this flawed shield law were inappropriate.

The rules of evidence as they were prior to this impugned shield law coming into effect, were due to unscrupulous maximization of what was permitted at the time, in desperate need of remedy. The Court or Parliament simply had to come to grips with the relevance and probative value of evidence of a complainant's previous sexual activities with persons other than the one on trial for having sexually abused her. A woman who took the stand as a witness and victim was not to be envied. In many cases, what they endured as a complainant during investigative and procedural stages was psychological horror and a saga probably much worse than the rape itself. The S.C.C. recognized that the torturous rules of evidence prior to s. 276, were rules that existed at common law. Would striking down s. 276 revive the outdated rules? The Court answered that question with a resounding "No" and said:

> "..... the reality in 1991 is, that evidence of sexual conduct and reputation in itself, cannot be regarded as logically probative of either the complainant's credibility or consent."

These, of course, were the key myths Parliament eradicated by means of s. 276 and 277. The old rules were so firmly entrenched that the law no longer protected the women who could not carry the day in the witness stand. Only the ones seen as virtuous and seemingly chaste could escape or withstand the defence's onslaught. Extensive research has revealed facts about the entire process (from the time a complaint was lodged until a verdict was rendered) one would consider impossible in our enlightened era. As a matter of fact the old procedures, and pre-conditions to be met for eligibility in that system, were the equivalent of attending the barber for dental care. The S.C.C. seemed to favour qualified dentists and prevented revival of the old common law by creating new evidence rules.

The S.C.C. firstly held that s. 277 is valid law and does not infringe the Charter. This section simply stipulates that sexual reputation, whether general or specific, is not admissible in sexual assault trials for the purpose of challenging or supporting the credibility of the complainant. It found that there simply is no rationale to support a link between credibility and sex habits.

As stated above, the Court did strike down s. 276 but created new rules to prevent revival of antiquated common law. The Court did so by reminding the judiciary of their inherent powers to adapt the law to contemporary standards. The Court also gave some direction in regard to procedures.

The Court firmly supported a restriction on the admissibility of evidence adduced by or on behalf of the accused concerning the sexual activities of the complainant with persons other than the accused. However, it broadened the scope of the exemptions to the exclusionary rule binding on the accused. Where the sexual behaviour of the complainant 1) is capable of casting doubt that there was in fact consent for the sexual contact subject to the charge; 2) where it tends to show fabrication and false accusations; or 3) where supportive physical Crown evidence can be rebutted by showing that someone else may have caused the physical symptoms, then, of course, that behaviour is relevant and admissible.

The Court seemed to address the judiciary and blame them for Parliament having to step in to put a stop to the barbaric procedures they allowed by their own outmoded rules. Said the Court:

> "It is hoped that sensitive and responsive exercise of discretion by the judiciary will reduce and even eliminate the concerns which provoked legislation such as s. 276, while at the same time preserving the right of an accused to a fair trial". (emphasis is mine)

The Court emphasized that the need for exploring the complainant's sexual behaviour with the accused or others, to allow him to make a full answer and defence will only be in "exceptional cases". When this is necessary, the Courts must follow a procedure that will minimize the invasion of the privacy of the complainant. Consequently the S.C.C. directed that the accused

must admit a written motion to be exempted from the exclusionary rule. If the trial judge holds that the motion is *prima facie* valid than he/she must conduct an *in camera voir dire* to determine if the probative value of the evidence is in balance with its potential prejudice.

Please note the inclusion of the complainant's sexual behaviour with the accused in this exclusionary rule. Although the S.C.C. seemed to be of the opinion that the need for admission of sexual behaviour with the accused is more likely to be relevant than such behaviour with others, it clearly stated that it ought not to be admissible by its very nature. Said the Court:

> "I question whether evidence of other sexual conduct with the accused should automatically be admissible in all cases; sometimes the value of such evidence might be little or none."

The S.C.C. also instructed trial judges to exercise their discretion to ensure that there was no unnecessary infliction of embarrassment and invasion of the complainant's privacy. The defence evidence of sexual behaviour on the part of the complainant has to be "for a legitimate purpose" that "logically supports a defence". Said the Court:

> "The fishing expeditions which unfortunately did occur in the past should not be permitted. The trial judge's discretion must be exercised to ensure that neither in *camera* procedures nor the trial become forums for demeaning and abusive conduct by defence counsel".

Trial judges were also instructed to caution jurors where they get to hear evidence of the complainant's sexual behaviour with the accused or others. They must be told that such evidence is only to serve the legitimate purpose of the defence and that they may not consider that evidence to determine the complainant's worthiness of belief or find on the basis of that evidence that the complainant was more likely to have consented to her sexual involvement with the accused.

In summary, the S.C.C. ruled that no evidence of the complainant's consensual sexual conduct may be adduced by or on behalf of the accused for the purpose of creating the inference of consent to the sexual encounter that is subject to the charge before the Court or to discredit the complainant's worthiness of belief.

Such evidence of sexual behaviour may only be admissible where it possesses probative value on an issue in the trial where that value is not substantially outweighed by the danger of unfair prejudice flowing from that evidence.

The Court then gave a number of examples of exemptions to this exclusionary rule. All of these are mentioned above.

The Court agreed that judges presiding over preliminary hearing lack the jurisdiction to consider the constitutional validity of legislation. Therefore the committals to stand trial were valid.

The appeals by the two accused were dismissed. They were ordered to stand trial.

CROWN MUST PROVE SEAT BELT IS PROPERLY ATTACHED TO THE MOTOR VEHICLE

Mr. Sara was simply not wearing his seat belt, the trial judge found at the conclusion of a trial. He appealed this finding to the BC Supreme Court arguing that the Crown had not met its burden of proof. The officer had given a detailed description of what he observed when he rode his motorcycle behind Mr. Sara's mid-seventies model car. There, no doubt, was a seat belt in the car. However, s. 217 (4) of the BC Motor Vehicle Act, states that a person in a motor vehicle shall wear the seat belt, provided the vehicle is equipped with one for the seating position that is properly attached to the vehicle. When the officer had not included in his evidence that the seat belt was so attached Mr. Sara had unsuccessfully made a no evidence motion at the closing of the Crown's case, or in the alternative, that the requisites of the offence were not made out. The judge had misunderstood the motion and held there was some evidence. Mr. Sara then testified, and in essence provided the evidence the Crown was short of. The Supreme Court Justice agreed that the Crown had failed to prove, that Mr. Sara's car was one that had "properly attached to it a seat belt assembly". There was a seat belt, but whether it was attached was not known at the end of the Crown's case. Mr. Sara had been entitled to his no evidence motion resulting in a dismissal. That the error made by the trial judge caused Mr. Sara to take the stand and supply the missing link will not cause the quashing of a conviction[23].

Mr. Sara's appeal was dismissed

Regina v. Sara - Supreme Court of BC, Vancouver No. CC901576, June 1991.

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[23] R. v. Boyer - [1968] 4 C.R.N.S. 127 (B.C.C.A.)