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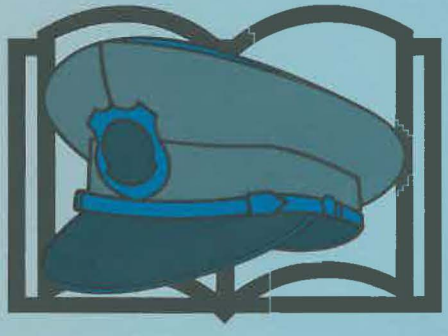

POLICE ACADEMY
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ISSUES OF INTEREST

VOLUME NO. 41

Written by John M. Post
July 1992

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REGINA v. MACKENZIE - 64 C.C.C. (3d) 336. Nova Scotia Court of Appeal

In the wake of the murder of three persons the accused was arrested. Due to intoxication he was left alone for a period of 12 hours. He was then cautioned and told of his Charter rights. In response the accused told the officers that he was responsible for the killings. He was then told by the officers that they wished to take a written statement from him. The accused said he firstly wanted to consult counsel. He phoned a relative who would get hold of a lawyer for him. Police said that they would not ask him any questions until he has spoken to his lawyer. During the ensuing 40 minutes, while waiting, the accused told police again how he had killed his three neighbours and why. The officers simply listened and did not say anything to the accused. When he had come to the end of his volunteered statement he wanted to know what they were waiting for. He was reminded that they were waiting for his lawyer. The accused was again assisted and left in privacy with a telephone. Shortly after the lawyer arrived and needless to say no further statements were made.

The trial judge had excluded the statement the accused made after he indicated he wanted to speak to a lawyer, despite the fact that it was volunteered. That statement was very explicit and descriptive. This was after a consideration of the accused's rights to counsel under s. 11 (d) of the Charter.

The jury acquitted the accused and the Crown appealed to the Nova Scotia Court of Appeal. One of the three justices of the Court found that the continued presence of police officers, while waiting for the lawyer, was an inducement that would lead the accused to believe that he was under an obligation to speak. The majority of the Court however, found that the police did nothing to unfairly entice the accused to continue relating the story of the events surrounding the killing of the three victims. Police had assisted the accused in retaining counsel and refrained from any further questioning. There was nothing that would bring the administration of justice into disrepute by admitting the second half of the voluntary statement in evidence.

Crown's appeal was allowed
New trial was ordered

CONSTITUTIONAL VALIDITY OF THE MANDATORY PRESUMPTIONS RELATED TO BREAK-IN / OUT OFFENCES

REGINA v. SLAVENS - Court of Appeal for BC, March 1991 - 64 C.C.C. (3d) 29

The accused was caught in a secured underground parking garage of an apartment block. When challenged he ran and found an exit that took him to the lobby of the building. When he tried to exit that place he walked into the arms of the police and consequently was convicted of breaking out of a place after having entered it with the intent of committing an indictable offence therein. For the latter part of this allegation, the Crown relied on the presumption in s. 348 (2) C.C. that in the absence of any evidence to the contrary, breaking out of a place is done after entering with the intent to commit an indictable offence therein. This the accused had claimed, is legislation that infringes his rights to be presumed innocent and violates his right to a trial based on the fundamental principles of justice. He was unsuccessful, and appealed the conviction to the BC Court of Appeal by raising the same Charter arguments as he had at his trial.

Since the Charter came into effect in 1982 the Courts as well as Parliament did rid our criminal law of several presumptions of guilt. These statutory as well as common law provisions became subject to various tests to determine their constitutional validity. Pre-conditions had to have a link of probability to the facts that may be presumed. However, the wording of these presumptions varied and the Courts divided them into two categories, "mandatory presumptions" and "reverse onus clauses". A mandatory presumption is the least threatening or aggressive. The enactment by means of which such a presumption is created usually outlines the conditions prerequisite to the presumption and then goes on to say that the absence of <u>any evidence</u> (not proof) to the contrary such conditions are proof of something. The presumption can be rebutted or avoided by evidence that raises a reasonable doubt about the presumed fact.

A reversed onus clause is far more obnoxious and assertive in law. It also outlines prerequisite facts to be proven beyond a reasonable doubt by the Crown, but then places the onus on the accused to displace the presumed fact by <u>proving</u> the contrary on a balance of probabilities. The presumption of innocence consists of two basic rights: (1) The Crown must prove beyond a reasonable doubt what it alleges (that burden may not shift), and (2) The accused has a right to remain silent. It is self-explanatory how presumptions of fact or guilt may run amok of the Charter, particularly the kind that is a reverse onus clause.

The trial judge had held that the provisions of s. 348 (2) (b) C.C. amount to a mandatory presumption. She reasoned that the provisions did not make it possible for the accused to be convicted despite a reasonable doubt. Furthermore the provision did not compel the accused to break his silence. He did not have to adduce the <u>evidence to the contrary</u> by means of his own testimony. This could be accomplished by cross-examining Crown witnesses. A simple

question relating to the possibility of the reason for his presence on the premises was for the purpose of finding a place to sleep, could suffice as evidence to the contrary.

The accused had made statements to the Crown witnesses about his presence in the garage. The trial judge had simply disbelieved them. Had they been believed they apparently were capable of amounting to evidence contrary to the presumed fact that he had entered with the intent to commit an indictable offence. The hour (03:00), the prowling among the cars, shining his flashlight in them, and his panicky flight made his explanations to authorities incapable of belief held the trial judge. Such, she held, is not evidence of any weight.

The BC Court of Appeal held that the trial judge was wrong and out-of-step with the tenor or trend of recent judgments by the Supreme Court of Canada. Although these cases were not on "all-fours" with the very issues in this case, they are in the application of general principles of law.

Without the provision contained in s. 348 (1) (c) the Crown would have to prove two essential elements of the crime alleged against the accused. The section relieves the Crown of the burden to prove that the accused did, or intended to commit an indictable offence. In this case the Crown has to prove one element (the breaking out) and the accused must take care of the other element (intent) to rebut the presumption the legislation provides. This means that if the accused fails to participate in his trial he could be convicted of the crime on the basis of a mandatory presumption, in the absence of which there could be reasonable doubt that there was the required *mens rea*. This is directly in conflict with the fundamental principles of justice (s. 7) and the presumption of innocence [s. 11(d)]. It means that a jury will have to convict even where there is a reasonable doubt as to the truth of an accused's statements.

The Court of Appeal quoted other superior Courts on the issue of mandatory presumptions and reverse onus clauses and seemed to agree that the distinction between these two does not solve the issue. Both place onus or burden on the accused while the presumption of innocence means that the Crown must prove beyond a reasonable doubt each element of the offence charged. It held that the impugned s. 348 (2) (b) C.C. is without any force or effect unless it is justified under a test described in s. 1 of the Charter. It simply says that reasonable limits to Charter Rights and Freedoms, "described by law", may be valid if demonstrably justified in a free and democratic society. The Supreme Court of Canada held in 1986[1] that where the law overrides a constitutionally - protected right or freedom its provisions must be of significant and sufficient importance. To determine the validity of such law the Courts must apply a "proportionality test". This consists of considering if measures were carefully designed to reach the objective of the presumption. It simply cannot be based on arbitrary, unfair or irrational considerations. Then the means the legislation describes for presuming certain facts, must violate as little as possible the rights and freedoms of an accused person. Lastly, "there must be proportionality

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[1] R. v. Oakes - 24 C.C.C. (3d) 321. See Volume 23, page 16 of this publication.

between the effects of the measures taken and the objective sought to be achieved". In addition, the "evidentiary assist" must make sense, be needed and be justified on the basis of statistics.

Although the statistics the Court uses were a few years old, it found that in Canada nearly one half million "breaking & entering", "breaking out" or "being unlawfully in" offences occur per year. Of these only 20% are cleared. About 17% of the crimes are committed in BC with a clearance rate of only around 13%. The Court found that this indicated "epidemic proportions". The clearance rate clearly indicates that obtaining evidence sufficient for a charge is a daunting task. The current clearance rate is, to say the least, not a deterrent. Without the evidentiary assist provided by this well-known presumption the requisite criminal intent is nearly impossible to prove. Removing the impugned sections from our criminal code would no doubt have an adverse effect and would make the situation even more deplorable.

The accused's appeal was dismissed
Conviction upheld

Comment:

It seems fair to say the BC Court of Appeal did not mean to give the Crown a leg-up because society is inundated with the crime the presumption relates to. The reason for a poor clearance rate can have causes unrelated to legislation. On the surface one may conclude the justification the BC Court of Appeal found for not striking down the presumption had more to do with convenience than law.

The presumption is there for obvious reasons. Without it the law that recognizes by means of its severe maximum penalties that entering someone else's premises to commit crime is a grave offence, would be rendered a legislative tiger with severe dental problems. Intent is simply not provable unless the perpetrator speaks or, for that matter, fails to explain. It seems that the legislation is in line with the dictum: "There comes a time that a person is so surrounded by inculpatory circumstances that he either speaks or stands condemned". In *R. v. Kowlyk* the Supreme Court of Canada recently upheld the rule of "Recent Possession" which is based on this dictum. "Intent or knowledge" are most of the time prerequisites to criminal offences. In many situations we cannot by the standards of proof in criminal law prove that those mental elements existed. If at common law we have "Recent Possession Rule" then why can we not have a statutory presumption that is geared to overcome the exact same threshold?

POLICE OFFICER AIMING GUN AT PRISONER TO DISSUADE HIM FROM FLEEING. GUN GOES OFF AND PRISONER IS KILLED. MANSLAUGHTER?

REGINA v. GOSSET - 67 C.C.C. (3d) 156, Quebec Court of Appeal, May 1991

The accused Gosset was a police officer who had been called to the scene of a man refusing to pay his taxi fare. The suspect, Tony Griffin, at first gave a fictitious name. When his correct name was discovered, the accused found that there was a warrant outstanding for Griffin. Another matter of suspicion was the quantity of cigarettes Griffin had in his possession. Griffin was taken to the police station. When he was led out of the police car he ran. The accused drew his revolver and shouted, "Stop, or I'll shoot". At this point the weapon was held at the accused's side and was pointed towards the ground. Griffin stopped and faced the accused. When it looked as though he would run again, the accused aimed the gun at Griffin. A shot rang out and Griffin collapsed with a bullet in the head. The accused claimed that he only aimed his gun to dissuade Griffin from further flight. When he did so he did not realize that the gun was cocked, which he deduced must have happened accidentally when he took it out of the holster. Neither was he aware of having pressed the trigger.

The accused was charged with manslaughter and tried by a jury. He was acquitted and the Crown appealed this verdict claiming that the judge had not adequately instructed the jury.

The applicable enactments for these circumstances provided that culpable homicide that is not murder is manslaughter. A person commits culpable homicide when he causes the death of a human being (1) by means of a unlawful act or (2) by criminal negligence. The indictment against the accused did not specify either of these two means. The jury was told it had to find that the accused had been criminally negligent while the Crown claims that it did prove that the death was caused by the unlawful act of careless use of a firearm.

The accused conceded at trial that the circumstances did not require that he fire at Griffin or ready his gun to be discharged. He simply did not know that the gun was cocked or that his finger was on the trigger. This, the defence had argued, left the Crown without proof that their was any malice or intent on the part of the accused. For careless use of the firearm the Crown must show at least, that the accused knew the gun was cocked. This to prove that there was absence of "reasonable precaution" for the safety of Griffin. The Crown rebutted this submission by saying that the accused should have checked the gun before aiming it a Griffin. He should have been aware that the gun was cocked. All this amounted to a standard of care less than a good police officer would have taken in the circumstances. There simply was no excuse for the accused's conduct which resulted in Griffin's death. The Crown did not say that the accused was careless because he drew his gun in the circumstances. However, when he did he exercised inadequate care and that constitutes careless use of a firearm. There simply was no requirement for the Crown to prove knowledge on the part of the accused that his gun was

cocked or that his finger was on the trigger. All the Crown claims it had to show is that the care the accused ought to have taken was not met by him. The Crown affirmed that the accused did not fire his gun deliberately or did intent to harm Griffin. This means, the Court confirmed, that he did not invoke the shield law contained in s. 25 of the Criminal Code or used excessive force (s. 26 C.C.), or used force to prevent an offence (s. 27 C.C.). However, what should have been explained to the jury was the meaning of "without lawful excuse" for the careless use of a firearm.

The Court of Appeal was of the opinion that it was "objectively imprudent as regards Griffin's safety" for the accused to consciously point the gun at Griffin. To do so with a loaded gun is not prudent, particularly not while the index finger is on the trigger and without ascertaining if the revolver is cocked. There certainly was a causal link between the accused's actions and Griffin's death. In criminal law, however, the drawing of a gun to dissuade a person under arrest from fleeing may be a lawful excuse and a justified action.

The instruction the jury received emphasized the essential mental element of criminal intent or malice on the part of the accused to find him criminally negligent. For that they were instructed to include in their consideration all events from the very beginning of the accused's contact with Griffin until after the shot was fired. Did his attitude or behaviour towards Griffin show any malice? This was inadequate for instructions to determine if the accused had been careless in the way he handled his firearm. The essential elements of that offence are substantially different from criminal negligence. Careless handling of a firearm is a crime of general rather than specific intent. The criminal intent required is the intent to do the act which constitutes the offence or wrongful act - in this case to handle, without lawful excuse, a firearm in a careless manner. In addition, to make out the crime of manslaughter the Crown has to show that the accused knew that his action did put Griffin at risk of some harm. In other words the jury was instructed to find graver elements than were necessary.

Crown's appeal was allowed
New trial was ordered

ADMISSIBILITY OF RESPONSE TO INITIAL INVESTIGATIVE QUESTIONS

REGINA v. ELSHAW - Supreme Court of Canada, September 1991 - 67 C.C.C. (3d) 97.

Two neighbours living adjacent to the public park saw the accused walking in a crouched position into some bushes. He was holding two boys (one 5 and 6 years old) by the hands. One of the witnesses notified police and the other approached the bushes to see and hear what was going on. The accused was found "wrapped around" one of the boys and heard to say, "This is our little secret".

When police arrived the accused tried to flee but was apprehended and told to be under investigation for possible child molestation. He was then placed in the rear of the police van while the officers spoke to the witnesses. This took five minutes. The officers then opened the doors of the van and had a brief conversation with the accused. He was asked, "What would have happened if we had not come along?" The accused explained that he could not help himself when he had "these urges". He said to be more attracted to girls than to boys and said that five or six year old children were his main target. He complained not to know how to get help and was then told by the officers that they could arrange that for him. This conversation prior to an official arrest became the kernel issue at trial as well as the subsequent appeals from conviction of attempted sexual assault. The trial judge had admitted the conversation in evidence and this was upheld by the BC Court of Appeal.[2] Claiming that his right to counsel had been violated as he was detained at the time he gave his statement and had not been informed by then of that right, the accused appealed to the Supreme Court of Canada (S.C.C.).

The issue of detention was not problematic. The Courts at the provincial level held (and the Crown conceded) that the accused was detained at the time he made the statement in issue. However, those Courts also held that the detention was reasonable and brief. Although the accused's right to counsel had been violated admitting the statement in evidence would not bring the administration of justice into disrepute. The sole issue before the S.C.C. was the application of the exclusionary rule [s. 24 (2) Charter] in these circumstances.

The S.C.C. was of the opinion that the BC Court of Appeal had erred in allowing the length of the accused's detention before he made the statement, to affect their judgment. The police did put a question to the detained accused and received an inculpatory reply prior to fulfilling their obligation under the Charter. This is the issue and not how long the accused was detained when the question was put to him. That violation was serious; the accused was denied his right to know that he had access to legal advice and the fact that he needed not to respond. This at a time when he needed those rights the most. The statement contributed considerably to his

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[2] See Volume 35, page 23 of this publication.

conviction and was a link to the similar fact evidence which was the foundation for his indeterminate sentence as a dangerous offender.

It was necessary in the circumstances to place the accused in the patrol wagon and detain him while the officers gathered information, but it was no urgency that justified violating his Charter rights. The S.C.C. recognized that there are circumstances where urgency and necessity justify the questioning of a suspect prior to advising him of his rights to counsel. The urgency of detention, as in this case, is no excuse to violate that right. Although the S.C.C. stressed that even if there was "good faith" on the part of the officers, it would not have mitigated the Charter violation. In the circumstances there was no "good faith" to be considered, but even if there was, it (good faith) cannot serve as support to admit evidence to cure an unfair trial as a result of admission of self-incriminating evidence. Even though the legal requisites for "good faith" did not exist the Court observed that what would have taken away from the common understanding of that phrase was the officers omitting to even give the accused the common law caution regarding his right to remain silent.

The S.C.C. seemed in complete disagreement with the BC Court of Appeal decision on this case and .....

Allowed the accused's appeal
and ordered a new trial

RELIGIOUS COMMUNICATION - PRIEST AND PENITENT PRIVILEGE

REGINA v. GRUENKE - Supreme Court of Canada, 67 C.C.C. (3d) 289, October 1991

The accused (a 22 year old reflexologist) had an 82 year old client who befriended her and her mother. Mr. B. (the client) became a surrogate father to the accused. He willed a life interest in his estate to her; he lent her money to start her own business; and she moved in with him in a platonic relationship. The "living-in" arrangement did not last long as Mr. B. demonstrated jealousy over her relationships with other men and insisted on sexual favours.

One day Mr. B. announced that he would come to see the accused. She arranged for her boyfriend to stand by in case of trouble. What happened after is somewhat murky, but all three went out of the populated area and Mr. B. was murdered. Both the accused and her boyfriend were convicted of murder. The verdict was upheld by the Manitoba Court of Appeal and the Supreme Court of Canada granted the accused leave to appeal her conviction.

The accused had decided to confess to the murder which was planned for the purpose of gaining the benefits of the B's will and to stop the sexual harassment. To do so she attended the office of the minister of the protestant church she attended at times. She spoke to the minister as well as a church counsellor. She wanted to know if she could be forgiven for what she did. She told the minister and counsellor in considerable detail what happened and that she had beaten B. to death. The minister and counsellor were subpoenaed and testified for the Crown. The statements were admitted despite the defence's submission that the conversation was privileged and guaranteed to be so under the Charter provision for freedom of religion.

History shows that the British and Canadian Courts have not as a matter of practice, compelled members of the clergy to disclose information that is confidential religious communication. However, there is no common law that protects such communication. It seems fair to say that the defence position was, that if the Court found that there was no such common law the Court should create it in this case. Section 2 (a) of the Charter guarantees us Freedom of Religion and a *prima facie* privilege of communication in the exercise of this Freedom, will give it full effect.

Solicitor-client communications are *prima facie* privileged in that they are inextricably linked to the effective operation of the legal system. Penitent or communications between a member of the clergy and a person who seeks religious personal advice or relief from a matter of conscience, may be socially desirable but it is not linked to the legal system. All relevant evidence is admissible unless proven otherwise. Consequently, no *prima facie* privilege should be created for this type of communication, held the Court.

Then the Court considered if there ought to be a "case-by-case" priest and penitent privilege. In other words, should there be a principled approach taken to this question, which takes in account the circumstances of each case. In 1987[3]the S.C.C. referred to the impact of the now entrenched freedom of religion in regards to privilege for religious communications. Prior to the Charter coming into effect there was a freedom of thought and belief. "With the enshrinement of this freedom we now also embrace a right to manifest religious belief by worship and practice or by teaching and dissemination". "Though this enhances a claim that the religious communication with an ordained minister or priest should be afforded privilege", its applicability must be determined on a case-by-case basis. In other words, the privilege is not absolute.

One of the fundamental prerequisites to the privilege is an understanding and expectation of confidentiality. This expectation is on the part of the penitent person (the one who feels sorrow for sins committed). After all it is his/her privilege and not that of the minister or priest.

In this case there was no suggestion of confidentiality. As a matter of fact the accused told the reverend that she intended to go to the police and "take the blame" for the murder.

Another prerequisite to privilege in regards to religious communication, is that its purpose must be religious or spiritual. One may deduce from this that the privilege is only available were "confession" is part of the theological doctrine of the denomination the penitent belongs to. The Court did however, emphasize that such a formal practice is <u>not</u> in and of itself determinative. In this case the communication was to relieve emotional stress and was not for a spiritual or religious purpose.

Accused's appeal dismissed
Conviction for first degree murder upheld

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[3] R. v. Church of Scientology - 31 C.C.C. (3d) 449.

LOUD PARTY INTERFERING WITH NEIGHBOUR'S ENJOYMENT OF PROPERTY - MEANING OF ENJOYMENT

REGINA v. PHOENIX - 64 C.C.C. (3d), BC Provincial Court, March 1991

The accused hedonistically pursue his love for hard rock music and partying until 5:00 am. The neighbours and their children were deprived of sleep. Police attended twice at the accused's home but all was to no avail. Consequently he was charged with mischief. The Crown alleged that the accused had wilfully interfered with the neighbour's lawful enjoyment of property.

The accused was represented by counsel who entered a plea of guilty on behalf of the accused. When the Judge heard the circumstances he refused to accept the plea and ordered a trial. When the accused appeared for trial, he again attempted to plead guilty but was again refused.

The operating words in the allegation are "wilful" and "enjoyment". Continuation of the infernal noise despite police pleadings and warnings was just about as inconsiderate as one can get and leads one to draw the inference that the accused and his friends were totally indifferent to the inconvenience and annoyance they caused. Although this does not show that they intended to do so, it does show that they were wilful.

"Enjoyment" commonly means pleasure. Not being able to sleep in your own home is far from pleasurable. But the Court held that in law enjoyment has a different meaning. If "enjoyment" was measurable in decibels and had to be taken at its common meaning, the use of power tools, planting a tree that obstructs view and many other acts would become indictable offences if someone objected to the noise or the tree. "Possession" and "enjoyment" are used interchangeably in law. It means that we have a right to possess real property without legal challenge of the title. When Parliament enacted the section under which the accused was charged it did not intend to create a crime for interfering with the pleasure, comfort or convenience of the use of real property. The accused had not interfered with the complainant's legal possession of the property and he was consequently acquitted.

MEDIA ACCESS TO TAPE-RECORDED CONFESSION AND RE-ENACTMENT OF A MURDER

REGINA v. VICKERY AND PROTHONOTARY OF SUPREME COURT OF NOVA SCOTIA - Supreme Court of Canada, March 1991, 64 C.C.C. (3d) 65.

We have recently experienced an increased interest on the part of the "media" in using actual trials for the purpose of competing for ratings in their commercial enterprise. Listening to the networks' excuses and reasons for this interest one would nearly be convinced that the objective is educational and a patriotic pursuit of the common law constitutional right of the public to be informed. Far be it from them to exploit the process and real human tragedy, to sell commercials. A "public trial" is a right and what we are about to get, if the media has its way, may be more than we bargained for or what the creators of this constitutional right had in mind. In this case the respondent Mr. Nugent was convicted at trial of second degree murder. The Crown filed as an exhibit, an audio tape of an interview of Nugent where he confessed to the police to have committed the murder. The Crown also produced a video tape of Nugent re-enacting the crime. The news media applied for access to and use of the tapes for their purposes. The application was originally granted and later dismissed. The issue of access of the media to exhibits of this kind reached the Supreme Court of Canada. The thresholds for those who opposed this media access, was the freedom of expression and press and that, "A trial is a public event. What transpires in the court room is public property. Those who see and hear what transpired can report it with impunity." (US Supreme Court 1947, *Craig v. Harvey*)

A matter that had to be considered as well as the fact that although the tapes were held to be admissible by the trial judge and the content was viewed by the jury, the Court of Appeal held that the tapes were inadmissible. Nugent's conviction was consequently quashed. Needless to say Mr. Nugent did not want to be exposed on television as a person who *de facto* committed a murder but escaped all consequences via the Charter escape hatch. At least this will be the view and opinion of probably the majority of the viewing public. At law, Mr. Nugent, is due to the verdict of the Courts, an innocent person. Furthermore the Courts, the custodians of exhibits, were interested in receiving some clear directions from our Court of last resort.

It should also be noted that the media's application was only for access to the tapes, not the right to copy them or to air them. Another matter that makes this case somewhat a restricted or conditional precedent is that the S.C.C. felt that it should not entertain Charter arguments in regard to freedom of expression or press. This as these issues were not raised in the Courts below and therefore it had blocked those who may have wished to intervene in these important questions. The S.C.C. was in essence deprived of the submissions and arguments interested parties may have raised.

The S.C.C. observed that scrutiny of the judicial process is essential. Particularly where judges have issued some process or judicial licence in camera (Search warrants or authorizations for interception). Such scrutiny is constructive and keeps the system accountable. When all is over, the media, on behalf of the public should have access to all information and exhibits. In this case the trail of Nugent was public, as was the appeal hearing. No one was impeded to attend and disseminate by whatever means, what was said, submitted, and decided. The exhibits the media wanted access to where part of the procedures and all details of it were revealed and examined. No meaningful contribution could be made, in as far as scrutiny is concerned, by broadcasting the tapes.

Confessions of this kind will by themselves, undoubtedly persuade the public that Nugent was factually guilty. His legal innocence will not likely impress many people. This, considering that "Not guilty" is our only verdict to express lack of guilt, (whether this is exoneration, "not proven" or technical and legal innocence only) would make the inevitable dramatization of the confessions unfair to the acquitted person.

The S.C.C. observed an exhibit is not the property of the Court but is simply in its custody for a specific purpose. When that purpose has been served it should be returned to the person with a propriety interest in it. Police, who probably owned the tapes, were not one of the competing claimants before the Court.

This left Mr. Nugent, as a participant to the creation of the tapes, and who was to suffer the consequences of the anticipated use of the tapes by the media, as a person with a superior claim. However, the Courts have the inherent right to restrict the use of exhibits it returns or releases. In this case the public interest in the tapes had been met during the public trial and appeal procedures. Our Court said, (quoting the US Supreme Court) :

> "....the requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."

Application dismissed
Media was refused the exhibits

CAN ONE CONSENT TO SUSTAIN BODILY HARM IN A FIST FIGHT OR BRAWL? THE ISSUE OF CONSENT.

Regina v. JOBIDON[4] - 66 C.C.C. (3d) 454, Supreme Court of Canada, September 1991.

Manslaughter, a culpable homicide, includes causing the death of a human being by means of an unlawful act. It follows, that when an assault is committed and death thereby caused the assailant committed, manslaughter unless he can negate the assault, in this case by means of the defence of consent. The question however, is whether we can in law consent to being wounded, having bodily harm inflicted or have death caused?

The accused Jobidon was involved in a consensual fight in which he with a voracious first blow got the better of his opponent. Despite the limpness of the victim he continued to punch his head. Injuries sustained caused the death of the willing partner in this fight. To prove manslaughter the Crown had to show that the accused had committed an unlawful act that caused the death. That unlawful act was assault, which is defined as applying force intentionally to another person without that person's consent. Needless to say, the fight had been the equivalent of ballroom dancing in terms of consent. The question therefore was where the boundaries are of our ability to give permission to another person to inflict injury on us. In civil law, particularly where it involves contract and agreements there is an immense body of common law known as, "he who consents, cannot receive injury". (*Volenti non fit injuria*)

Section 7 C.C. in essence states that common law defences established by the criminal law of England are available in Canada except as altered, modified, varied or affected by the C.C. or any other statute of Canada. The Criminal Code provides that "no consent (to assault) is obtained" where the victim submits or does not resist by reason of the application of force to the victim or someone else; threats or fear of the application of force to the victim or other person; fraud; or exercise authority. Defence counsel argued that this s. 265 (3) C.C. had altered or revised the common law. The victim in this case had undoubtedly consented to the fight and that consent had not been obtained by any of these means hence there was consent and no assault argued Jobidon's lawyer.

Centuries ago one man chopped another man's hand off so he would be eligible to make a living begging. This had been done upon the initiative of the victim and with his full consent. The Courts held that the consent in the circumstances was nullified.

In another case the English Courts held that one man cannot licence another person to beat him

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[4] See Volume 35, page 35 of this publication for detailed circumstances and the decision of the Ontario Court of Appeal here reviewed by the Supreme Court of Canada.

In another case the English Courts held that one man cannot licence another person to beat him up. A fight by mutual consent is no excuse in criminal law for assault. These nullifications of the defence of consent were carried forward with Canadian *juris prudence*. Therefore the nullifications of consent provided for in 265 (3) C.C. do not limit the common law but reflect it. In others words the section is not exhaustive.

Reviewing all the Canadian cases the S.C.C. came to the conclusion that the provincial Courts of Appeal are rather divided on this issue. Said the Court, "....there is certainly no crystal-clear position in the modern Canadian Common Law....". However, it found that the common law always incorporated persistence to minimize the validity of a consent to have bodily harm inflicted in a fight.

The S.C.C. also considered this issue of consent on the basis of social policy. Unlimited consent to assault would be a step regressive in terms of civilized norms of conduct. Brawls and consensual fights are useless in social value. The harm and injury they cause is sometimes devastating. In this *Jobidan* case, a young man died on his wedding day, for absolutely no reasonable or defensible purpose. Common law limitations on what we can consent to will serve as an essential deterrence to fights and brawls. Consensual fights must not be a license to take advantage of others. Said the Court:

> "The sanctity of the human body should militate against the validity of consent to bodily harm inflicted in a fight".

The Court concluded that in a weaponless consensual fist fight between adults consent is vitiated where force intentionally applied causes serious hurt or non-trivial bodily harm. In the factual circumstances of this case this is the limitation common law must place on what we can consent to.

Further limitations may be established on a case by case basis. The S.C.C. emphasized that this ruling avoids nullification of consent where the results of the application of force in a fight results in minor hurt or trivial bodily harm. The bodily harm we cannot consent to is found in s. 267 (2) C.C.:

> "..... any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature".

The S.C.C. made special mention of assaults and consent during sports activities. It warned that the precedent they established in this case for brawls and fist-fights will not affect sporting events. When a person of his own free will participates in a rough game there is consent on his part as long as the force applied is within the customary norms and rules of the game.

The injuries the victim of the consensual fist fight with the accused sustained were the results

of the latter's sole objective, to strike the deceased as hard as he physically could, until his opponent either gave up or retreated. The victim's consent was nullified.

Appeal dismissed.
Conviction of manslaughter upheld

WHAT IS THE TEST TO DETERMINE IF AN OTHERWISE NEUTRAL OBJECT IN THE POSSESSION OF A PERSON IS A WEAPON

REGINA v. WEES - BC Supreme Court, Vancouver CC 900977, February 1992.

The accused was searched incident to his arrest for possession of cocaine. Police found in one of his trouser pockets a knife with an eight centimetre blade. The trial judge was satisfied that the accused did not know that the knife could be opened automatically by the application of centrifugal force, until the arresting officer demonstrated it. The officer asked the accused if he carried the knife for protection. The closest he came to admitting that was by saying, "....it's the area, like the people are not good". His main purpose was to, "...clean my fingernails and cut things with it". The accused was convicted of carrying a concealed weapon and appealed the verdict to the BC Supreme Court.

It was common ground that this pocket knife was not designed to cause death or injury to persons. The only issue to be resolved then, was if the trial judge was wrong in finding that the accused had the knife in his possession with the intent to use it as a weapon. (See definition of weapon in s. 2 C.C.C.).

The complexity of this issue is that where the person who possesses an otherwise neutral object is carrying it to use it as a weapon in an existing scenario, he has the prerequisite intent to the offence alleged here. However, is that also the case where the person carries that neutral object in the event a scenario may arise where he may want to use it as a weapon? In others words, must the intention be immediate to use it as a weapon? It is only the intent of the possessor who can convert a neutral object into a weapon.

Despite some conflicting judicial opinions on this issue, the law by means of precedents, dictates an explicit test that must be applied in circumstances like these. The trial judge had held that there was no reason why the Crown had to show an immediate intention on the part of the accused to use the knife as a weapon. However, the BC Supreme Court decided that the correct test was established in 1979[5]. The reasons for judgment in that case indicate circumstances not dissimilar to the issue in this case. The relevant portions of those reasons are as follows:

> ".....there is not one tittle of evidence that the appellant had ever used the knife as a weapon, nor, in my view, is there anything to suggest that he, certainly at the time of his possession in the beer parlour, intended to use it as a weapon. The test applicable to such an intention of possession is a subjective one at the time in question....."

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[5] R. v. Halvorssen - 46 C.C.C. (2d) 543.

In view of this there was no evidence beyond a reasonable doubt that the knife was intended to be used for any purpose for which law abiding citizens carry a pocket knife.

That was precisely the case here. Although the trial judge in this Wees case, could, based on the evidence before him have found that the knife was a weapon, he had used the wrong test. This means that the accused's appeal should be allowed and that a new trial must be ordered. However, since the Crown proceeded by summary conviction and the events took place over three years ago, the Court entered a verdict of not guilty.

ROADSIDE DEMAND - OFFICER DOES NOT HAVE DEVICE IN HIS POSSESSION - ACCUSED COULD NOT COMPLY FORTHWITH

REGINA v. DAVIDSON - BC Supreme Court, Prince George, 5C22934, April 1992.

Ms. Davidson, the accused was demanded to supply a sample of breath for the purpose of analysis, in a hand held roadside screening device (ALERT). As the officer did not have such a device he "radioed" for one to be delivered. The accused refused "to do anything for you guys". The officer explained the consequences of a refusal and repeated the demand in simpler terms. Again there was an indication that no sample would be given. The accused, upon a third demand, again promised to refuse. By this time the "device" was delivered to the scene and a fourth demand met with the same results. At no time did the officer make the accused aware of his right to counsel.

The accused was convicted. She appealed this verdict to the BC Supreme Court. Both counsel stressed that the Court give guidance to police on the issues involved as the rulings of the lower courts are inconsistent with one another.

The Supreme Court referred the parties to Supreme Court of Canada rulings in April of 1988[6] (*R. v. Thomsen and R. v. Hufsky*). Mr. Thomsen refused to give a sample of breath for analysis in a road side screening device. Two demands had been made of him. He was not arrested but an appearance notice was served on him. He was not informed of his right to counsel.

In the *Hufsky* case the circumstances were slightly different. Where *Thomsen* was stopped for having one headlight, *Hufsky* was stopped arbitrarily in a "road-check" to inspect documents and the condition of the motor vehicle and to discover the sobriety of the driver. Hufsky also refused to blow in a road side screening device. He also was not made aware of his right to counsel. (In this case the arbitrary detention issue was also settled)

The Supreme Court of Canada had held that when police stopped the cars, *Thomson and Hufsky* were detained. What also caused detention was the demand for a sample of breath for the roadside test. Both men had a right to be informed of their right to counsel, particularly as refusing to give such a sample is a criminal offence. The Supreme Court of Canada said that the section that provides for the roadside test implies an operational requirement that limits the right to counsel, as there is simply no opportunity for contact with counsel prior to giving a roadside breath sample. S. 254 (2) implies that the demand must be made upon finding a person operating a motor vehicle who must then forthwith comply with that demand. This causes a limit to be placed on the right to counsel and the section was tested for justification under s. 1

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[6] R. v. Thomsen - Volume 31, page 10 of this publication - (1988) 40 C.C.C. (3d) 411
R. v. Hufsky - Volume 31, page 10 of this publication.

of the Charter. Considering the havoc caused by the drinking driver the limitation to the right to counsel is reasonable and justified in our free and democratic society said the Supreme Court of Canada.

Since the *Thomsen and Hufsky* decisions in 1988, the Supreme Court of Canada reviewed, the acquittal of a Mr. Grant of refusing to proivde a sample of breath for analysis with a roadside device. The officer had the device delivered to the scene and it arrived 30 minutes after the demand was made. This delay had brought the police action outside the relevant criminal code provisions. Mr. Grant who by law was to comply forthwith, committed no offence when he refused 30 minutes later. The acquittal was upheld. *(R. v. Grant [1991] 3. S.C.R. 139).*

One would reason that all the Supreme Court Justice had to do was follow the precedents related above. However, since the *Thomsen and Hufsky* decisions the so-called "roadside" breath test provisions in the criminal code have slightly changed. The words, "roadside screening device" was changed to "approved screening device". The demand can be made not only of drivers but also of boats operators, pilots and railroad engineers. These people are not likely found on the "roadside". In the earlier decisions the Supreme Court of Canada had attached some weight to the word "roadside" as it signified the test had to happen right then and there. It was argued that the removal of "roadside" makes the case distinct from the *Thomsen and Hufsky* decisions. These arguments were however, to no avail. When the Supreme Court of Canada decided the appeal by Grant, it reiterated what it had ruled in *Thomsen* and said that the word, "forthwith" was the key word.

The BC Supreme Court held that where a police officer cannot provide the test immediately, he will be required to inform the suspect of his right to counsel. Not having an approved device in his possession makes compliance with what the law requires for a roadside test impossible. The examples of margin of leeway the court gave were:

1. walking back to the police car to get the device;
2. mouthpiece falling off causing the test about to be administered to be delayed as long as it takes to put back on; or
3. momentary delay to ensure device is working properly

The accused's right to counsel had been violated in the circumstances as they were. As the officer was not in a position to administer the test immediately, the accused should have been informed of her right to counsel

Accused's appeal allowed
Acquittal entered

Comments:

If one reads the Grant decision, it seems that the Supreme Court of Canada did not address the issue of right to counsel. It had already decided that in the *Thomsen* case. In *Grant*, the Supreme Court of Canada seemed to have held that a demand was made with which the suspect was to comply "forthwith". Due to the officer not having a device to administer the test the suspect could not comply "Consequently *Grant* was under no obligation to comply." His refusal did therefore, not amount to an offence. It appears that no right to counsel warning would have remedied this.

Residual alcohol and the roadside test

Trying to give guidance to police, the BC Supreme Court, (dealing with the meaning of "forthwith") explored the problem of residual alcohol in the mouth of the "roadside" suspect who may have consumed an alcoholic beverage within 15 minutes of blowing in the approved device. The officer could take the sample "forthwith" and the reading would, of course, be inaccurate to the detriment of the suspect. Police may then arrest the suspect and the analysis of breath on the breathalyzer would with all its safeguards give an accurate reading. If that is below the legal limit the suspect will then be released. This process, the Justice felt, was a lesser evil than waiting 15 minutes before administering the roadside test. He reasoned that few people have consumed alcohol within 15 minutes of being demanded to blow in a roadside device. Waiting for 15 minutes at the "roadside" for the residual alcohol, if any, to dissipate would inconvenience all persons who are tested.

The day before the Supreme Court Justice expressed this opinion in this *Davidson* case, a brother Justice decided on this very issue in *Regina v. Gartrell* (Penticton Registry No. 18314). The officer demanded that *Gartrell* provide a sample of breath for analysis in the screening device. He waited for 15 minutes for any possible residual alcohol to dissipate before administering the test. A "fail" reading resulted and a demand to accompany the officer was made. The breathalyzer readings supported an "over 80 milligrams" charge. The Provincial Court Judge had acquitted *Gartrell* as the 15 minute delay had invalidated the "fail" result as a basis for the demand to accompany and provide samples of breath for the breathalyzer. The Supreme Court decided that the roadside test should have been administered as soon as possible. The Court held that the test must be administered with a minimal infringement of the suspect's Charter right. The 15 minute delay had placed his actions outside the ambit of the roadside demand and testing provisions. [s. 254 (2) C.C.].

Crown's Appeal was dismissed
Acquittal was upheld

Note:

R. v. Elder - Penticton Registry No. 18314. The circumstances in that case were identical to those in *Gartrell*. The Crown's appeal in *Elder* was for the same reasons dismissed.

REGINA v. DEDEMUS - BC Supreme Court, New Westminster, X030420, March 1992.

The accused was stopped after a brief chase. He showed signs of impairment by alcohol. He was told of his right to counsel and was subsequently demanded to provide a sample of his breath for analysis in the roadside screening device. Based on the precedents the officer was not obliged to "Charter" the accused at this stage of his investigation. However, he was told he had that right and should have been afforded an opportunity to consult counsel. The accused was left with the impression of having a right to counsel before he had to provide a sample of breath. As he was not given an opportunity to exercise that right he had an excuse to refuse giving a sample. At least this was the defence's position.

The BC Supreme Court Justice who heard the accused's appeal held that the officer's mistake could not give the accused a right he did not have in law. The accused was taken to have known that he had to provide the sample demanded from him.

POLICE APPREHENDING MISSING YOUTH UNDER FAMILY AND CHILD SERVICES ACT CONSEQUENTLY ARRESTING YOUTH FOR POSSESSION OF PROHIBITED WEAPON. LAWFULNESS OF POLICE ACTIONS - REASONABLENESS OF SEARCH

REGINA v. W.T.B. - BC Supreme Court, Vancouver CC911394, March 1992

A police officer encountered the accused youth (who appeared to be about 16 years of age) on a public street. According to CPIC information he was a permanent ward of the Superintendent of Family and Child Services. He was listed as "missing" in that he had very recently walked away from a Social Service group home. The absence was a repeat occurrence. The officer arrested the accused youth and told him that he would be returned to the group home. He then explained to the youth that he would be searched before being transported. With this the youth took a switch blade knife from under his clothing and gave it to the officer. With that he was arrested for carrying a concealed weapon and possession of a prohibited weapon.

When at his trial an issue was made over the reasonableness of the search, the trial judge held that the weapon was not discovered by means of a search but was voluntarily surrendered. The youth appealed the resulting convictions to the BC Supreme Court.

The Supreme Court Justice disagreed with the trial judge. He held that there was a search. The consent indicated by voluntarily turning the knife over to police is due to "the authorization and coercive nature of police authority" without meaning. Hence the knife was discovered by means of a search.

As the search was warrantless the Crown had to show that it was reasonable. In this case the search was incident to an arrest. This is lawful at common law. However if the arrest is unlawful then so is the search incident thereto.[7]

The arrest which prompted the search was obviously not under the Criminal Code. The officer did testify that he had apprehended the youth under the Family and Child Services Act. The applicable provisions of that Act do authorize the apprehension of a child that is in need of protection. The Superintendent or a police officer may do so on having reason to believe that there is need for such protection. They may also apprehend (take in custody) a child who is "absent from his home in circumstances that endanger his safety or well being".

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[7] R. v. Klimchuk - Volume 40, page 19 of this publication
Cloutier v. Langlois - Volume 37, page 5 of this publication

The defence argued that apprehending a child is distinct from arresting him/her. Arrest exclusively relates to breaches of criminal law. Although the Court agreed with this reasoning, the issue became academic as the Court found that the apprehension was unlawful due to a lack of evidence that the youth was found in circumstances that endangered his safety or well being. The distinction is also in the functions of the police officer in the enforcement of criminal law and rendering assistance as a public servant by returning a child home, or to protect the health and welfare of children. When a police officer apprehends a child under that Act, the wellbeing of the child is paramount. Said the Court:

> "I have no difficulty in concluding that the appellant was unlawfully arrested. The arrest exceeded the jurisdiction granted to a police officer under the provisions of the Family and Child Service Act and accordingly the warrantless search conducted, following the arrest was unreasonable.

Although the officer was dealing with the youth under social service legislation designed to protect the child, he immediately effected a criminal arrest when the youth voluntarily gave him the prohibited weapon. The officer had a legitimate interest to ensure that the youth had no weapons on him before he transported him, but "he had no legitimate interest in punishing the accused for his cooperation."

The original arrest or apprehension was improper and the search was unreasonable. Accordingly the evidence of the knife was inadmissible.

Appeal was allowed
Acquittal recorded

POLICE RECRUITING AN INFORMER TO ELICIT A STATEMENT FROM A SUSPECT - RIGHT TO REMAIN SILENT

REGINA v. BROYLES - Supreme Court of Canada, 68 C.C.C. (3d) 308 - November 1991

The accused lived with his grandmother who went missing on June 26. On July 3 the accused was arrested for fraud and made aware of his right to silence and counsel. He was at the time of arrest found in possession of his grandmother's van and her cheque book. He was then not suspected of having anything to do with his grandmother's disappearance, not even when her body was found in a plastic bag under the stairwell of her basement suite.

When the accused did become a suspect in his grandmother's death the investigators recruited the assistance of a friend of the accused. They arranged for an unsupervised visit by the friend at the Youth Detention Centre. By means of a body pack police learned that the accused was aware of his grandmother's death on the day of her disappearance. Needless to say that knowledge carried weight in the case against the accused for second degree murder.

Defence counsel argued that the taped conversation was obtained by a means that infringed the accused's right under s. 7 Charter and that the evidence was inadmissible. That right, of course, is the right to remain silent. The accused had clearly indicated to police that he wanted to exercise that right. Despite that awareness police obtained incriminating evidence from the accused by surreptitious means and did thereby violate the accused's right to remain silent.[8]

In the *Hebert* case, a police officer had posed as a cell mate and had elicited a statement from *Hebert* - a statement he had refused to make when he was officially questioned by police investigators. The police officer was "an agent of the State". For the *Hebert* decision by the Supreme Court of Canada to apply in this Broyles case, the accused's friend must be "an agent of the State" in the circumstances as they were. Another weighty aspect is whether the "friend" had "elicited" the inculpatory statement. Said the Supreme Court of Canada when comparing *Hebert* with this Broyles case:

> "The right to silence will only be infringed where it was the informer who caused the accused to make the statement, and where the informer was acting as an agent of the State or its agents?"

This includes situations where there is no pre-existing relationship between the authorities and the informer, where the authorities have provided incentives for the eliciting of incriminating

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[8] R. v. Hebert - (1990) 57 C.C.C. (3d) 1. See Volume 37, page 16 of this publication

statements by making it generally known that they are willing to pay for such information or that they will reward the informer with reducing outstanding charges against them.

In this case the informer was held to be an agent of the state. He would probably not have visited the accused if it was not for the intervention of police. He was specifically instructed to inquire from the accused whether or not he had murdered his grandmother and, no doubt, the conversation was specifically riddled with questions to elicit this information from the accused. Questions were asked to elicit this information from the accused, and the informer to undermine the accused's confidence in his lawyer who had advised him to remain silent.

Hence the informer was an agent of the state and "the form and manner" in which the conversation with the accused took place was very much influenced by the intervention of the authorities. Consequently the informer had, as an agent, solicited a statement from the accused. This made the *Hebert* decision applicable in this case.

The evidence of the self-incriminating statement the accused made to the informer is quite distinct from evidence that is "real" and existed regardless of the breach of the accused's Charter Right by which it was obtained.[9] The former affects the fairness of a trial as the State had conscripted the accused against him or herself. Where that fairness is in question if the evidence is admitted, excluding the evidence will not bring the administration of justice into disrepute. If the statement had been omitted from the evidence, the jury may have had a reasonable doubt as to the accused's guilt.

The accused's appeal was allowed and a new trial was ordered.

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

REASONABLE SEARCH - RIGHT TO COUNSEL
ACCUSED CONSENTING TO POLICE ENTERING HIS APARTMENT
EVIDENCE WAS IN PLAIN VIEW - NO CHARTER VIOLATION

REGINA v. RUBE - BC Court of Appeal, January 1992, Vancouver CAO 12276

A man was found unconscious in a pool of blood on a loading platform in a back alley. Bloody footprints, obviously made by "NIKE" running shoes, were found at the scene.

The accused arrived at the scene on his bicycle and started a conversation with the investigating officers. He inquired about the injured man's condition and he supplied information regarding conversations he had overheard from people who probably had something to do with the beating of the injured man. He even pointed out a vehicle that was used by the men whose conversation he overheard. One officer said to the accused, "I don't believe anything you are telling us." The officer made it clear that he thought the accused was directly involved in the assault or was a witness to it. The accused denied these allegations.

The officers felt the accused should be brought to the attention of the detectives who would do the follow-up investigation. As they were not too sure about the accused's veracity, he was asked if he did mind if the officer (the one who found the footprints) would follow him to the nearby address where he claimed he lived. The accused did not object; neither did he object to the officer following him into his building right up to his apartment and holding the door open for him so he could get his bike inside. There, 8 feet from the door, inside the apartment were a pair of "NIKE" running shoes with blood splatterings on them. The constable entered the apartment upon consent by the accused who first said he did not own running shoes. He later said they did belong to him and not to the other man who also lived in the apartment. The accused was arrested and charged with aggravated assault. He was told of his rights but did not indicate any desire to exercise them. He then said he had kicked the injured man about four times in the head and had left his buddies to finish the guy off. He also admitted that a piece of clothing at the scene belonged to him.

The victim died and the accused was convicted of second degree murder. He appealed that conviction claiming that the statements he made and the running shoes, should not have been admitted in evidence. The latter had been obtained by a means that violated s. 8 of the Charter and the statements he made to police (prior to his arrest) were obtained before he was given his right to counsel.

The BC Court of Appeal held that the accused was not detained until immediately after his running shoes were spotted and seized. That is when he became a suspect. He had consented to everything and there was in the circumstances no obligation on the officers to inform the

accused that he needed not to cooperate. The seizure was reasonable and lawful and the accused was informed of his right to counsel as soon as he was detained. All the evidence had been properly admitted at trial.

Accused's appeal dismissed
Conviction upheld

CONSTITUTIONALITY OF "CONSTRUCTIVE MURDER"

REGINA V. SIT - (1991) 3 C.S.R. 124, October 1991

The accused appealed his conviction of second degree murder to the Supreme Court of Canada (S.C.C.). The reasons for judgment by that Court do not give the facts that led up to the charge, but it is obvious that the accused was a party to a crime listed in section 230 C.C. That section provides that if a death is caused during the commission by anyone of those crime, whether or not death was intended, that causation amounts to murder. Apparently the accused had not caused the death himself. A person he was aiding or abetting and had "an intent in common" with [s. 21 (1) and (2) C.C.] was the one who caused the death of the victim.

The trial judge had instructed the jury that there were for them to consider three different grounds by means of which they could return a verdict of guilty:

1. Aiding or abetting intentional killing;
2. Having an intent in common with the person who caused the death, to commit a crime listed in s. 230 C.C.
3. Having an intent in common with the person who caused the death by stopping the breath of the victim.

Considering the wording of section 21 (2) and 230 C.C. the trial judge told the jury that they could return a verdict of guilty even if they found that the accused did not know and had no reason to know that the victim's death would result from committing the crime listed under s. 230 C.C. The jury returned a verdict of guilty and the Court of Appeal for Ontario upheld that verdict.

A similar issue was raised in the S.C.C. in 1987[10] In that case *Vaillancourt's* partner in an armed robbery, shot and killed someone. By the combined operation of sections 21 (2) and 230 (a) C.C. *Vaillancourt* was found guilty of second degree murder. He had argued that the sections of the Criminal Code which where so constructed that he could be convicted of the most serious crime without having committed or even intended that crime. That, he argued, is contrary to the fundamental principles of justice and therefore in violation of s. 7 Charter as well as the presumption of innocence. Parliament, by means of the Constitution Act of 1982 guaranteed that it would not violate those rights and that any legislation that does, is without force or effect. Consequently, s. 230 C.C. is unconstitutional he argued. This section is known as the constructive murder section and is a left over of British Common Law. A few centuries ago, it was reasoned that if the act that caused the death of a person was unlawful, the offender committed murder. If a person shot an arrow at wildlife he was entitled to hunt and killed a person, the death was accidental. If however, it was unlawful to hunt that wildlife the act

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[10] R. v. Vaillancourt - Volume 30, page 1 of this publication, 25 C.R. 636 (1987)

amounted to murder. Although s. 230 C.C. lists the most serious crimes for constructive murder, it still renders a person liable for murder while he did not cause or intended death to ensue.

Our Parliament also contradicts itself in the culpable homicide provisions of the Criminal Code. It defines murder as an offence requiring specific intent (an offence that can only be committed by means of another offence) and then includes a person in the crime of murder, who does not even need to foresee the possibility of death to a human being being caused. As demonstrated in this and other cases if one becomes a party to a crime mentioned in s. 230 C.C. and the death of a human being occurs in circumstances as mentioned in the subsection of s. 230, that person also becomes a party to murder whether the murder was foreseeable or not.

The S.C.C. held that s. 230 infringes the rights and freedoms guaranted by s. 7 of the Chart (Right to life, liberty and freedom of the person and not be deprived thereof except in accordance with the principles of fundamental justice). The Court also held that s. 230 C.C. could not be saved by s. 1 of the Charter. For that the Court would have to find that despite the section being inconsistent with the Charter it is demonstrably justified in a free and democratic society. About s. 21 (2) C.C., (which provides that parties who have a criminal intent in common to carry out an offence, who ought to have known the probable consequences of carrying out their common purpose, are each criminally liable for the actions of any of them) the S.C.C. held that it also is inconsistent with the Charter "with respect to offences to which subjective foresight is a constitutional requirement in so far as it permits a party to be convicted on the basis that he ought to have known the probable consequences of carrying out a common purpose". In as far as this subsection (2) of s. 21 C.C. is inconsistent with the Charter, it also fails to be justified in a free and democratic society.

In view of the above, the S.C.C. allowed the accused's appeal and ordered a new trial.

CONFESSIONS ADMITTED DESPITE RIGHT TO COUNSEL VIOLATION

The accused was arrested for murder and was on several occasions told of his right to counsel. As the accused made no move to call a lawyer he was asked in the booking area if he wanted to call counsel. He accepted the offer and was taken to a private area. As he walked in the phone room he volunteered (no questions were asked) an inculpatory statement. This was followed by a number of similar statements without any prompting by the officer. After one half-hour, the accused was asked again if he wanted to phone a lawyer. He said, "What can a lawyer do for me anyway?" A little later the accused changed his mind and did leave a message for a lawyer to call him back. As there was no return call the police got the accused the duty Legal Aid counsel. Three hours later the accused's lawyer attended at the police station. The statements were admitted in evidence. The trial judge held that the first confession made as the accused entered the room was voluntary and free of any violation of the accused's Charter rights. The subsequent confessions were made while the right to counsel was violated as police did not assist the accused in contacting his lawyer. However, they were also admitted. The statements were not elicited and he made them while he full well knew he had no obligation to do so. Hence, admitting the statements could not bring the administration of justice into disrepute. Upon appeal by the accused, the Ontario Court of Appeal agreed with the trial judge and.....

Dismissed the appeal and upheld the murder conviction.

R. v. YAECK - 68 C.C.C. (3d) 545.

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OBTAINING EVIDENCE BY TRICK DURING PRE-DETENTION PERIOD

The accused was questioned several times regarding a murder. He finally informed police that he retained counsel and would not speak to them anymore. Although police had enough to arrest the accused they did not do so as they wanted to obtain a sample of his handwriting. This to compare it with a note the perpetrator left at the scene of the crime. The investigators persuaded the accused's employer to obtain that sample. It had to be hand printed and it was not expected that the accused would cooperate to provide it for investigation purposes. The manager of the car lot where the accused was a "jockey" had him make advertising cards to place in the car windows. These were used for comparison with what was found in the victim's apartment. This, the accused claimed, was evidence obtained in a manner that infringed his right to remain silent, which prior to an arrest or detention exists at common law. The defence argued that this right is in these circumstances incorporated in s. 7 of the Charter as one of the fundamental principles of justice. Hence the crucial evidence ought to have been excluded. The Court of Appeal for Ontario to which the accused appealed his conviction, held that the common law right to silence had never extended to police tricks in pre-detention periods. The fact that the officer had the grounds to arrest the accused but did not so he could obtain the evidence without running amok of the Charter, did not cause the accused to be technically detained when he provided the evidence to an agent of the police (the employer). The handwriting samples and the evidence related thereto were admissible in evidence.

Regina v. MILLER - 68 C.C.C. (3d) 517

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AGENT - VIS A VIS - INFORMER

The accused conspired to blow up an aircraft while in flight. The accused had several meetings with a police informer to supply some ancillary equipment and information. The informer, upon instructions of the police, introduced the police officer to the accused who was supposed to be the explosives expert he needed. At trial the accused demanded that the informer be produced as a witness and the Crown objected on the basis of the Supreme Court of Canada's decision in *Bisaillon v. Keable (1983)* [11] The trial judge agreed with the Crown. The accused appealed successfully to the Quebec Court of Appeal. It held that the informer's direct evidence was used; he was no longer an informer who simply told police what he knew by means of his relations with the accused. He had been replaced by the undercover officer and had continued his relationship with the accused on behalf of the police. He was no longer an informer but an agent. Appeal was allowed. New trial was ordered.

Regina v. KHELA and DHILLON - 68 C.C.C. (3d) , September 1991.

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[11] See Volume 15, page 3 of this publication.

ACCUSED INSISTING ON LAWYER'S PRESENCE WHEN SUPPLYING BREATH SAMPLES - RIGHT TO COUNSEL

The accused was arrested for impaired driving. He was told his rights and put in a phone room with a list of lawyers names. The accused requested a particular lawyer by name and the officer provided him with the phone number. Between 10:00 p.m. and 11:00 p.m. (when the lawyer finally arrived) the accused made three calls to "his lawyer" and said that he would not give any breath samples until he arrived. When the lawyer arrived he was surprised that the accused had not yet supplied the demanded samples. He spoke to his client in private and then said to the officer, "Where is your breathalyzer, we'll go and blow." He attempted to accompany his client into the breathalyzer room but was refused. The accused did blow and was convicted of over 80 m.g. but appealed his conviction to the BC Supreme Court claiming that refusal for the lawyer to be present amounted to a violation of his right to counsel. The Supreme Court held that the accused's claim was without merit. His lawyer had ample access to the accused and was able to advise him to his heart's content. There was no reason for the lawyer to be present in the breathalyzer room. Appeal dismissed.

Regina v. ATCHISON - 68 C.C.C. (3d) 241, November 1991.

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ADMISSIBILITY OF INMATES' CONVERSATION - POLICE AGENT?

An inmate of a correctional institute was assisting police on various investigations. When interviewed about the progress he was making the inmate asked if police were interested in the accused who was awaiting trial for murder. The inmate was shortly afterwards sentenced and was very upset about the jail term he received. Because of this he withdrew himself from assisting the police. However, a few months later he raised the matter again and the officer took a statement from the inmate that following his preliminary hearing the accused had shown the transcript of his preliminary hearing to the inmate to have his changes at trial assessed. During this discussion the accused had admitted to the murder. The inmate testified at the accused's trial and the defence unsuccessfully reminded the Court of the *Hebert* [12] decision. The accused appealed his conviction to the Ontario Court of Appeal which found that the discussion between the inmate and the accused was upon the initiative of the inmate without instructions or requests on the part of the police. The inmate was not a police agent in the circumstances and the accused's rights were not subverted or infringed. Appeal dismissed, conviction upheld.

Regina v. GRAY - 66 C.C.C. (3d) 6, Ontario Court of Appeal, June 1991.

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[12] See **R. v. Hebert - 57 C.C.C. (3d) 1**. Also see Volume 37, page 16 of this publication.

CHOKE HOLD - PUNCHES AND PRYING TO OPEN MOUTH
UNREASONABLE SEARCH AND SEIZURE

A police officer observed the accused selling a substance he removed from this mouth. Other officers who were made aware of this observation, grabbed the accused by the throat simultaneously to identifying themselves. A command to open his mouth was to no avail, neither were two blows to the stomach area. The accused held his mouth tightly shut until one officer used his handcuffs as a pry-bar to force the teeth apart. This caused profuse bleeding and the accused opened his mouth. A balloon with cocaine was found. At trial the evidence was excluded as all of the search in relation to the mouth were held to be unreasonable. The Crown appealed the acquittal to the BC Court of Appeal which held that the choke hold was to preserve evidence incidental to the lawful arrest of the accused. The accused had been in control of the violence to which he was subjected held the Court. All he had to do was open his mouth and it would have ended. Hence there was no infringement or denial of the accused's rights. Crown's appeal allowed, new trial ordered.

Regina v. Garcia - Guiterrez - 65 C.C.C. (3d) 15, May 1991.

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FAULTY SEARCH WARRANT USED TO CONDUCT SEARCH

Police were granted a search warrant under the Narcotic Control Act. Their information had come from a reliable informer. They discovered while looking for the place to be searched, that the address on the warrant was wrong. Nevertheless they did find the place the informer had directed them to and the police executed the flawed warrant. The officers found all kinds of evidence of trafficking. Due to the family dog acting up, a noxious repellant was sprayed and everyone had to leave the premises for a while. This time period was used to get a new search warrant from the same Justice of the Peace. After the fumes had dissipated the search was continued and a considerable amount of drugs and paraphernalia were found and seized. The trial judge had held that the faulty warrant had not caused the accused's rights under s. 8 of the Charter to be infringed and admission of the evidence resulted in a conviction. The accused appealed to the BC Court of Appeal. This Court held that the first warrant did not authorize the search police conducted. Consequently the search was warrantless and unreasonable. Appeal allowed, acquittal entered.

Regina v. SILVESTRONE - 66 C.C.C. (3d) 125. BC Court of Appeal, July 1991.

MEANING OF THREATENING SERIOUS BODILY HARM

The accused wrote anonymous letters to three young women outlining in detail what sexual acts he desired to perform with them. This included sexual intercourse, "even if I have to rape you?" He emphasized to be serious about this by writing, "Even if it takes me till the day I die" he would carry out his intentions. One woman received a second letter ordering her to meet with the accused. If she failed to show he would come and get her. Consequently the accused was charged under s. 264.1 C.C. in that he knowingly caused these women to receive a threat that "serious bodily harm" would be inflicted. The trial judge held that what the accused threatened to do was not "causing serious bodily harm". Whether or not this was so ended up in the Supreme Court of Canada. It held the "serious bodily harm" means any hurt or injury, whether physical or psychological, that interferes in a substantial way with the integrity, health or well-being of a victim". The accused did threaten "forcible sexual penetration without consent through the use of violence or threats of violence". The accused was convicted.

Regina v. MCCRAW - [1991] 3 R.C.S. 72, September 1991.

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PRISON STAFF SEARCHING A PROSPECTIVE VISITOR - REASONABLENESS

The accused attempted to visit a prisoner in a provincial gaol. She was suspected of smuggling drugs to the prisoner. Prison staff prepared for her visit and planned to search her. A female staff member said to her, "You are going to have to submit to a skin search before you can come in." The accused made it clear that she would not submit to a search. She was then told, "Stay here, I'm going to phone police". The accused then gave a balloon containing narcotics to the staff member. Consequently she was charged with possession for the purpose of trafficking. The accused claimed in her defence that the seizure was unreasonable and that the evidence as well as the statements she made at the time were inadmissible. The BC Supreme Court trial justice agreed with the defence. Although the search as well as the seizure were lawful, they were not reasonable. All warnings on the walls of the visiting area and the relevant pamphlets indicate that a person wishing to visit a prisoner may be searched. The accused indicated she wanted to visit a prisoner. When she said that she would not submit to a search she was detained instead of being given an opportunity to leave. "No search - no visit". The staff had acted as law enforcement officers. This made the seizure unreasonable and contrary to s. 8 of the Charter. Admitting the evidence would bring the administration of justice into disrepute held the Court and ruled accordingly.

Regina v. CHRISTIE - Victoria Registry 58898, November 1991

REFRESHING MEMORY FROM PICTURE TAKEN OF ACCUSED FOR PURPOSE OF IDENTIFYING HIM IN COURT

Some 7 months after having processed Graham for a drinking driving offence, the arresting officer attended the accused's trial. He looked for the accused in case an identity defence was included in the defence strategy. As he did not see the accused he went to the detachment and took a look at the photograph he had taken of the accused on the evening the arrest was effected. When he returned to the Courtroom he instantly recognized the accused who was indeed placed among the public in the gallery. The officer admitted having looked at the photograph but was very strong in his testimony that, "I had immediate recognition of him. I wouldn't have needed the picture at all". However he agreed that it would never be known if looking at the picture assisted him at all in identifying the accused. The defence prepared a "booklet" of cases where a witness had firstly looked at a photograph and then identified a person in a line-up. It is then questionable if the witness identifies the "culprit at the scene" or the person in the photograph. Upon appeal the BC Supreme Court agreed with the trial judge who had held that the officer did identify the accused, as the person he apprehended 7 months ago. All the "line-up" cases are distinct from this situation. In essence, the Court held that refreshing his memory from the photograph is the equivalent to reading notes taken at the time of an event to refresh one's memory for the purpose of giving evidence. The accused was not a latent person to the officer. He personally dealt with the accused and took a picture of him. Appeal dismissed, conviction upheld.

Regina v. GRAHAM - New Westminster Registry, X0126787, November 1991

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IMPAIRMENT ALONE IS NOT SUFFICIENT TO SHOW CAUSATION OF BODILY HARM

The accused struck a pedestrian in a crosswalk while her blood-alcohol content was 0.15. Consequently she was charged with impaired driving causing bodily harm to another person. The trial judge had found that the accused was indeed impaired which had beyond a minimal degree contributed to the victim's bodily harm. The precedents on this issue establish that the test for "causation" is not satisfied with proof of impairment alone. There must be additional evidence from which an inference of causation can be drawn. The trial judge did not say from what proven facts he had drawn such an inference. The accused appealed the conviction to the Court of Appeal for BC. It held that the Crown had not adduced evidence from which an inference could be drawn that the accused's condition and her manner of driving had beyond a minimal degree contributed to the pedestrian's bodily harm. Accused's Appeal allowed, acquittal registered.

Regina v. FISHER - Court of Appeal for BC, Vancouver CA013880, March 1992

SUSPECT IS ENTITLED TO BE SHOWN BREATHALYZER READING

The accused demanded to see for himself what the reading was on the breathalyzer as a result of the analysis of his breath. The operator refused to let the accused look at the dial. The trial judge had held that the request was reasonable and, in a way, part of "disclosure" to which an accused person is entitled as a fundamental principle of justice. This resulted in an acquittal the Crown appealed to the Supreme Court of BC. This Court agreed with the trial judge and said that the entitlement to this disclosure exists for three reasons; 1. the officer misreading the instrument; 2. wrongly recording the reading or; 3. deliberate falsification. The request was also reasonable as the condition of the accused was not such that showing him the dial would be absurd or verge on the ridiculous. Crown's appeal dismissed, acquittal upheld.

Regina v. PARTINGTON - BC Supreme Court, Kamloops, 39973, February 1992

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IS READING THE DEMAND SUFFICIENT FOR INFORMING THE DETAINED DRIVER FOR REASON OF THE DETENTION

The Charter of Rights and Freedoms provides that we are promptly to be informed of the reasons for an arrest or detention. In this case the police officer made a demand for a sample of breath and told the accused of his right to counsel. The closest he came to telling the accused the reason for the detention was a part of the demand, ".....committed an offence under section 253 of the Criminal Code....". The question in this Crown's appeal from an acquittal of impaired driving and "over .08", is whether reading the breath test demand is sufficient to comply with the right to be informed of the reasons for the detention. The BC supreme Court Justice held that the accused, at the time, was not charged with anything but was detained for the purpose of obtaining tests. The wording of the demand was sufficient for the accused to make a decision to decline or submit to the detention and whether to contact counsel. However, "You are being investigated for a drinking / driving offence" or words akin thereto, may prevent the Charter challenge as raised in this case. Crown's appeal allowed, new trial ordered.

Regina v. RAE - BC Supreme Court, Kamloops, 39971, February 1992

QUALIFIED OPERATOR TAKING BREATHALYZER APART IN PRESENCE OF ACCUSED - DOES THIS PROVIDE A REASONABLE EXCUSE TO REFUSE GIVING SAMPLES OF BREATH?

After having been warned by a police officer not to drive his car due to his impaired condition, the accused was seen driving 20 minutes later. He was taken to a breathalyzer operator who used an instrument that had just been returned from the lab where it had been serviced. For shipping purposes a "shipping screw" was installed in the instrument and the operator had to remove that screw before the instrument could be used. In the presence of the accused the operator dismantled the breathalyzer, removed the screw and put everything back together again. When the time came for the accused to blow he refused claiming that the breathalyzer was not working. As he obviously thought the operator had repaired the instrument, the reason for the dismantling was explained to the accused and the tag that said, "Please remove the shipping screw" was shown to him. This was to no avail. The accused claimed that the operator had tampered with the breathalyzer.

The trial judge found that the accused had, in the circumstances, no "reasonable excuse" to refuse complying with the demand for breath samples. The accused appealed this decision to the Court of Appeal for British Columbia. This Court held that if the accused had a firm foundation to believe that the instrument would not eventually analyze his breath, he could have a reasonable excuse to refuse. In the circumstances (the exhaustive explanation given to him for the procedure to remove a safety device) there was no firm foundation for such belief.

Regina v. LAMKE - Court of Appeal for BC, Vancouver CA014495, February 1992

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BEATING AT SCENE OF ROBBERY - ATTEMPTED MURDER

The accused youth and a boy who was three years younger than he, robbed and severely beat a service station attendant. The attendant, a man of around 50 years of age sustained serious injuries, some of which will have a permanent effect on him. The youths were convicted of robbery and attempted murder. This youth appealed the conviction of attempted murder. He claimed not to have had the required intent for such a conviction. For attempted murder the Crown must prove *mens rea* as well as *actus reus*, that is in relation to the latter some steps towards carrying out the intent that go beyond mere acts of preparation. The completion of the offence involves a killing. One cannot intend to commit an unintentional killing. Hence for attempted murder the Crown must show that the accused specifically intended to kill and committed acts towards that, but failed to complete the intended act. The youth claimed that the Crown fell short of proving such an intent. They subdued and beat the attendant to prevent him from leaving the scene. However, the attendant testified that the one youth had said, "Oh he has seen us. Now we have to kill him". This was also said by one of the youths in a statement to his foster mother. He just didn't want any witnesses. This was all consistent that the youths attempted to carry out the announced killing of the only witness. Appeal dismissed, conviction upheld.

Regina v. A.D.Y. - Court of Appeal for BC, Victoria V01443, March 1992

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DISTINCTION BETWEEN CROSS-EXAMINATION FOR THE PURPOSE OF IMPEACHING CREDIBILITY AND SUCH EXAMINATION TO "INCRIMINATE"

Due to an appeal the accused was tried twice on the same information that he had left the scene of an accident to escape civil or criminal liability. His testimony during the second trial was inconsistent with the evidence he gave at his first trial. The prosecutor cross-examined the accused on the inconsistency solely to attack his credibility. The accused claimed that this was an infringement of his right against self-crimination by virtue of s. 13 Charter:

> "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

This dispute ended up in the Supreme Court of Canada which held that there is a clear distinction in cross-examination for the purpose of impeaching a witness' credibility and cross-examination to "incriminate" him/her. The former is to establish the weight the testimony deserves while the latter is to prove guilt on the part of the witness. The Crown simply unveiled that the accused had, under oath, given two different versions of events. Any witness, whether or not he/she is an accused, vouches for his/her credibility when testifying and opens the door to having his/her trustworthiness challenged. The accused's rights had not been violated and he was convicted.

Regina v. KILDIP - [1990] 3 S.C.R. 618

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