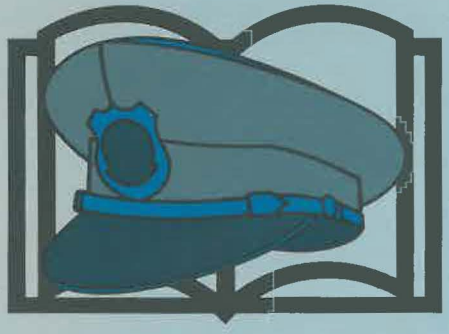
JUSTICE INSTITUTE OF B.C.



# ISSUES OF INTEREST
# VOLUME NO. 42



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

**ISSUES OF INTEREST**

**VOLUME NO. 42**

**Written by John M. Post**
**December, 1992**

**TABLE OF CONTENTS**

**Page #**

ISSUES OF INTEREST Vol. 42

ISSUES OF INTEREST Vol. 42

ISSUES OF INTEREST Vol: 42

ISSUES OF INTEREST Vol. 42

ISSUES OF INTEREST Vol. 42

## CROSS EXAMINATION OF COMPLAINANT OF SEXUAL ASSAULT RE: PREVIOUS SEXUAL ACTIVITIES WITH PERSON OTHER THAN THE ACCUSED

**REGINA v. MORDEN - Court of Appeal for BC, Vancouver CA013082, December 1991.**

On July 1, "the complainant" broke off her relationship with the accused. This relationship had lasted approximately 6 months during which the accused visited the complainant at her home and had sexual intercourse with her from time to time. She broke off with the accused as her sexual preference was women. An additional reason was the possessiveness of the accused. He seemed to monitor her activities.

About a month after the relationship ended, the accused entered the home of the complainant and had sexual intercourse with her without her consent. He was charged accordingly and convicted by a jury of sexual assault.

When the complainant was cross-examined, defence counsel asked her if it was not a fact that she had sexual intercourse with a man, just two nights before the alleged offence occurred. The question was disallowed under the provisions of the criminal code that prohibits a complainant from being asked about her previous sexual experience with persons other than the accused, unless it is a rebuttal of prosecution evidence of such sexual activity. The trial judge held that the Crown had not introduced such evidence and that the question could not be put.

Since the trial, but before this appeal was heard by the BC Court of Appeal, the Supreme Court of Canada decided that the criminal code provisions the trial court had applied, were unconstitutional and consequently without force or effect.[1]

The BC Court of Appeal held that despite the now defunct provisions of the criminal code defence counsel would have been entitled to pursue the complainant's alleged sexual encounter with a men other than the accused. The Crown brought out the complainant's sexual preference for women as a reason for the break-up of the relationship. This leaves the unequivocal impression that the complainant would not have consented to sexual intercourse with the accused. The defence was entitled to rebut that evidence.

Accused's appeal allowed
New trial ordered

---

[1] See Regina v. Seaboyer and R. v. Gayme - 66 C.C.C. (3d) 321 or Volume 40 page 41 of this publication.

## IS THE COMMUNICATION BETWEEN POLICE AND PROSECUTOR PRIVILEGED?

**REGINA v. GRAY ET AL - Supreme Court of BC, Vancouver CC910548, February 1992.**

Gray and four others were charged with conspiring to commit offences under the Narcotic Control Act. In the wake of very favourable rulings for total disclosure of the Crown's case, the defence in this case went a step further. The defence lawyers applied for disclosure of all communications between and advice rendered by Crown Counsel to police. The defence claimed to need this information to make a full answer and defence in relation to the issues of adequate disclosure, entrapment, abuse of the process of the Court and Charter violations. The Crown opposed the application by claiming that a solicitor-client privilege exists in respect to such advice and communication.

In this case the investigation of the five suspects was unique. The five were strongly believed to be major drug traffickers and the operation to capture them was in essence a reverse sting operation. Instead of undercover personnel purchasing drugs from them, police offered for sale a large quantity of drugs. Usually the investigators are the consumer-purchasers; this time police were the wholesalers. The accused agreed to purchase 550 pounds of Hashish for $750,000. One pound was given to them prior to a meeting where the deal would be finalized. Upon arrival the accused were arrested and the three quarters of a million dollars was seized. Needless to say the latter was the advantage of the reverse sting method.

Police were the traffickers as they had to supply drugs up front before a deal could be made. Needless to say they needed some legal advice as well as policy support to conduct an investigation with a strategy like this.

Crown Counsel had declined to become involved. After a briefing of what was intended, police were advised to work this out with their force. The pound of Hashish was not to be given until agreement was obtained from the Ministry of Justice. As the plan would cause the officers to violate the Narcotics Control Act, members were to be granted immunity before this could be carried out.

The police did receive advice from members (presumably lawyers) of the Justice Ministry. It was this advice the defence claimed had to be part of the Crown's disclosure. Without it the accused were deprived of making a full answer and defence to the charges against them.

The definition of the lawyer-client privilege is:

> "Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at this instance permanently protected from disclosure by himself or by his legal advisor except the protection be waived."

As the definition clearly indicates the privilege is that of the client.

The cases on this point are interesting.

The Alberta Court of Appeal held in 1979[2] when dealing with a claimed inadequate disclosure on the part of the Crown:

> "There is, however, a very considerable distinction between furnishing facts and particulars, on the one hand, and placing an accused in a direct line of communication between Crown Counsel and the investigators, on the other hand".....
>
> ....."I'm further of the view that the report [to Crown Counsel] goes forward in the full expectation of confidentiality. In my view such solicitor-and-client relationship must....be fostered and maintained."

The Supreme Court of BC decided on a case in 1982[3] where defence counsel sought to call the prosecutor as a witness due to a conversation between him and a police officer that was overheard. The Court held that a police officer is not an agent of the Attorney-General (prosecutor). It also decided that the suggestion that a solicitor and client relationship exists between a police officer and Crown Counsel is untenable and unsupported by law.

Though interesting on the point of privilege the Court found that the cases were not directly on the point. Also that many cases have been decided since 1982 that have given us a clearer picture of the meaning and application of s. 7 of the Charter which includes a right to make a full answer and defence to any criminal accusation.

The Court did actually not say that no solicitor-client privilege exists between a police officer and Crown Counsel but examined situations where this privilege must yield for the sake of justice. The Court had however, no doubt that police officers who seek advice from Crown Counsel have and do so, with an expectation of confidentiality "which is a corner stone of the criminal law".

---

[2] Medicine Hat Greenhouses and German v. The Queen - 45 C.C.C. 297.

[3] Regina v. Girouard and The Queen - [1982] 68 C.C.C. (2d) 261.

The right to confidentiality or solicitor-client privilege is a substantive rule of law. However, there are exceptions to the rule. In other words, the rule is not absolute. Where, for instance, the communications with the solicitor are criminal in themselves or intended for a criminal act to be committed with, for example, the least chance of detection or conviction, the rule is of no force.

Another exception, particularly in civil proceedings, is where one of the parties claims to have acted on what he/she believed was professional legal advice. Then the knowledge of the law becomes relevant to the proceedings and the privilege is removed.

In criminal law the privilege must be removed where the communication with a lawyer may assist the accused to prove his innocence. If this was not so the privilege designed to be a shield, could become a sword in that it would permit to screen information from a jury that may enabled someone to establish innocence. Consequently, where the privilege blocks a person from adducing evidence that may assist him in his/her defence, it must yield to the rights established in s. 7 of our Charter. If not, the rule would in effect, violate the supreme law.

The BC Supreme Court viewed the accused's application for disclosure as an application for further particulars so a full answer and defence can be made. Said the Court:

> "It is for these reasons that the application [by the accused] is allowed and the Crown's right to solicitor-client privilege is removed." (emphasis is mine)

The Court clearly indicated that this does not mean that all and everything had to be disclosed. Only those things that are relevant to the defence would be admissible. What ought to be disclosed,

> "....are the general advice which the police received from the Crown and matters such as immunity to prosecution and all those matters which were dealt with by counsel".

**Comment:**

What is regrettable is that this judgment did not include the relationship between police and Crown Counsel. As a matter of fact, it seems that the defence is more interested in the advice rendered to the RCMP by Justice Department lawyers, rather than specific advice given to the investigators. The former may be a matter of forming force policy while the latter may be advice of a different category all together. As a matter of fact, Crown Counsel, in our structure, is not a legal advisor to police. The prosecutor (an agent of the Attorney General) belongs to the executive branch of government and is in criminal proceedings "the State". The

police are neither; they are surrogate citizens robed with discretionary powers and authority that are original to the office they hold (free agents). Although they do join the State in its interest, they are not "the State".

Public perceptions; the language used by our judiciary; behaviour of police; the relationship between State entities and police, indicate an erosion of the system as it was intended. There simply is, particularly since our Charter came into effect in 1982, a wave of Americanization of our system. Due to provisions in our Charter similar to those in the US Constitution's Bill of Rights, US jurisprudence is quoted without additional comments or editing to reiterate and make clear our distinction from the US system.

## WATER SKIING OFFENCE FOR OPERATOR OF BOAT.
## MUST OPERATOR BE ON BOARD OF THE TOWING VESSEL?

**REGINA v. GATT - BC Supreme Court, Penticton #18480, April 1992.**

The Criminal Code creates an offence for operating a vessel that is towing a water skier without having a responsible person on board to keep watch over the skier.

The accused operated a remote towing device. It consists of a 6 foot long boat-type device that is powered by a 40 h.p. inboard motor and weighs in total about 250 pounds. The device is not designed to and cannot carry any person. It is remotely controlled from the handgrip the skier holds. He can steer, control the speed and stop the towing device. Should the skier spill and lose his/her grip on the handle, the device will automatically stop.

The accused was operating this "Ski-Free" device and was charged with operating the vessel without a responsible person keeping watch. In this case, of course, the accused was the skier as well as the operator of the vessel. It is quite obvious that the invitation extended to the police to watch the performance, was done by a commercial enterprise to test the law.

The accused submitted that the device is not a vessel. The trial judge disagreed and convicted the accused. He appealed the conviction to the BC Supreme court. Also this Court had no hesitation to find that the Ski-Free device is a vessel. It is powered, navigable and meets the requirements of the Criminal Code provision mentioned above.

However, the Supreme Court questioned whether the accused was included in "Every one.....while operating the vessel" etc. The trial judge had held that whether that person is on board or not is of no consequence in respect to the offence. The Supreme Court Justice was not so sure if that was an accurate finding. He referred to the suggested forms of charges in the back of the Martin's Criminal Code. It suggests for an information the wording, "A person who operates a vessel while towing <u>another</u> person.....etc." That seems to indicate that the vessel operator and the skier are not one and the same person. He held that Parliament envisioned the conventional means of towing a water skier and not the technologically advanced Ski-Free device. The Court simply found that the wording of the section was not broad enough to cover this situation. Furthermore the section states that the operator must have another person on board to watch the skier. This implies that both the operator and the watch person must be on board.

Considering all these issues, the section is ambiguous whether or not the accused was a person the section renders criminally liable. The ambiguity had to be resolved in favour of the accused.

Appeal was granted
Accused was acquitted

## ADMISSIBILITY OF STATEMENT OF CLAIM TO I.C.B.C. AND TAPES OF SURVEILLANCE TO SHOW THE CLAIM AMOUNTED TO AN ATTEMPT TO DEFRAUD

**REGINA v. ERSHAD - Supreme Court of BC, Vancouver CC901508, December 1990.**

The accused was involved in a car accident and claimed injuries that totally disabled him. He is a self employed home contractor and sought compensation for loss of income in addition to the usual claims associated with injuries. He told the adjuster that he was unable to walk without the assistance of a cane.

A private investigator was engaged by ICBC and the accused was videotaped and photographed laying drain tiles, hammering, bending and sawing. He, without a limp or use of a cane, was seen running to a truck parked nearby the construction site. He'd leave home for work early in the morning, go home to change and pick up his cane to keep appointments with his physiotherapist. Special investigators of ICBC, to corroborate the evidence of the private investigators, attended the construction site and observed the accused, apparently unobstructed by any disability, doing all the work of a carpenter and construction worker. Subsequent to this ICBC asked the accused to submit a detailed statement of his income loss. He complied and delivered a notarized statement of these losses. Obviously the claim was inconsistent with what was observed. He was charged with attempted fraud as a result. During his trial the admissibility of the video tapes and his statement were argued in the Supreme Court of BC.

In regard to the statement the defence claimed that the right to remain silent should extend into the investigatory stages of a civil insurance claim process. ICBC asked the accused for the statement which was the basis for this criminal allegation. He had the right to remain silent and consequently s. 7 of the Charter was infringed. The defence claimed that there was no distinction between this case in terms of gathering the evidence and the Hebert case, decided by the Supreme Court of Canada in 1990[4]. The Supreme Court of Canada extended in that case the privilege against self-incrimination to the investigative stages of criminal proceedings. Hebert was unaware that his cellmate was an agent/provocateur. He was able to obtain a confession from Hebert, who had been advised by his lawyer to remain silent. This advice Hebert had clearly indicated, he wanted to comply with. The surreptitious action of police had violated Hebert's right to remain silent, held our highest court, and consequently the statement was inadmissible. A person detained by the State in the course of a criminal process has a right to choose whether to speak to the authorities or remain silent. Such a person must clearly have that choice and Hebert had been deprived of it.

---

[4] R. v. Hebert - See Volume 37, page 16 of this publication, 57 C.C.C. (3d), (1990) 2 S.C.R. 151.

The BC Supreme Court disagreed with defence counsel and said there was a considerable distinction between this case and the issues addressed in Hebert. The accused here was not detained. He made a claim from ICBC and was by law compelled to submit a notarized statement of his claim. It was that very claim that amounted to the attempted fraud. The investigations and the statements were to determine the accused's entitlement to lost income, the normal duty of an adjuster in the course of the insurance company's business.

In *Regina v. Spyker*[5], Mr. Spyker faced a dangerous driving charge and the Crown sought to introduce the statement he was compelled to make to ICBC. The BC Courts ruled that the statement was inadmissible as it would amount to conscript the accused to provide testimony against himself. The defence also made the court aware of that case to support its claim that the accused's statement of loss of income was inadmissible.. The BC Supreme Court again disagreed and held that in Spyker the statement was a compulsory statement regarding the circumstances of an accident in which he was involved. In this case, the accused submitted a claim that was false. "The Crown is seeking to admit the statements which in themselves are an offence". When Mr. Spyker made his statement the offence he was charged with had already occurred. Again, here making the claim/statement was the offence of attempted fraud in itself. The statements were ruled to be admissible.

The defence further argued that the video tapes made of the spry accused while he claimed to be totally disabled, were an unreasonable search and seizure and hence a violation of the accused's Charter Right under s. 8.

The Court reviewed a number of cases and held that this right can only be infringed by means of electronic surveillance if the target person has in the circumstances a reasonable expectation of privacy. There was no such expectation in this case. The accused worked in the public view from a public place. The investigator was at all times in a public place while he taped the accused. It would be permissible for anyone to conduct video surveillance as it was done here. The tapes were also admissible in evidence.

---

[5] Regina v. Spyker - Volume 40, page 3 of this publication, 63 C.C.C. (3) 125.

## TAKING PICTURE TO ASSIST INVESTIGATOR IN IDENTIFYING THE ACCUSED IN COURT

**REGINA v. DILLING - BC Supreme Court, Vancouver CC910455, December 1991.**

A police woman posed as a prostitute on a public street. The accused approached her to inquire about her sexual services; no deal was made. When the accused drove away he was stopped by two other constables who worked in concert with the police woman. Particulars were taken and an appearance notice was issued alleging the offence of communicating with a person for the purpose of obtaining sexual services from a prostitute.

While the details were obtained one of the officers "suddenly" turned around and took a polaroid flash picture of the accused. The accused appealed his conviction to the BC Supreme Court claiming that the constable's identification of him at trial was inadmissible. The constable who had posed as a prostitute had been given the accused's picture about an hour after it had been taken "while the accused was detained".

It was conceded that the photograph had assisted her in matching the accused with the circumstances and content of their communications. She had made notes of the conversation and attached the photograph to those notes.

A provincial court judge in Alberta had held that there was no distinction between taking fingerprints or a photograph without the consent of the person printed or photographed. The offence is one of summary conviction and as no fingerprints can be taken without consent neither should a photograph, reasoned the Alberta provincial court judge. He held non compliance on the part of the police violates the subject's rights under s. 7 of the Charter.

The BC Supreme Court disagreed with the Alberta decision and reasoned that the polygraph picture was taken for one single purpose, to assist the recollection of the undercover officer. Fingerprints have numerous purposes in the criminal field. It normally requires the cooperation of the subject to take them. Fingerprints are "given" and involve elements of participation and self-incrimination. It differs in every aspect from the surreptitious taking of a photograph.

If time had been taken to make a detailed description of the accused or a sketch, this in law would not have been different from the taking of a picture without consent. Generally we have no property in our image. Said the Court:

> ".....I remain of the view that a photograph taken in the circumstances ..... is nothing more than an aide-memoir similar to contemporary notes or a sketch".

In 1990 the Ontario Court of Appeal ruled on a challenge of the right of police to take a photograph of a person before his arrest. In other words, photographing an accused outside the provision of the Identification of Criminals Act. Because no consent is prerequisite to the taking of a picture following certain arrests, does not mean that consent is required where there is no arrest. Facial features which are fact, can be recorded by photographing the suspect. There is no testimonial compulsion involved in this practice.

Provided there is not compulsion involved, (such as posing), police require no consent of a suspect to take his/her picture in a public place.

To suggest that the police practice of the surreptitious taking of the photograph was a violation of the accused's rights to be secure against unreasonable search and seizure was "primitivist and inappropriate" held the court. There was no search and nothing was seized, capturing the accused's image on film is no seizure, said the Court.

Accused's appeal dismissed
Conviction upheld

## ADMISSIBILITY OF DECLARATIONS MADE BY MURDER VICTIM THAT TEND TO SHOW THAT KILLER WAS A PERSON OTHER THAN THE ACCUSED. HEARSAY RULE

**REGINA v. CHAHLEY - Court of Appeal for British Columbia, Vancouver CA 009634, May 1992.**

If hearsay statements and evidence in general were admissible in evidence to prove facts, concoction would be unlimited. Basically, witnesses must be able to vouch for the truth of what they say by having learned the facts of their testimony directly by one of their bodily senses. Unless there is an exception to this rule (there are approximately 40) hearsay evidence is inadmissible.

In this case the accused had been convicted of murder. Evidence against him included statements he made to a number of people over a period of 10 years. Finally one of the recipients of these statements phoned crime-stoppers and police collected a number of consistent versions of the utterances by the accused.

The defence tried to raise a reasonable doubt about the accused's guilt by depicting the victim of the crime as a person who did live far from an exemplary life and one who had enemies one or some of whom may well have been responsible for "slitting his throat from ear to ear" and leaving his body in the back of a car.

To adduce such evidence the defence cross-examined the woman the victim had been living with at the time of the murder. It showed that the victim had a sloppy life; was a heroin addict and was active in the drug trade. He was gone every day and all day and seldom came home before early morning hours. A few days before his death he had changed this pattern and was questioned about that by this witness. She related the victim's answer in her testimony. He had explained that "a coon had pulled a knife on him..." For a period of about four days the victim stayed home at night and did not go out until he received a phone call which caused him to say that all was okay again.

It does not take a legal expert to conclude that this hearsay evidence of what the victim had declared, is an important circumstance on the issue of identification. It tends to show that someone other than the accused had a motive to kill the victim. One may well conclude that it is less likely that the accused was the killer. The victim was threatened with violence by an unknown person with an instrument of a type that was used to kill him by a person other than the caucasian accused.

There was sufficient connection between the death and the person who threatened the victim, to make the fact of pulling the knife and the "coon" description by the victim, logically probative of the issue of identification, held the BC Court of Appeal.

Over the last decade the Supreme Court of Canada has been rather liberal in the acceptance of hearsay evidence. Where such evidence is "logically probative", said the Court in 1983[6], of a matter required to be proved, then, subject to the exclusionary rule, such evidence is admissible. This evidence to be logically probative must logically fit in all of the evidence to support the issue in favour of which it was adduced.

Another reason why the evidence was admissible was on account of it being evidence that "directly asserts the condition of intention or emotion, which establishes a certain state of mind." Such evidence of a declaration as made by the victim in this case is not to prove the truth of the content of what he said but only to show a certain state of mind.

The evidence the defence sought to have admitted was "reasonably necessary" for it to show the possibility that a person other than the accused had a motive to, and did kill the victim.

This leaves the reliability of the evidence to be considered. To weigh this the evidence must withstand four tests:

1. There must be no alternative permissible means of adducing the hearsay evidence;
2. the declarant (in this case the victim) did not make the statement in favour of his interest;
3. the declaration was made before there was any dispute or litigation, so that it was made without bias; and
4. the declarant must have had peculiar means of knowledge.

What is also of interest in regard to the reliability test is that in terms of the reliability of persons is concerned, it is that of the declarant that is the focus of concern and not that of the witness through whose mouth the declaration is tendered. The credibility of the latter only goes to the weight to be given to the evidence.

The declarations by the victim were admissible in evidence.

Accused's appeal allowed
New trial ordered

---

[6] Morris v. The Queen [1983] 2 S.C.R. 190

## OBSCENITY AND THE CHARTER'S FREEDOM OF EXPRESSION

**REGINA v. BUTLER - Supreme Court of Canada - 70 C.C.C. (3d) 129. February 1992.**

The accused owned a Video Boutique from which he sold and rented video tapes, magazines and sexual paraphernalia. All the material was obscene and in excess of 170 charges were preferred relating to the possession and distribution of that material. The trial judge who found that the Crown had failed to prove the "community standard of tolerance" as to what is obscene, only convicted the accused on 8 counts for movies considered to be "hard porn" and obscene by any standard. Needless to say, the accused argued that the criminal code sections defining and creating offences in relation to obscene matters, were without force or effect due to being inconsistent with the freedom of expression guaranteed by the Charter.

The Manitoba Court of Appeal allowed the Crown's appeal and convicted the accused of all charges. The accused then appealed his convictions to the Supreme Court of Canada (S.C.C.)

The S.C.C. held that the material allegedly obscene is protected by the Charters' freedom of expression guarantee. Those provisions in the Criminal Code that restrict obscene expressions must be tested by means of s.1 of the Charter to determine if they are demonstrably justified in a free and democratic society (The trial judge had tested the alleged obscene material and it reiterated that our Criminal Code definition of obscenity is exclusive and objective.)

Whether or not something is obscene as defined by our Criminal Code depends on the community standards. What will the community allow or tolerate its members to be exposed to. This standard must not be established by personal morality or convictions but by what the community may consider harmful. In others words the definition and offences in relation to obscenities was not enacted to set national standard of morality or decency. That is an individual responsibility or discretion. These enactments are like other criminal law provisions, to protect us from harm.

In other words what these laws are designed to prevent and prohibit is the possession and distribution of material that predisposes persons to act anti-socially, such as mistreatment of women and children. These laws formally identify material and activities that may encourage or arouse conduct that is incompatible with society's proper functioning. For these purposes the laws are justified under s. 1 of the Charter.

Although undue exploitation of crime, horror, cruelty or violence are included in the definition of obscenity, the S.C.C. addressed itself to obscenity in regard to sex and referred to it as

pornography[7]. It is divisible into three categories:

1. Explicit sex with violence;
2. explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing; and
3. explicit sex without violence that is neither degrading nor dehumanizing.

In regards to sex with violence the S.C.C. held that it "almost always" amounts to an undue exploitation of sex. In relation to category 2., the Court held that where the risk of "harm" as explained above, is substantial it also may be undue within the definition of obscenity. About category 3, the Court held that unless it employs children in its production, it will not qualify for undue exploitation and is simply not obscene.

The S.C.C. also made a significant decision in holding that whether material is obscene does not depend on where or to whom it is shown or exposed. Furthermore, "artistic expression" is at the kernel of the freedom of expression. Therefore any doubt about such artistry must be resolved in favour of the freedom of expression.

If the obscenity provisions in our criminal law were there to stifle expression of thought or feelings by means of censure then the Charter freedom of expression would cause them to be without force or effect. This includes material that has no redeeming value as all expression is entitled to be protected. However, that, as explained above, is not the purpose of those enactments. Considering their purpose in a free and democratic society, it simply is a reasonable limit placed on the freedom of expression to protect harm to that society. The Court was also satisfied that the definition of obscenity was not excessive for this purpose. It is proportionate to identify obscenity that may harm society.

The S.C.C. acknowledged that there has to be a link between obscenity and the harm it does to society in terms of criminal behaviour. The court held that it is reasonable to presume that attitudes and beliefs do change when persons are exposed to obscene material and that there is a causal relationship between that exposure and that change which potentially victimizes women. Once again the Court warned that the section meets the "minimal impairment" test that it does not include in its definition nor prohibit sexually explicit erotica that is practised without violence and is not degrading or dehumanizing. Furthermore it does not capture in what it defines or prohibits materials which have scientific, artistic or literary merit.

---

[7] Seems S.C.C. is not following the suggestion by the Law Reform Commission that there is a distinction between obscenity and pornography. It, found that the former means words or acts not said, written or done for the purpose of causing sexual arousal, while the latter has failed if such arousal does not result. Arousal is to pornography what laughter is to comedy. Also the commission suggested that obscenity may be incidental while pornography is the exclusive purpose of certain material. Dialogue or continuity is not a necessary to pornographic material.

As the trial judge and the Court of Appeal for Manitoba had not considered the impugned materials found in the accused's possession by these standards and principles....

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

## SELF-DEFENSE - EXCESSIVE APPLICATION OF FORCE - REASONABLE APPREHENSION OF DEATH OR GRIEVOUS BODILY HARM

**REGINA v. SIU - Court of Appeal for BC - 71 C.C.C. (3d) 197. March 1992.**

The accused picked up a prostitute and drove her to a basement suite she "partially occupied". An argument arose over price and service. The accused had already paid some money and four men, solidly on the side of the prostitute, came to help her out. They argued that she should keep the money and evicted the accused. They smashed the back window of his car as he drove away. These four men were not choir boys of the neighbourhood church. They all had lengthy records for violent crimes and were involved in drugs, prostitution and robberies - including rolling prostitutes' clients while in the suite. One of them was armed with a bayonet during the encounter with the accused.

The accused returned one half hour later with a loaded revolver to retrieve his driver's licence. As soon as he found it he left. When he heard someone shout, "You fucking chink" he stopped the car because he was scared despite the fact that usually people who are scared keep on going. One of the men who evicted him came running up pulling "something metal" from the side of his body. The accused fired some shots in the air and drove off, promptly colliding with a telephone pole. According to the accused, the man walked towards the accused's car and nicked the accused's cheek. This again scared the accused who then fired a number of shots killing the man.

The Crown's position was that the accused returned to the scene to take revenge and shot and killed the deceased while he stood unarmed some distance from the accused's car.

The accused's defence was self-defence which must have failed as a jury convicted him of second degree murder. The accused appealed the conviction claiming that the trial judge had inaccurately instructed the jury on the law with regard to self-defence. The Crown argued that considering the evidence, the defence of self-defence was not available - it simply had no air of reality.

The BC Court of Appeal rejected the submissions by the Crown that the evidence made self-defence unavailable to the accused. The evidence revealed that police found a knife with blood on the blade among the deceased's belongings. Police acknowledged that the accused had a scratch on his cheek that was clearly visible on the photograph police took of the accused. One of the four men who evicted the accused testified that he saw the deceased in the possession of a gun minutes before his fatal encounter. A nearby resident testified that the deceased's wife removed several items from her husband's body before police arrived on the scene. The wife claimed she only removed drugs and a notebook but the witness said there was more removed that just those two items. This, held the BC Court of Appeal, was evidence that made it necessary for the trial judge to instruct the jury on the law of self-defence.

The trial judge had told the jury that if in the circumstances the force and actions the accused used to defend himself were excessive and disproportionate in relation to the force applied to him, self defence was not available. This the defence counsel claimed was an error. In essence the trial judge had told the jury that if force used to defend oneself is excessive in relation to the force applied to the defender, self defence is unavailable. Needless to say that instruction is wrong if death was caused under a "reasonable apprehension" of death or grievous bodily harm on the part of the person defending himself. Considering the accused's knowledge that the deceased was violent and had very recently applied violence to him was evidence in support of the "reasonable apprehension" of death or grievous bodily harm.

Appeal was allowed
A new trial was ordered

## THEFT - TAKING ADVANTAGE OF KNOWN ERROR

**REGINA v. MILNE - Supreme Court of Canada, 70 C.C.C (3d) 481.**

The accused, owner and operator of a small company, completed his contractual obligations and was paid $17,000.00 by the Hudson's Bay Company. By some administrative error the H.B.C. paid the accused another $17,000.00. The accused, fully aware of the mistake deposited both cheques. Subsequently the accused cleaned out his company's account by means of certified cheques payable to him and cashed them. He was convicted of theft by converting $17,000.00 to his own use. He appealed his conviction claiming that what he had done did not amount to an offence known to law.

The Alberta Court of Appeal agreed with the accused. It in essence held, that the accused had not deprived the H.B.C. of their money by any inducement on his part. He had not committed fraud or false pretence, neither had he taken the money without the H.B.C.'s consent. If that was the case, there would not have been a transfer of property. In this case, though it was a mistake, and there was a transfer of property. It was for the H.B.C., which in terms of law did knowingly transfer property to the accused to recover that property by means of civil process. The accused had committed no crime in these circumstances.[8]

The Crown appealed the Alberta decision to the Supreme Court of Canada (S.C.C.). It did acknowledge that the reasoning of the Alberta Court of Appeal was correct at one time, but asserted that the trend of criminal law is now inconsistent with those reasons. Whether or not there is "transfer of property" or if the transaction is "void or voidable" has really little relevance any more in criminal law. Instead we must now focus on the acts and intent of an accused. Needless to say knowledge is also an important factor in this.

The law as explained above is necessary in civil law to protect innocent third parties to whom the property may have passed in the meantime and who depended on the legitimacy of the transaction by which they obtained the property. "The criminal allegation against the accused in this case would not affect a property claim of an innocent third party to whom the property had passed in the meantime."

".....the accused's knowledge of the mistake, rather than the type of mistake made" must be focused in a case like this. The Court reviewed some cases that were not dissimilar:

---

[8] Regina v. Milne - Volume 38, page 30 of this publication 59 C.C.C. (3d) 372.

1. *Brochu v. The King (1950) 10 C.R. 183*

   Brochu cashed a cheque and received, by mistake, $1000.00 more than the amount the cheque was for. Unlike what the trial court did in the Milne case, the Court did focus on the knowledge and actions of Brochu instead of analyzing the nature of the mistake by which he became a recipient of the extra funds. Brochu had taken these funds as well as converted them to his own use..

2. *Regina v. Johnson (1978) 42 C.C.C. (2d) 249*

   Johnson found that funds had been deposited in his account by mistake. In the full knowledge that he was not entitled to the funds he withdrew and spent them. The Manitoba Court of Appeal zeroed in on Johnson's knowledge and found that spending the money amounted to converting it to his own use. Again the type of error was made by the bank or its nature in law was irrelevant for the purpose of criminal law.

Mr. Milne knew that the second cheque was issued by mistake. Therefore, for the purpose of criminal law, property did not pass from the Hudson's Bay Company to Mr. Milne. He took the property and/or converted it to his own use with the intent to deprive the H.B.C. of it. This was done without colour of right and fraudulently.

Crown's appeal was allowed
Conviction was restored

## "ATTEMPTING TO BREAK INTO A HOME"
## PROOF REQUIRED

**REGINA v. BLENCOE - Court of Appeal for BC, Vancouver CA014678, May 1992**

Late evening, man and wife were awakened by someone knocking on their front door. The wife found a vantage point from where she could observe what was happening in front of her house. She did not recognize the person at the front door, nor the two other men just outside her window. Police were alerted and attended with a dog and all three youths were apprehended, after they did flee upon the arrival of police. Police also found a knapsack as well as a long knife that had been discarded beside a trail one of the accused used to get away from the scene. They were arrested and tried for attempted breaking and entering a dwelling house with the intent to commit an indictable offence therein.

In regard to the accused Blancoe the Provincial Court judge had found the following inculpatory facts; the residents did not know the accused; they were trespassing by night; Blancoe was the one knocking on the door wearing a sock on one hand and mitt on the other; "the guilty always flee"; the house was in darkness and was apparently unoccupied, etc.

From these facts the trial judge had drawn the irresistible inference that, although there was no physical attempt to get inside, the three men were trying to break into the house. The men were casing their target and the knocking was part of discovering if anyone was in the house. This, held the trial judge, was an action that had gone beyond mere preparation stages. He found the accused guilty. This conviction was challenged by this accused to the Court of Appeal for BC.

The Court of Appeal held that the trial judge's findings were not supported by the evidence. The Court of Appeal was, like the trial judge, satisfied that the youths were casing and testing "in preparation" to break into the home. However there was insufficient evidence to prove that the accused had an intent to break-in or did do anything for the purpose of carrying out that intention. The circumstances were at best, suspicious, due to the lack of any overt act that manifested such intent. If a door knob had been turned or some other act manifesting an intent to enter the home had occurred the attempt would have been proved.

Accused's appeal allowed
Conviction set aside

## DRIVER DETAINED AND SEARCHED UPON SUSPICION SHE STOLE CAR. ADMISSIBILITY OF NARCOTIC FOUND ON HER

**REGINA v. DALSHAUG - Supreme Court of BC, Vancouver C.C. 910596**

The accused drove a fancy car and did so quite awkwardly. She was stopped due to three separate traffic offences. The accused did not "fit" the car; she seem out of place in it. When asked if it was her car she admitted it was not. When asked if she stole the car she answered with the question, "Is it stolen?". She could not produce any driver's licence or any documents for the car, and did not have an idea who owned it. Yet the car had not been reported stolen. Despite not knowing any details the accused was kept in detention and removed from the scene in a police van. She was searched and a baggie of marihuana was found on her. She was convicted of possession of a narcotic and appealed the conviction claiming that the evidence had been obtained by means of an unreasonable search.

The burden of proving this alleged infringement of her right was on the accused. As the law stands, she has to show on the balance of probabilities that the search was warrantless and then the Crown must show if it was authorized by law and reasonable. The trial judge had held that the search was illegal but reasonable. The strip search of the accused was, of course, not pursuant to the Narcotic Control Act, but incident to detention which had not resulted from a formal arrest. No arrest had been effected until the narcotic was found. The Court found that incident to "detention", a pat down search is all that is allowed to determine if there are weapons on the detainee. The narcotic had been found by means of a strip search.

Although the Court sympathized with the officer considering the circumstances, nonetheless the evidence is that a person was pulled over for minor traffic violations and was detained and strip searched.

The evidence was not admitted, the appeal was allowed and the accused was acquitted.

## BEHAVIOUR AMOUNT TO THREAT OF VIOLENCE TO THREE TELLERS WHOSE CASH DRAWERS WERE EMPTIED; THREE ROBBERIES

**REGINA V. PELLETIER - Court of Appeal for Quebec, 71 C.C.C. (3d) 438.**

Robbery is taking property from its possessor, by means of violence. It is, for instance, not the bank that is robbed but the teller. The accused in this case, had jumped over a counter behind which three tellers were serving customers. The accused ordered the bank's manager to, "Get out of your office". The tellers backed away and the accused helped himself from all three cash drawers. The accused had acted aggressively and brusquely and had created a lot of noise. He threw one of the drawers on the floor when he had difficulty with it. Except for what he said to the manager he did not speak, uttered no threat, wore no mask and no weapon was visible.

The trial judge held that the accused had robbed three tellers and he was convicted and sentenced accordingly. He appealed to the Court of Appeal for Quebec claiming that what he did amounted to theft only. Should the Court of Appeal disagree with that, then he committed only one robbery as his actions were continuous.

The Quebec Court of Appeal disagreed with the accused. The accused's aggressive conduct had amounted to violence or at least a threat of violence. "Cooperate - get out of my way or else", the accused's demeanour had conveyed to the tellers, his victims. The Court also held that all three tellers were robbed and therefore three convictions were appropriate.

Accused's appeal dismissed

**BASED ON INFORMATION FROM PHYSICIAN WARRANTS FOR SEIZING BLOOD AND MEDICAL RECORDS WERE OBTAINED**
**REASONABLENESS OF SEARCH AND SEIZURE**

**REGINA v. ERICKSON - Court of Appeal for Alberta, 72 C.C.C. (3d) 75.**

The accused was seriously injured in a major motor vehicle accident. Ambulance attendants, hospital staff including the attending physician thought that the accused was possibly impaired. The driver of the other car involved was killed. The investigating officer questioned the doctor as to details of the analysis of the accused's blood. No details were withheld and the doctor showed the officer the medical records which included the accused's blood-alcohol content. Based on all this information the officer obtained one search warrant for the accused's medical record and another for the blood that was taken for medicinal purposes. The grounds for these warrants were the information the doctor gave the officer. The Crown appealed the accused's acquittal of "over .80 mg" (180 mg%) due to the trial excluding the analysis of the accused's seized blood, as well as the medical records.

The Alberta Court of Appeal agreed that the accused had a reasonable expectation of privacy in regard to his medical records and the hospital analysis of the blood taken for medicinal purposes. The questioning of the attending doctor and thereby seizing the information from him upon which the search warrants did issue, was an unreasonable search and seizure. The doctor was obliged to keep the medical information confidential and that information was seized unreasonably without a warrant.

The officer could have obtained a warrant based on the opinions of himself and others as to the accused consumption of alcohol, in which case the seizure would not necessarily have been unreasonable.

However, following the precedents on this point of law, the Court of Appeal held that the evidence was real and existed prior to and irrespective of the Charter violation. It could have been discovered in any event. Had the doctor only told the officer that a blood sample had been taken and was kept, nothing improper would have occurred in these circumstances. In any event, admitting the evidence as it was would not bring the administration of justice into disrepute.

Crown's appeal allowed
New trial ordered.

## POLICE OFFICERS QUESTIONING AND SEARCHING A SUSPICIOUS PERSON. ADMISSIBILITY OF NARCOTIC FOUND

**REGINA v. ARRUDA - Supreme Court of BC, Vancouver CC 010220**

Two constables in a patrol car saw the accused running across the street carrying a duffle bag. It was late evening and the area was a target of B & E's and theft from cars. The officer turned around and caught up with the accused on a path way through some bushes that led to a trailer park where the accused lived.

From here-on-in the versions of what happened are quite distinct from one another.

The officers testified that they had asked the accused to come back to the sidewalk where they asked him for identification and to give an account of himself. The accused had complied and told the two officers that he had come from a nearby bus stop. They had asked him for permission to search the duffle bag and he answered, "Sure. Go ahead". He explained the origin of various items he had in the bag as well as the $1689.00 that caused a bulge in his pants. However, he failed to do so with regard to a quantity of marihuana cigarettes he had in the bag. Just before the bag was searched and the marihuana found, one of the officers had asked, "You don't mind if I look through the bag?" to which the reply was, "No, I don't care". The accused was arrested for possession and despite his claim that the marihuana was for personal use, he was prosecuted for possession for the purpose of trafficking. The officers could not think of authority to conduct the search as they lacked reasonable and probable grounds. They had depended solely on the accused's permission. There was no evidence that the accused was told or was aware that he need not answer the officers probing questions or allow them to search his person and the bag.

The accused's evidence did not contradict the facts as related by the officer but simply did shed a different light on it. The trial judge believed the accused when he said not to feel free to leave or to challenge the officer's authority. At one point the accused claimed to have been ordered, "Stand there and don't move."

The Crown conceded that most likely the search of the bag and the person of the accused prior to the marihuana having been found was unreasonable. The defence lawyer called the whole thing a "proverbial fishing expedition". The officers were simply curious and at best suspicious. The Court did agree with both views and said the only issue was whether admitting the evidence would bring the administration of justice into disrepute.

The officer had been suspicious that the accused may have committed on indictable offence. Considering what occurred it was reasonable for the accused that he had no choice but to stay where he was and to consent to the officers searching the bag. He was not told he was free to refuse.

The evidence was real and the questioning and searching were not done in bad faith ( not meaning there was "good faith"). They did what they thought was appropriate in the suppression of B & E's and thefts from cars. The trial would not be rendered unfair if the evidence was admitted and the alleged offence is serious. Hence the administration of justice would not be brought into disrepute if the evidence was admitted.

Marihuana was admitted in evidence

## CARRYING A RIFLE WRAPPED IN A JACKET ON PUBLIC TRANSPORTATION SYSTEM - CONCEALMENT WITHOUT EVIL OR UNLAWFUL INTENT - OFFENCE MADE OUT

**REGINA v. FELAWKA - Court of Appeal for BC, Vancouver, CA 009868, December 1991**

The accused, a contractor by trade, wore his green coveralls when he and a friend when target shooting with his 22 calibre rifle. On the way home the accused spent some time at his friend's and took the public transit system home. He carried his rifle wrapped in his jacket. Passengers reported to the transit security police that a man wearing fatigues carried a rifle. He was approached and asked what he carried in his jacket and the accused had laughingly answered, "I'm on a killing spree". He transferred to a bus and was apprehended by police who charged the accused with carrying a concealed weapon and carrying it for a purpose dangerous to the public peace.

The trial judge accepted that the accused had been facetious, and had said to be on a "killing spree" in jest. However, despite the fact that the court accepted that the accused did not carry the rifle concealed for some evil or unlawful purpose, but only as he considered "carrying it in the open would be inappropriate", he was convicted of carrying the rifle concealed. He appealed that conviction submitting that his purpose was an innocent one and to prevent passengers from being alarmed.

The Crown had proved "carrying", "weapon" and "concealment" and the question to be answered by the Court of Appeal for BC was whether the Crown must also show the mental element of some evil or unlawful purpose on the part of the accused. For such an element not to be an essential one in an offence for which a person can be imprisoned is clearly an infringement of s. 7 of the Charter, urged the defence counsel. Indeed, there has to be an intent answered the Court, but was this an intent to conceal or an intent to conceal for an evil or unlawful purpose? The Court of Appeal held that the criminal intent required by the section is the putting out of sight of a weapon for the purpose of concealment.

The court considered Parliament's intent for enacting this offence. In other words, "What was Parliament attempting to remedy?" It clearly wants to protect the community from persons carrying hidden weapons. Said the Court:

> "Philosophically most Canadians are antipathetic to improper use of weapons of any kind."

The offence mandates that people who lawfully carry a weapon do that in a manner that forewarns everyone, enabling them to make an informed decision how to respond.

Accused's appeal dismissed
Conviction upheld

**Comment:**

The section that creates this offence seems to be flawed in terms of equal application. There are many so-called neutral items the classification of which depends on what we intend to use them for when we carry them. Other times are weapons because of design or intend of the manufacturer. If we carry a neutral item the Crown has to prove the essential mental element that converts that item into a weapon. When we carry something designed as a weapon, even for an innocent purpose, then the offence does not have evil or unlawful intent as a prerequisite. In essence the definition of weapon causes this offence to vary from a strict liability offence to one requiring specific intent; depending on what is carried and concealed. Only when we carry what is classified as a weapon must we at all times do so with that weapon exposed, probably scaring a good number of the public, but enabling them to decide how to respond. Probably this is now a good way of securing a seat on the bus. Many may get off at the next stop whether or not that is their destination.

If appealed further it seems not impossible that the Supreme Court of Canada will hold that unlawful and evil intent is an essential element to this offence.

## DEMAND FOR BLOOD SAMPLES MUST INCLUDE ASSURANCE THAT THEY WILL BE TAKEN BY A DOCTOR

**REGINA v. GREEN - Supreme Court of Canada, February 1992, 70 C.C.C. (3d) 285.**

A police officer demanded the accused give samples of blood as in the opinion of a qualified person were needed to determine the concentration of alcohol in his blood. This demand was read from a card and ended by warning that refusal to comply would result in criminal charges. The accused did refuse and claimed at trial that the demand the officer made was inadequate. The Nova Scotia trial court and its Court of Appeal agreed with the accused and acquitted him. The Crown then took its plight to the Supreme Court of Canada (S.C.C.).

The argument was that the Parliament, when it enacted the provision in the Criminal Code for the blood sample demand, did include a safeguard and direction that (not the likes of Dracula but) a practising medical practitioner only must take or direct the taking of the blood samples. The Courts held that this provision is not only a safeguard or directive but also an assurance to the person subject to the demand that proper medical procedures will be followed. The health circumstances of some persons or sheer apprehension may cause them to refuse to comply. Inclusion of this assurance, that a doctor will be in charge and that no blood will be taken where it may in the opinion of that doctor endanger the life or health of the detained person (the demand triggers detention) is essential . The right to counsel, is part of the remedy to convey to the detained person the statutory assurance but is insufficient by itself, reasoned the S.C.C.

> "Parliament's purpose appears to be directed to putting to rest the fear that an improper procedure might be followed or that unqualified persons might conduct the procedure".

The exclusion of this assurance in the demand made of the accused caused that demand to be invalid. The refusal was consequently not an offence.

The S.C.C. approved of the sentence police in Nova Scotia added to the demand after its Court of Appeal upheld the acquittal:

> "Blood samples will only be taken by or under the direction of a qualified medical practitioner and if the medical practitioner is satisfied that the taking of the samples will not endanger your life or health."

Crown's appeal was dismissal
Acquittal was upheld

## ALIBI EVIDENCE AND ITS WEIGHT

**REGINA v. McCALLUM - Supreme Court of BC, Victoria 63120, April 1992**

The accused was positively identified in a photographic line-up as well as in the courtroom, by the victim of a drugstore robbery.

The accused, who did not testify, produced three witnesses who said that the accused was with them at the time of the robbery. These witnesses who had no criminal records, had, despite their knowledge that there was a Canada-wide warrant for the accused's arrest, sheltered, aided and abetted him to keep him out of the hands of the authorities. They also assisted in attacking the identity evidence. These witnesses, the accused's common-law wife and the couple they were staying with, testified that on the morning of the day of the robbery the accused had shaved off a few days growth of beard. The victim of the robbery had testified that the robber was in need of a shave due to a growth of several days.

Three months after the robbery and two months before the trial, defence counsel gave notice to the Crown that alibi evidence was to be adduced. This was in compliance with precedents dictating that the defence must give the Crown at the first reasonable time (not first available time) notice of alibi evidence. Neither the Crown nor the defence have property in their witnesses and the Crown must have time and opportunity to investigate the claim that the accused person was at the time of the crime at a location other than the scene. In this case it seems that the witnesses' evidence was for that purpose put in affidavits and when police approached the witnesses they refused to be interviewed and had nothing to say other than refer to the sworn statements. There is no obligation on the part of a witness to cooperate or say anything, acknowledged the Court.

The Crown argued that in weighing the testimony of the alibi witnesses, the Court had to consider the fact that the accused had not testified. In *Vezzeau v. The Queen (C.R.N.S. Volume 34, 309)*, a witness testified that he had been in the company of *Vezzeau* miles away from the crime scene at the time of the offence. He, like the accused McCallum had not testified. The trial judge had directed the jury that they were not to attach any consideration to that fact. Said the Supreme Court of Canada in allowing the Crown's appeal from *Vezzau's* acquittal:

> "The failure of an accused person, who relies upon an alibi to testify and thus to submit himself to cross-examination, is a matter of importance in considering the validity of that defence."

In this case, the Crown had received reasonable notice. There had been no investigation to speak of by Police and there was no evidence that the alibi was a fabrication. In terms of the accused's failure to testify the Court held that there had been no evidence that the alibi witnesses

were of bad character and they were not shaken by thorough cross-examination. In other words, their credibility remained intact.

Accused acquitted.

## ADMISSIBILITY OF MURDER VICTIM'S DECLARATION AS TO ACCUSED'S MOTIVE FOR KILLING

**REGINA V. LEMKY - BC Court of Appeal, Vancouver CA 013096 - August, 1992**

A declaration made by the victim of a homicide shortly before dying has recently been tested on several occasions for admissibility in evidence. This must not be confused with a dying declaration a well known exception to the hearsay rule. That is a statement made by a victim after the cause of death has been inflicted and that person, fully aware that death is imminent and inevitable, makes statements as to the identity of the perpetrator or the cause of death. The victim must have no hope whatever of recovery. The situation must be so solemn and awful that every motive to falsehood is silenced. Such state of mind is the equivalent of an oath and the law permits such a statement to be admitted as proof of the truth of its content.

The declaration in question in this case was made by the victim of the murder the Crown alleged the accused committed. The Crown as part of its case, set out to prove that the accused had a motive to murder his common-law wife. She had told her mother and her brother, days before she was shot in the neck by the accused, that she wanted out of the relationship. The accused's drinking had made things impossible. The evidence of a pathologist was that there were bruises and injuries indicative of assault inflicted very shortly before death occurred. The Crown did convince a jury that the gunshot was not accidental but that it was a domestic murder motivated by the victim wanting to permanently end her relationship with the accused.

The state of mind of the victim with regard to her intention to leave the accused was introduced by testimony from the victim's mother and her brother. This, the accused argued when he appealed his conviction for a second degree murder, was inadmissible hearsay evidence.

The BC Court of Appeal responded by saying that all the recent cases on this point are clear. When the Crown includes such declarations in its "Statement of Facts" and relies on the motive by proving as in this case, that the death was not accidental, the declarations are admissible. The declaration showed the victim's state of mind relevant to the accused's motive for taking her life. When such declaration withstands the test of reliability it is admissible in evidence.

Accused's appeal dismissed

## DOES NON DISCLOSURE TO A SEX PARTNER THAT ONE IS INFECTED WITH AIDS VIRUS CAUSE THE ACT TO AMOUNT TO AGGRAVATED SEXUAL ASSAULT?

**REGINA v. SSENYONGA - 73 C.C.C. (3d) 216, Ontario Provincial Court**

The accused, knowing he was infected with AIDS virus, had consensual sexual intercourse with three women who were consequently found to be H.I.V. positive.

Due to endangering these women's lives, the Crown alleged that the accused had committed aggravated sexual assault. It claimed that the consent had been negated due to it having been obtained by means of fraud.

The precedents indicated that fraud to gain consent is a deception causing the other person to have a misconception about the nature of the act they consent to. If a physician, for instance, would claim the act to be therapeutic, solely to gain consent, then what the person consented to did not happen. However, if the deceptor claims to have a certain status or promises some reciprocal service or favour, the consent remains intact.

At this preliminary hearing the defence claimed that the women did not misunderstand the nature or quality of unprotected sexual intercourse. Failure on the part of the accused to tell the women of his AIDS is in that second category of consent as it is collateral to the act itself. The fraud here had nothing to do with the quality and nature of the act of sexual intercourse or with the identity of the accused. Therefore the defence claimed there had been consent and consequently there was no assault.

The issue of consent was compared to the implied consent of a hockey player. In one case the Courts found in 1991[9] that a deliberate cross-check to the back of the neck of a player exceeded the implied consent he gave for the physical contact in a rough game. A conviction resulted.

The Crown argued in as much as the player could not consent to the cross-check and the resulting serious injuries, neither could the accused consider to have consent from these women to have sexual intercourse with him if they knew about his viral infection. It simply extends beyond the norm of conduct to which one can validly consent.

---

[9] Regina v. LeClerc, 67 C.C.C. (3d) 563.
Also see Regina v. Jobiden (1991) 66 C.C.C. (3d) 454. Volume 41, page 14 of this publication.

Considering the "horrific medical consequences", the presence of AIDS is a new concern for the Court. The arguments the Crown advanced with regard to the issue of consent, supported that a properly instructed jury may return a verdict of guilty.

The accused was ordered to stand trial.

## POLICE OFFICER STOPPING PERSON LEAVING SCENE OF A FIGHT. POLICE AUTHORITY.

**REGINA v. LANGEMAN - BC Supreme Court, Vancouver CC 910752, July 1992**

Police officers attended at a home where a fight was reported. A woman met the officers and gave them information what was or had been going on inside. When the officers entered the home it was very obvious that there had been quite a fight. The accused immediately tried to leave and seemed anxious to do so. The accused was asked in undiplomatic terms, "Where do you think you are going?" The accused had responded with language unheard of in diplomatic circles, indicating he was not staying around until the officers had conducted some investigation. When his path was blocked the accused "took a full, left handed, backhand swing" at the face of one of the officers. Due to moving his head back, the swing only brushed the officer's nose. Consequently the accused was convicted of assaulting a peace officer in the lawful execution of his duty. The accused appealed the conviction and the main grounds were related to the lawfulness of the actions of the officers.

The case had been complicated by the trial judge having made some errors. The trial judge had held that what the officers were told by the woman before entering the house was hearsay and inadmissible in evidence. In 1987, the Supreme Court of Canada[10] reiterated that such evidence is not received to prove the truth of the content of the statement, but only to prove the state of mind of the receiver to determine whether he/she had sufficient grounds or beliefs to justify their actions. Due to the trial judge erroneously not allowing the evidence the appeal court justice (BC Supreme Court) had to decide on the kernel question of this appeal without the benefit of this crucial information.

As it turned out, the accused had no involvement in the fight. The trial judge had held that the accused had contributed to the dilemma as he had not done anything to show this. This was also erroneous as the accused was not obliged to do so.

The trial judge had also failed to consider whether the accused had been detained by police. The Supreme Court justice held that the accused was detained as soon as the officers stopped him from leaving.

The defence argued that since the accused was detained as soon as the officer accosted him, and as they did not tell him of his right to counsel, they were not in the lawful performance of their duty. The Supreme Court found that after the officer told the accused he was not going anywhere, there had been no time for him to say anything else as this was followed immediately

---

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

by a struggle. This had been a finding of fact by the trial judge with which the Appeal Court Justice could not interfere. Due to this fact the officer's lawful execution of duty was intact.

Defence counsel then argued that the officers had no grounds to detain the accused. He therefore had a right to resist the detention. At least, the lack of grounds caused the officers not to be in the lawful execution of their duty. The Court held that the officer had the right to stop the accused for the purpose of enhancing his investigation. However there was no "correlative duty" on the accused to stop on the constable's instructions. When the accused, who had not been involved in the fight under investigation, refused to stop the officer either had to arrest or, if he did not want to do so, let him go. This did not get that far. The detention, as momentary and "such as it was", was merely a reasonable step in the officers investigation. With the instant hostile gesture of the accused there was not time for those decisions or assessment of grounds. Had the accused not assaulted the officer and, for instance, had asked if he was under arrest and had wanted to leave when the answer was "No", it would have progressed into a situation as defence counsel claimed it was. As it stood in these circumstances the officer was in the execution of his duty.

Accused's appeal dismissed,
Conviction upheld

## CRIMINAL CONTEMPT OF THE COURT

**UNITED NURSES (Union) OF ALBERTA v. ALBERTA - [1992] 1. S.C.R. 901, April 1992.**

"The United Nurses" were by directive of a labour board under the Labour Code of Alberta, ordered not to strike. This order was filed with Queen's Bench of Alberta and was according to the Code, the equivalent of an order of that Court.

The Union did go on strike contrary to the order and was consequently found to be in criminal contempt of the Court on two motions and fined $250,000 and $150,000 respectively.

These convictions were appealed and finally ended up in the Supreme Court of Canada (S.C.C.) The interesting questions asked of that Court were: 1. Does a Union have the status to be found in criminal contempt? 2. Does the offence of criminal contempt violate the Charter? 3. Can a prohibition order issued by a provincial board and filed with a Court give rise to criminal contempt?

A Union is a corporate entity under a provincial labour statute. The provincial societies acts do all recognize that entities incorporated under another statute is nonetheless a society. Incorporation is done for the pursuit of a common objective and as such the entity can contact and be contracted, sue and be sued, and is as an entity, liable under criminal law. A union is a society and may be prosecuted under the Criminal Code. Hence they have the Status to be found in criminal contempt. (This answered Question #1)

The Criminal Code does not define criminal contempt but only provides a punishment for the offence. As such, criminal contempt is an offence at common law. Section 9 of the Criminal Code states specifically that not withstanding anything in any statute, no person shall be convicted of an offence at common law. Consequently the Courts and not Parliament, have created and defined criminal contempt: (a historical development that is quite interesting). For a criminal contempt the Crown must prove that the accused "*in a public way*" defied or disobeyed a court order. That is the "*actus reus*" (the wrongful act) of the criminal act. The "*mens rea*" (criminal intent) required for this offence is that the accused intended or knew, or was indifferent that his/her public defiance or disobedience tended to depreciate the authority of the court. As publicity is a requisite component of criminal contempt, an accused person can predict in advance if his/her defiance is consequently not inconsistent with s. 7 of the charter. (This answered Question #2)

The creation of the labour board, its authority to issue an order prohibiting a strike and the provision that filing such an order with a court of superior jurisdiction causes that order to be the equivalent of an order of that Court, were enacted by the Alberta Provincial Legislature. Violation of this provincial law and its procedures caused this Union to be convicted of a

criminal offence. Our constitution clearly provides that the Parliament of Canada has exclusive jurisdiction to create criminal law and its procedures. In other words the accused Union claimed that indirectly the provincial lawmakers had overstepped the boundaries of their legislative jurisdiction.

The S.C.C. disagreed with this argument and said that filing the orders by the provincial board, caused it to have the same force and effect as an order of that superior court. The Union was consequently convicted of disobeying an order of that Court rather than an order of the provincial labour board.

The Union had argued that such reasoning was erroneous and in essence defective in logic and reason. The Justice of a Court of superior jurisdiction who entertains a motion for contempt of an order made by another Justice of that superior Court, does not have the power to judge the order for validity. As only the filing of the order by the provincial labour board causes it to have the force and effect of an order by a Court of superior jurisdiction, the Justice entertaining the motion for contempt should have the power to judge the validity of the defied order when issued by an inferior tribunal. The S.C.C. held that validity of the order is not an issue in criminal contempt. The validity cannot be tested by defiance of the order. There are alternatives means to challenge the directive order the labour board issued.

The convictions were upheld.
Accused's appeal dismissed.

## ACCUSED IN POSSESSION OF LARGE QUANTITY OF NARCOTICS. NO EVIDENCE OF KNOWLEDGE THAT SUBSTANCE WAS A PROHIBITED SUBSTANCE

**REGINA v. WING HONG TO - Court of Appeal for BC, Vancouver CA 012992, July 1992.**

The accused made a short trip to the place of his descent, Hong Kong. His passport did unexplainably not show the usual immigration stamps associated with the trip. Upon his return, he had not gone to the apartment he shared with friends, but had booked into a hotel for a couple of days, using an address he had in Toronto some years ago. After this he returned to the apartment, where he also had the use of his friends' car. Five days after his arrival from Hong Kong the accused was seen walking from the apartment building to the friends' car carrying two plastic bags. He placed the bags in the car and was arrested. It was found that the one bag contained rented video tapes and the other 4.4 pounds of 96% pure heroin. No fingerprints were found on the inside of the plastic bag containing the heroin.

The testimony of the accused at his trial for possession for the purpose of trafficking was that a man known to him as "Big Head Chee" (who he had met only once some two or three months ago) had phoned him and had asked that he place the plastic bag to be found in a certain cupboard, in the friends' car and leave the key in the ignition. The accused said he figured the car would be returned at some time and then he would return the video tapes. He wanted them in the car so he would be reminded to return them. Hence the accused did not know that the bag contained a forbidden substance, let alone that it was heroin. The latter, of course is not an essential element the Crown has to prove, but the former clearly is.

The trial judge had held that if the accused's explanation is capable of being true, he provided himself with a defence. However, he found that considering all the circumstances, the lack of logic and the absurdity of the accused's version of events made the explanation incapable of belief. He therefore drew the irresistible inference from the lack of any other rational conclusion that the accused had the required knowledge and was guilty as charged.

The accused appealed his conviction and argued that the trial judge had not been entitled to find the accused guilty simply because he did not believe his explanations. The BC Court of Appeal did agree that it was not "jurisprudentially correct to infer guilt merely from disbelieving the evidence of the accused." After all, "rejection of evidence by an accused cannot become positive evidence of the accused's guilt." However, evidence given by an accused which is proved to be false may cause an inference of a guilty conscience. The crucial question in cases like these is the reason for the accused to lie. He can do so for many reasons other than a guilty conscience related to the crime for which he is on trial.

In this case the accused had simply been disbelieved and the Crown failed to show that what the accused said amounted to falsehoods. Hence, said the defence, the trial judge had merely speculated that the disbelieved testimony was proof of guilt rather than a legitimate inference of such a conclusion.

Another question raised was the issue of criminal intent. Where the Crown proves that an accused had possession of a forbidden substance, must it then not also prove that the accused had knowledge that it was such a substance? All the Crown did in this case was prove that the accused had possession of a substance that happened to be heroin. It failed to prove that the accused knew that he was carrying a forbidden substance (the Crown need not prove knowledge on the part of an accused that he knew what the forbidden substance was). If there is an onus on an accused to show that he lacked criminal intent (as the accused had attempted in this case) then surely the burden of that proof is not beyond a reasonable doubt but on the balance of probabilities.

The Court of Appeal reiterated the law as they had stated it in previous cases. It applied to a rule that is somewhat akin to that where *"recent possession"* is an issue. There comes a time when someone is so surrounded by incriminating circumstances that he either explains or stands condemned. The BC Court of Appeal held that it is legitimate to infer guilty knowledge from physical possession. However, that inference is displaced if an explanation is given that raises a reasonable doubt about such knowledge or raises inferences consistent with innocence. This reasoning will distinguish inference from speculation in regards to disbelieved evidence.

Regardless of the trial judge not having adequately explored these issues, the Court of Appeal unanimously decided that all the evidence and the broad facts in this case justified drawing the inference that the accused knew that the bag he carried contained a prohibited substance. The large quantity alone made it unlikely that it would be entrusted to a stranger. This coupled with the suspicious conduct of the accused and his disbelieved testimony "make it impossible to draw any inferences which would displace the legitimate inference which may be drawn from physical possession that he knew what he was possessing."

Accused's appeal dismissed
Conviction upheld

## INADEQUATE "RIGHT TO COUNSEL" WARNING CAUSING EVIDENCE OF REFUSAL TO BE EXCLUDED

**REGINA V. BLANCHARD - BC Supreme Court, Vancouver CC920213, July, 1992.**

The investigating officer had made a proper demand from the accused to give samples of breath. With regard to informing the accused of his right to counsel the officer had not used the printed card he had been issued for that purpose. In testimony he had given different versions and words of the message he had conveyed to the accused. According to the officer he had in essence said to the accused.

> "That he could consult a lawyer if he wished and that if he did not know any lawyers or could not afford one he would be provided with a list of legal aid who could assist him at no charge."

This fell short of the three separate routes to legal counsel, the Supreme Court of Canada said in 1990[11] must be included in the Charter warning. They are, the right (a) to consult and retain counsel without delay; (2) that if the suspect cannot afford counsel legal aid is available to him/her; and (3) that there is duty counsel who is immediately available without charge, to advise him/her.

The trial judge held that what the officer had told the accused was adequate. He had held that telling that counsel may be consulted without delay and that duty counsel are available for that purpose fulfilled the requirement of creating awareness of immediate availability of duty counsel.

When the accused appealed his conviction for refusing to blow, the Supreme Court Justice held that the trial judge was wrong. The three essential components were not included in the information the officer gave the accused in an effort to comply with his Charter obligations to the person he detained.

Considering this infringement of the accused's right to counsel the defence moved that the evidence of the accused's refusal to blow be excluded from evidence. Needless to say that evidence amounted to the very crime alleged. The Crown claimed that this evidence was real and should not be excluded while the defence claimed the refusal to be "self-generated" inculpatory evidence. The former should only be excluded in "the rarest of cases" while to get exclusion for the latter a very low threshold only is facing the accused.[12]

---

[11] Regina v. Brydges (1990) 53 C.C.C. (3d) 330.

[12] Regina v. Collins (1987) 33 C.C.C. (3d) 1. Also see Volume 27, page 1 of this publication.

The court did not actually determine what category the evidence of refusal belongs to. It simply held that the offence may well have occurred due to the breach of the accused's right. Had he been told that duty counsel were readily available for him to consult, he would have been informed that in the absence of a reasonable excuse, he had to comply with the demand. Consequently the trial judge should have disallowed the evidence of refusal.

Accused's appeal allowed
Acquittal set aside.

## IS "CARE OR CONTROL" INCLUDED IN "OPERATING" WITH REGARD TO A MOTOR VEHICLE?

**REGINA v. STEVENOT - Court of Appeal for BC, Vancouver 012620**

The applicable part of the "drinking and driving" offence section reads as follows:

> "Every one commits an offence who operates a motor vehicle ..... or has the care or control of a motor vehicle ..... whether it is in motion or not ..... etc."

The accused was involved in an accident and was convicted of having the "care or control of a motor vehicle" while his blood/alcohol level was in excess of "80 milligrams". He appealed claiming that since the latest amendment to s. 253 C.C. it should be construed as saying:

> "Every one commits an offence who operates a motor vehicle or who not being the operator of a motor vehicle has the care or control of the motor vehicle....."

In other words "care or control" is no longer included in "driving".

The Court of Appeal responded that whether or not "operating" and "care or control" are separate or included offenses is irrelevant to this case. It has to do with the construction of the section and whether or not the accused committed the offence alleged.

The Supreme Court of Canada had addressed this issue in *Regina v. Toews*[13] claimed the defence and although it had not said so directly it did support his submission. The BC Court of Appeal said the S.C.C. did nothing of the sort. It simply addressed the issue of when someone can be in care or control short of driving the car.

Appeal dismissed
Conviction upheld

---

[13] Regina v. Toews - Volume 22, page 24 of this publication.
Also see Ford v. The Queen - Volume 5, page 23.

## MEANING OF S. 101 C.C.C - ARMED ROBBERY - POLICE STOPPING SUSPICIOUS CAR

**REGINA v. CATROPPA - Supreme Court of BC, New Westminster X030083, May 1992.**

In response to an armed robbery call from a convenience store, one officer attended the scene, a dog master arrived to conduct an area search and another officer patrolled the surrounding streets looking for anything that may be connected with the robbery. The robber was reported to have a pistol or revolver. The officer patrolling the adjacent streets observed a car driving away without its headlights on. He stopped the car and was given permission to look in the trunk where nothing was found. The accused, who was the driver and lone occupant of the car was told of the armed robbery that had taken place nearby. The accused was nervous and asked questions about the robbery. He gave an account for his presence in the neighbourhood that was quickly proven to be false. The officer also learned that the police dog had picked up a trail from the scene that had ended right where the accused's car was parked. With this the officer informed the accused he was being detained for armed robbery and that he had a right to counsel. The officer then observed from outside the car that something was stuffed between the front seats. This turned out to be a nylon stocking. The accused was then formally arrested for armed robbery and "Chartered". The car was completely searched and a pellet gun with the appearance of a semi-automatic pistol was found in the back seat. Needless to say, the defence attacked the actions of police. The accused's consent to search was a nullity as the right to counsel warning had not been promptly given at the initial stages of the encounter. Without that consent there was at that time no reasonable basis for a warrantless search. Hence the search was unreasonable and the evidence should be excluded, argued the defence.

There were three stages to the encounter in regard to detention. There was the stopping of the accused's car as he drove without lights in the vicinity of a recently committed armed robbery. Then the falsehood for being in the vicinity and the evidence of the dog leading his master from the scene to the very spot, where the accused had entered his car, caused the officer to "detain" the accused. The third stage was the formal arrest after finding the stocking in the front seat. The consent to search was given during the first stage. The Crown countered that the officer had authority to search under the provisions of section 101 C.C. It provides that reasonable and probable grounds justify the search of a person, conveyance or any place other than a dwelling house where the grounds relate to the use of firearm in the commission of a crime.

The Court had some problems in holding that the accused was detained during the first stage of the encounter. The officer was properly suspicious considering the circumstances. During this stage he did not accuse the accused of anything and had no intention of taking him into custody for anything. Until a person's freedom is threatened by the exercise of the power of arrest or

detention for some offence, there is no detention as it is meant by the Charter to trigger the obligation on the part of the authority to make the suspect aware of his/her right to counsel, held the Court.

The so-called "Judge's Golden Rules" as well as our common law, recognize that police have a right to speak to anyone to discover the author of a crime. When they do so, they need not "Charter" every citizen they accost.

The Court also rejected the suggestion of the Crown that s. 101 C.C. had application in the case. That would mean that if a crime was committed with the assistance of a firearm (to overcome the resistance of a victim) the police may randomly search vehicles no matter what the circumstances are. The section clearly does not target these contingencies but only offenses related to the firearms laws.

The question was, considering all of the circumstances, whether the law prescribes a warrant to search, or if not, the searches carried out by the officer were reasonable. Given what the officer knew, coupled with the accused's consent to search, the search was not unreasonable. The accused was detained when the searches of the car took place. He had been Chartered by then. Consequently there was no infringement of his Charter rights.

The evidence was admitted.

## DELAY IN MAKING DEMAND FOR ROADSIDE BREATH SAMPLE - - RIGHT TO COUNSEL IN THOSE CIRCUMSTANCES - BROAD MEANING OF "FORTHWITH".

**REGINA v. FLINN - Supreme Court of BC, New Westminster, X030410, May 1992.**

The accused was involved in an accident. In the opinion of the attending officer the accused could have had too much to drink. He asked the accused to sit in the police car and then radioed for a roadside screening device to be delivered to the scene. Ten minutes later the device arrived. During the wait the officer told the accused "what was going to take place". He did not give him a warning of any kind nor did he advise him. When the device was there the officer made the roadside demand and the accused complied "forthwith". This avoided the legal difficulties encountered lately with officers making the demand and then requesting the delivery. So far the Courts have ruled that the suspect is to comply forthwith. If the device is not available when the demand is made there is no obligation on the suspect to comply.

The accused failed the roadside test and the breathalyzer analyses indicated a blood/alcohol level well above the legal limit. He was convicted of "over 80 mg." and appealed claiming that the officer had been obliged to make the roadside demand "forthwith". The defence conceded that it is now trite law that a person detained under the provisions of the Criminal Code in regards to the roadside breath test need not to be advised of their right to counsel. However the detention for the purpose must be in the spirit and technically be in compliance with those provisions. Where the accused was detained for 10 minutes as was the case here, he should have been advised of his right to counsel. The section was interpreted by the Courts so it could meet its objective. The spirit of the section is to screen with the least inconvenience or encroachment on the rights of a suspect. The Court held that the demand to provide "forthwith" a sample of breath must be made as soon as the officer has determined that there might be excessive alcohol in the blood of the suspect.

Due to the 10 minute delay and detention, the precedent that a suspect need not to be notified of his right to counsel when a demand for a roadside breath sample is made, did simply not apply.

Accused's appeal was allowed. Conviction set aside.

## OFFICER QUESTIONING DRIVER IF HE HAS BEEN DRINKING - DOES THE OFFICER HAVE TO TELL SUSPECT HE HAS A RIGHT TO SILENCE?

**REGINA v. BACON - Supreme Court of BC, New Westminster X029189, May 1992.**

The accused was stopped in a roadblock and was questioned if he had anything to drink. As he denied this and as the officer seemed convinced that the accused had been drinking, a number of questions were put to him. Finally the accused admitted that he had attended a party and had been drinking up to 30 minutes ago. He was then demanded to blow in the screening device. When the accused failed the test he was "processed" as per usual and the breath analysis showed a blood / alcohol content greater than 80 milligrams. The defence counsel successfully argued that the accused's right to remain silent had been infringed as he had not been informed, before being questioned whether he had been drinking, that he was not required to say anything. Without such a warning that right is illusory held the trial judge and he acquitted the accused. The Crown appealed this verdict.

The Supreme Court of BC immediately went to the heart of the issue. There is no doubt that during pre-trial detention a suspect has the right to remain silent, but does he have a right to be so informed? The Hebert decision[14] by the Supreme Court of Canada emphasizes the right of a detained person to make "a meaningful choice" whether to speak or remain silent. When that right of choice is violated the statements may be rejected by the Courts. In other words the right is an option to be exercised only by those who are aware and understand. However, that is the way the majority of our highest Court did rule. That has also been the opinion of the BC Court of Appeal before[15] and after[16] the Hebert decision.

Concluded the BC Supreme Court:

> ".....there was no obligation on Constable J. to inform the respondent of his right to silence and in answering the questions put to him he waived that right."

---

[14] Regina v. Hebert - Volume 37, Page 16 of this publication, (1990) - 57 C.C.C. (3d) 1.

[15] Regina v. Van Den Meerssche (1989) 53 C.C.C. (3d) 449 - Volume 36, page 35 of this publication.

[16] Regina v. Van Haarlem - Volume 39, Page 24 of this publication (1991) 64 C.C.C. (3d) 543.

## IDENTIFICATION OFFICER PHOTOGRAPHING CRIME SCENE IN PRIVATE YARD STUMBLING ON AND SEIZING REAL EVIDENCE

**REGINA v. CHIPAK - Supreme Court of BC, New Westminster No. X028639, June 1992.**

The accused allegedly attempted to murder a woman in the yard of a private residence at 9:45 p.m. Police kept the house on this property and the one next door under surveillance as there was a possibility that a suspect lived in either home.

The weather was not at all suitable for the identification officer to examine the scene. Furthermore, he did not want to interfere in anyway with the surveillance. When the officer arrived at work the next day around noon, no arrests had been made and the surveillance had been cancelled. The officer attended at the crime scene by entering the private yard and took photographs. He did not expect to find any physical evidence. However, he discovered a pair of glasses on the ground. He never considered obtaining a search warrant and seized the glasses. As it turned out the victim had knocked the glasses off her assailant's face and she could testify to that fact. Hence the glasses were weighty evidence particularly as the accused admitted to one of the detectives they were his. The crime scene was in the accused's yard. Defence counsel argued that not only the real evidence (the glasses) were inadmissible due to unreasonable search and seizure, but also the photographs.

The three decisions[17] that were raised in this case established the application of Section 8 of the Charter in these circumstances. It was obvious to the Court that the investigating officers were unaware of these cases and the affect they had on investigative practices. But it seems that the Court did its very best to find distinction between this case and the precedents set in cases 2 and 3 below. There the officers had searched upon "suspicion" (or so they testified) while in this case the officer was in the yard solely to take pictures and then stumbled on the glasses, the crucial real evidence. In the other cases the officers possibly had objectively, the prerequisite reasonable and probable grounds to search or obtain a warrant. What they apparently lacked more than anything was the subjective grounds to search or obtain a warrant. They testified that they "thought" there were not enough grounds and believed that the searches did not require them to have or that no warrant was obtainable in the circumstances.

---

[17] Hunter v. Southam Inc. (1984) 2 S.C.R. 145 - Also Volume 18, page 12 of this publication (Supreme Court of Canada).

Regina v. Kokesch 61 C.C.C. (3d) 207 - Also volume 39, page 6 of this publication (Supreme court of Canada).

Regina v. Klimchuk - See Volume 40, page 19. (BC Court of Appeal)

One must agree, that is not the case here, with the exception perhaps of the taking of the pictures. However, the defence's objections were feeble in regards to the admissibility of the pictures. The focus of his arguments were in regard to the glasses and this judgment was rendered solely in relation to the glasses.

The Court concluded that a combination of good faith and some distinction of the precedent setting cases made it permissible for the glasses to be admitted in evidence. The identification officer had not attended to search for anything and he harboured no suspicion of any kind. He considered not to need a warrant to take pictures. Had he intended to search the area he undoubtedly had from an objective viewpoint grounds to obtain a warrant, held the Court. Said the Court:

> "In so far as his knowledge of the law with respect to perimeter searches, I reiterate the comments made earlier and add that even if he had been familiar with the Supreme Court (of Canada) ruling, he could easily have concluded that it had no application to photographing a yard".

The seriousness of the offence balanced against the Charter breach involved here, would cause disrepute to the justice system if the evidence of the glasses were excluded.

Evidence was admitted

## POLICE SEARCHING A PICK-UP TRUCK. WITHOUT WARRANT - GOODS FOUND SUSPECTED TO HAVE BEEN STOLEN - REASONABLENESS OF SEARCH

**REGINA v. FRIDLEIFSON - Supreme Court of BC, Vancouver CC 911135, January 1992.**

Police maintained surveillance on a house where the accused lived. According to police information and that received from the neighbours, there was considerable activity on the premises of moving furniture and all kinds of articles. The accused and all associates who had been identified by police had records for and were known to be actively involved in property offenses.

Two officers observed the accused backing his truck into his driveway. A large square item was in the box covered by a quilt. Police also identified the accused's passenger as one Kahn. They erroneously believed the accused by virtue of a probation order, was not to associate with Kahn. Police blocked the driveway and as they approached the accused's truck the occupants ran. The accused was apprehended and arrested for breach of probation. He was immediately made aware of his rights.

The accused was taken to the back of his truck and one of the officers looked under the guilt. The accused explained the TV set belonged to Kahn's mother. The officer then looked in the cab of the truck. The doors were standing open and the remote control of the TV was in clear view. The TV and quilt had an aggregated value of $1600 and were taken in a B & E that very day. However, the officers did not know that at the time. Considering the circumstances and reputations they assumed the goods were stolen. Then the officers discovered that the accused was not under a probation order not to associate with Kahn. They then cancelled the arrest but said they'd believed the TV was stolen. They seized it and said to the accused that if it was stolen he'd be charged. Four days later the officers discovered the TV had been stolen and they arrested the accused. At trial it was discovered that the officers were unaware of the leading and latest cases regarding search and seizure. They were under the impression that no warrant was required to search the truck.

Needless to say the defence argued that since the search was warrantless it was *ispo facto* unreasonable[18] and the Crown had failed to show that it was not. Of course, the search would be reasonable if it was incidental to a lawful arrest. The arrested person and his immediate surroundings may then be searched. Defence counsel claimed the first arrest was unlawful and the search consequently unreasonable. The stolen goods should be excluded despite the fact it

---

[18] Hunter v. Southam Inc. (1984) - Volume 18, page 12 of this publication
Regina v. Klimchuk - Volume 40, page 19 of this publication.

was real. An additional argument was that the officers had at the time of the search no grounds (other than suspicion) that the goods were stolen. Hence the seizure was unlawful as well.

The defence's threshold was on observations BC's Chief Justice made in the Klimchuk decision. Although his judgment was a dissenting one, he said:

> "I am not persuaded that every warrantless search undertaken in spontaneous circumstances, particularly where an officer has strong suspicions based upon objective facts known to him, will necessarily be unreasonable".

The Crown conceded that the officers had no grounds to effect the initial arrest and could not conduct the search when they encountered the accused and Kahn with the goods. The Crown invited the Court to apply common sense to determine if in the circumstances (what the officers knew and the flight) the accused had a reasonable expectation of privacy.

However, the Court rejected to so hold. It concluded that a person has expectation of privacy in property carried in the back of a pick-up truck "in circumstances similar to those in which the stolen property was being carried in this case. Consequently the accused's right to be secure against unreasonable search and seizure had been violated. This left as the single issue, if admission of the evidence would bring the administration of justice into disrepute. The major factors to be considered to determine this are:

1. The fairness of the trial;
2. The seriousness of the Charter violation; and
3. The consequences of exclusion.

Of course the balance of the categories is of great importance.

The Court reviewed what the officers knew and what they witnessed. Despite the fact that the officers as a "practice of policy" never obtained search warrants to search a motor vehicle and seemed unaware of precedents binding on their investigative practices, they were possibly in a position to successfully apply for a search warrant. They knew that the accused's vehicle was used for the moving of stolen property. They were aware of the accused's propensity in regard to someone else's property. They had been informed of the activities at the accused's house. They observed the shape of the TV set under a quilt. When they approached the truck the accused and Kahn fled. The search itself had amounted to no more than lifting the corner of the quilt and looking in the open cab. It was in terms of being intrusive, trivial by comparison with the search of Klimchuk's car where the incriminating keys to vending machines were found in a heater duct. That search had required dismantling of a part of the dashboard. The officers' violation of the accused's right under s. 8 of the Charter was a "factor in favour of exclusion" but not by any means as significant a factor as it was in Klimchuk.

In both cases the evidence was "real". According to the Supreme Court of Canada[19] the exclusion of real evidence is not required to preserve the fairness of a trial.

In terms of the consequences of the exclusion of the evidence it does not take a genius to figure out that it would result in acquittal. Hence considering the three factors mentioned above, they are in terms of circumstances, grounds and severity distinct from those in Klimchuk. This left the balance of those factors to be considered.

Defence counsel strongly submitted that the officers in this case lacked good faith to the same degree as their counterparts in Klimchuk. They had all acted without lawful authority either deliberately or because of their ignorance of relevant law. If despite this lack, the Courts will admit into evidence the fruits of such unlawful practices, the reputation of the administration of justice will inevitably be adversely affected. This was the very issue that had tipped the scales in favour of exclusion in the *Klimchuk* case.

The Court held that the distinctions, as mentioned above, between the two cases in terms of the balance between the three factors (fairness of trial; seriousness of infringement of right and consequence of exclusion) are sufficiently distinct from Klimchuk that the decision there reached is not binding in this case.

The Court concluded that the TV and quilt were, despite the Charter violation on the part of the officers, admissible in evidence.

**Comments:**

Considering the trend of rulings by our highest Courts, it would not be surprising if this case will bite the dust, in regard to the issues discussed here. This despite the fact the Supreme Court of Canada said in its trend setting Collins decision on the exclusionary rule [s. 24 (2) Charter] that real evidence should not be excluded but in "the rarest cases". Since then there had been innumerable "rarest" cases, judging by the real evidence that has been suppressed since the Collins decision in 1987. These words "only in the rarest of cases", have been used in many recent precedents which, if abused, would amount to absurdities and legal luxuries for our criminal element, we can ill afford. "But in the rarest of cases", are superfluous words. What was intended to be a small leak turns quickly into a flood.

Another reason for being pessimistic about this case surviving an appeal is that the actions of the officers caused the search to be quite distinct from the seizure. The grounds discussed by the trial judge, which were possibly sufficient to get a search warrant, would have authorized looking under the quilt and into the cab, but the goods there found were at best suspected to be stolen. The grounds for the search were stronger than for the seizure, it seems. The Charter

---

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

by guaranteeing a right to be secure against unreasonable search or seizure, provides that they can be considered separately. It seems possible that one may be reasonable and the other unreasonable even in a continuing action in relation to the same goods.

Although this may be red-neck reasoning, it always astounds me when it is belaboured if, in circumstances like these, admitting the evidence will bring the administration of justice into disrepute. As it turned out the accused and his cohort apparently invaded the most private place of the owners of the TV set and the quilt. It is not the theft but the intrusion that causes in most cases the real trauma of many victims. Here the infringement of the right of the accused pales when compared with the invasion of the victim's privacy. Although the former is constitutional and the latter criminal, the distinction is established by the classification of the perpetrator. The infringement of the accused's right was inflicted by police where they had joined the State in its prosecutorial interest and the criminal offence was committed by a private individual. However, in terms of victimization the criminal one is weightier by far.

Needless to say, in our process to determine guilt or innocence the impact on the crime of the victim cannot and must not be irrelevant. However, the issues that cause the exclusion of facts from being admitted in evidence, are also rarely relevant to the guilt or innocence of the accused person.

## DOCTOR SELLING PRESCRIPTIONS - DOES THIS AMOUNT TO TRAFFICKING?

The accused, a physician, sold prescriptions for narcotics to addicts. He was charged with trafficking. As the trial judge found that this practice was not included in the definition of trafficking he was acquitted. The Crown appealed.

The trial judge had held that the verb "to administer" was the one in the definition of trafficking the Crown relied on. He found that to prescribe and administer mean different things in regard to trafficking. According to the Court of Appeal for Saskatchewan[20] a narcotic is not administered until it enters the recipient's system.

However the Court of Appeal for Quebec failed to agree with their Saskatchewan counterpart. It held that selling prescriptions with profits as a purpose, amount to trafficking. Considering that to manufacture, sell, give, send, deliver or distribute are all included in trafficking, the Quebec Court of Appeal was not prepared to sacrifice the meaning of trafficking in these circumstances, on the alter of formalism. Crown's appeal allowed. Accused convicted.

**Regina v. Rousseau - Court of Appeal for Quebec, 70 C.C.C. (3d) 445.**

* * * * * * *

## DISHONOURED CHEQUE - PRESUMPTION OF GUILT

The criminal Code of Canada provides that where a cheque is dishonoured due to insufficient funds the goods gained by that cheque were obtained by a false pretence unless the accused can show on reasonable grounds that the cheque would be honoured. This provision violates the Charter's assurance that we will be presumed innocent unless the Crown, by meeting its burden of proof, shows otherwise, held the Court of Appeal for Prince Edward Island. There is no rational connection between the prerequisite facts and the presumption of guilt. The trial judge in this case had relied on this arbitrary presumption. Hence a new trial was ordered.

**Regina v. Ferguson - Court of Appeal for Prince Edward, 70 C.C.C. (3d) 330.**

---

[20] Regina v. Tan (1984) - 15 C.C.C. (3d) 303.

## INFORMER IN ARSON CASE SELLING HIS INFORMATION TO INSURANCE COMPANY. ABUSE OF THE PROCESS. INFORMERS TESTIMONY INADMISSIBLE

The accused owned an hotel and had a paid arsonist set fire to it so he could collect the insurance money. He was charged with arson and attempted fraud. A Mr. P. was the intermediary for the accused and he had made all the arrangements with the arsonist. Mr. P. then approached the insurance company and offered to provide them with information concerning the arson provided he was paid a substantial sum of money. The insurance company promised to pay $50,000. to Mr. P. provided the accused was convicted of arson. The police were not only fully aware of these negotiations and arrangements, but appeared to have acted as intermediaries between Mr. P. and the insurance company.

The accused claimed that this amounted to an abuse of the process of the court. The Quebec Court of Appeal agreed. It held that the abuse was, however, insufficient to stay the proceedings but should result in excluding Mr. P's testimony. A new trial was ordered.

**Regina v. Xenos - Quebec Court of Appeal. 70 C.C.C. (3d) 362.**

* * * * * *

## USE OF SURREPTITIOUSLY INSTALLED TRACKING DEVICE IN ACCUSED'S CAR AMOUNTS TO UNREASONABLE SEARCH AND SEIZURE

The accused was a suspect in a series of homicides. A search warrant was executed but nothing was found. Hours after the expiration and without judicial authorization police installed a beeper in the accused's car. This device was used on occasion to locate the accused while he was under constant police surveillance. On the day a one million dollar telephone communication tower was blown up the police had pin pointed the accused's car near the scene. On that information a search warrant was issued for the car and material linked to the tower explosion was found. He was charged with mischief. Admissibility became an issue as the use of the beeper was in the circumstances an infringement of the accused's right to be secure against unreasonable search and seizure. The Supreme Court of Canada held that the police use of the device was only minimally intrusive and that admitting the evidence obtained as a result would not bring the administration of justice into disrepute. The evidence was therefore admissible.

**Regina v. Wise - Supreme Court of Canada, February 1992. 70 C.C.C. (3d) 193.**

## SEARCH INCIDENT ON ARREST AND BOOKING PROCEDURES

The accused breached the curfew imposed on him by means of a probation order. He was arrested and searched. No weapons or anything suspicious was found. The officer who booked the accused before being placed in cells, paid attention to a cigarette package and found a small quantity of cannabis in it. Consequently he was convicted of possession and appealed this to the Court of Appeal for Quebec claiming that the search of the cigarette package was unreasonable and in violation of his rights under s. 8 of the Charter. This Court of Appeal agreed with the accused and reiterated that a search incident to arrest is lawful only to determine that the arrested person has nothing on him to harm others or himself, or anything which can constitute evidence against the accused. The accused was searched twice and nothing with which he could harm anyone was found on him and police had no grounds to believe he was in possession of narcotics. In this case, the search of the cigarette package was a fishing expedition and the evidence thereby found was not related to the offence for which he was arrested. However, as the evidence was real and admitting it would not affect the fairness of the trial, the accused's appeal was dismissed.

**Regina v. Garcia - Quebec Court of Appeal - 72 C.C.C. (3d) 240.**