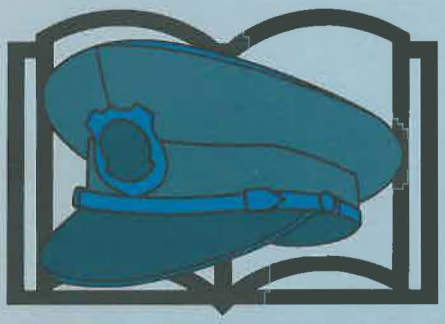

ISSUES OF INTEREST

VOLUME NO. 22

Justice Institute of British Columbia
POLICE ACADEMY
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ISSUES OF INTEREST

VOLUME NO. 22

Written by John M. Post

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TABLE OF CONTENTS

Page

THE IMPECCABLE RESPONSE TO RIGHT TO COUNSEL POLICE DISSUADING SUSPECT TO SEEK LEGAL ADVICE 1
Regina v. Dotchuk, County Court of Vancouver, No. CC842005 March 1985

DOUBLE JEOPARDY. ARMED ROBBERY - USING A FIREARM IN THE COMMISSION OF AN INDICTABLE OFFENCE - POINTING FIREARM - UNLAWFUL POSSESSION OF A WEAPON 2
Regina v. Krug, Supreme Court of Canada, October 1985

IS EVIDENCE THAT TWO SAMPLES OF BREATH WERE TAKEN, A CONDITION OF ADMISSIBILITY OF A CERTIFICATE OF ANALYSES? 5
Regina v. Schlegel, B. C. Court of Appeal, Vancouver CA 003000, October 1985

PERJUROUS ALIBI EVIDENCE - CROWN FAILING TO REBUT IS CHARGE OF PERJURY PROPER? 7
Crdic v. The Queen, 19 C.C.C. (3d) 289, Supreme Court of Canada

MEANING OF "REMOVED OR OBLITERATED" IDENTIFICAION NUMBER OF A MOTOR VEHICLE OR PARTS OF IT - PRESUMPTION OF GUILTY KNOWLEDGE 9
Regina v. Hodgkins, 19 C.C.C. (3d) 109 Ontario Court of Appeal

Page

CHARTER OF RIGHTS AND FREEDOMS
MOBILE BREATHALYZER - NO TELEPHONE - NO COUNSEL 10
Regina v. Blades, County Court of Westminster,
No. X015010, October 1985

CHARTER OF RIGHTS AND FREEDOMS. WHO WAS DRIVING? - ADMISSIBILITY OF TRANSCRIPT OF EVIDENCE DURING TRIAL - OBSTRUCTING JUSTICE 11
The Queen v. Stegmaier, Robertson and King, County Court of Westminster, No. X014607, September 1985

YOUTH COURT ONLY HAS JURISDICTION OVER "YOUNG PERSONS" - MUST THE CROWN IN EACH CASE PROVE AGE BEFORE COURT HAS JURISDICTION? ... 12
Between R... and C..., B. C. Court of Appeal CA002902,
November 1985

MUST "EVIDENCE TO THE CONTRARY" TO THE PRESUMPTION OF EQUALIZATION IN RELATION TO BLOOD-ALCOHOL LEVEL, CREATE A REASONABLE DOUBT ONLY? 13
Regina v. Hoffman, County Court of Vancouver, No. CC850747, October 1985

DANGEROUS OFFENDER - PROOF AND BURDEN OF PROOF 14
The Queen v. Burroughs, Vancouver County Court, No. CC841565,
Vancouver June 1985

CONSTITUTIONALITY OF PRESUMPTION THAT PERSON WHO POSSESSES COUNTERFEIT MONEY HAS KNOWLEDGE THAT THE CURRENCY IS COUNTERFEIT .. 16
Regina v. Burge, County Court of Yale, Kamloops CCC914
May 1985

ROAD CHECKS - RANDOM STOPPING OF CARS TO FERRET OUT IMPAIRED DRIVERS - LAWFULNESS OF POLICE ACTION 17
Regina v. Dedman, Supreme Court of Canada
20 C.C.C. (3d) 97

CHARTER OF RIGHTS AND FREEDOMS
DETENTION - TO BE INFORMED OF RIGHT TO COUNSEL 20
Regina v. Rosenbush and Rosenbush, B. C. Court of Appeal,
No. CA002265, June 1985.
Regina v. Gladstone, B. C. Court of Appeal
No. CA 000941, September 1985.

Page

CARE AND CONTROL OF A MOTOR VEHICLE 24
Regina v. Toews, Supreme Court of Canada, September 1985

RIGHT TO COUNSEL - EXCLUSION OF EVIDENCE 27
Regina v. Dawson, Court of Appeal of Yukon Territory, October 1985, Vancouver C.A. Registry Y40-83.

ENTRAPMENT - Is entrapment available as a defence or is it an aspect of "abuse of the process of the Court"? 29
Regina v. Mack, B. C. Court of Appeal, November 1985, CA000997.
Regina v. Jewitt, Supreme Court of Canada, Sèptember 1985.

B. C. TRAFFIC VIOLATION REPORTS AND THE CHARTER 35
Regina v. Langhorne and Regina v. Boshard, B. C. Provincial Court, Vancouver, B. C. November 1985, A1454708 and A1430060, respectively.

DEMAND - DETENTION - REFUSAL - RIGHT TO COUNSEL 36
Regina v. MacKinnon 21 C.C.C. (3d) 264
Prince Edward Island Supreme Court, Appeal Division

LEGAL TID BITS

Possession For the Purpose... 37
Alibi 37
Strip Search 38
Intercepting Communications/Public Telephone 38
Civil Action to Have Funds Seized Under N.C.A. Restituted 39
Drunkenness and Assault 39
Burden of Proof re Admissibility of Statement 39
Specificity in Information re Trafficking 40
Sufficiency of One Fingerprint 40
Inference from Quantity of Drug Transported 41
Reasonable Search/Right to Counsel 41
Lawyer Phoning to Assist Client 42
Rented Video Equipment - Theft by Conversion 42
Police Board's Discretion to Conduct Public Enquiry 43

THE IMPECCABLE RESPONSE TO RIGHT TO COUNSEL
POLICE DISSUADING SUSPECT TO SEEK LEGAL ADVICE

Regina v. Dotchuk, County Court of Vancouver, No. CC842005
March 1985

The accused, appealed his conviction of "over 80 mlg.". At his trial he had testified that when he sat in front of the breathalyzer he had said, "I would like to call my lawyer. Do I have a right to do so?" The police response had been "impeccable" said the appeal court. The officer had, pointing at a board up on the wall, said: "There is every name and every phone number of the lawyers in the Vancouver area. You're quite welcome to call".

The County Court found that the response by police was impeccable only if taken in isolation. The accused had testified that the officer had raised his voice and had shown signs of annoyance. He also had claimed that police told him in addition, that it did not matter who he phoned, a lawyer could only tell him one thing which was that he had to blow or else had to face a criminal charge. Not wanting to cause any hassles the accused had given samples of his breath.

The County Court found as a fact that the accused had been intimidated not to call a lawyer, and said:

> "In my view when an accused expresses a wish to call a lawyer under such circumstances he should be afforded that right by way of access to a telephone and a telephone book without intervention or comment by the police".

Comment by police that legal consultation would be of no avail, in addition to the behaviour of the officer, amounted to an infringement of the accused's right to counsel. No informed public would approve of the improper dissuasion by police for the accused to exercise that right. Consequently acceptance of the evidence would bring the administration of justice into disrepute. The analyses evidence should have been disallowed held the appeal court. Appeal was allowed and the conviction was quashed.

* * * * *

DOUBLE JEOPARDY

ARMED ROBBERY - USING A FIREARM IN THE COMMISSION OF AN INDICTABLE OFFENCE - POINTING FIREARM - UNLAWFUL POSSESSION OF A WEAPON

Regina v. Krug, Supreme Court of Canada, October 1985

In the mid seventies the Supreme Court considered whether it was appropriate in law to convict a Mr. Kienapple* of rape as well as carnal knowledge of a girl under the age of fourteen years while both charges arose from one act of sexual intercourse. By means of complex (and in spots somewhat confusing) reasons for judgment, the Supreme Court of Canada said "No". It reasoned that if the accused was convicted of rape (considering that sexual intercourse was an essential ingredient of that crime) and the age of the girl proved, then there was nothing left to be tried for the crime of carnal knowledge of an under 14 year old girl. If both convictions were appropriate the Court would in essence have said that multiple convictions may arise from one act of wrongdoing. That, the Court held, would be a form of double jeopardy and Kienapple stood convicted of rape only.

The Kienapple decision caused overlapping offences to receive similar consideration as a combination of charges to which the doctrine of double jeopardy would apply. Prior to this decision dual convictions for one delict were not uncommon. For instance impaired driving and "over 80 mlg." arising from one act of driving occurred regularly. Dual convictions arising from one act of wrongdoing was appropriate as long as the offences were separate and distinct from one another. However, when the lesser of two alleged offences arising from one incident is an offence included in the main offence, a conviction for that lesser offence was and is improper if the accused stands convicted of the main and more serious offence. To determine if one offence is included in another more serious offence is rather simple**. The second offence must be an offence of necessity to commit the main offence; or the second offence is included in the definition of the main offence; or the second offence is included in the wording of the indictment in respect to the main offence. Any offence that is not so included is a separate and distinct offence.

Convictions for separate and distinct offences arising from one incident, was quite permissible. The Kienapple decision abolished this practice, or at least, included in the dictum described above offences that overlap with one another.

Defence counsel have relied on the Kienapple principle many times when their clients charged with armed robbery, were also charged with using a firearm in the commission of an indictable offence (s. 83 C.C.). In 1982, approximately one month before the Charter came into effect,

* Kienapple v. The Queen [1975] S.C.R. 729.
** See section 589 C.C.

the Supreme Court of Canada addressed this very question in McQuigan v. The Queen*. McQuigan who had attempted to rob a variety store proprietor with a loaded shotgun, argued that his conviction for that offence made an additional conviction of "using a firearm in the commission of an indictable offence" improper. The Supreme Court of Canada held that Parliament, by providing for an additional one year in gaol to the penalty imposed for the indictable offence arising from the same event, made it clear in s. 83 C.C. that to curb the menace of use of firearms in the commission of crime, the Kienapple principle does not apply in such cases.

The same issue was brought before the Supreme Court of Canada in post Charter days by means of this Krug case. Krug was apparently unhappy about a financial institution repossessing his cars. He went with a loaded rifle to the compound where the vehicles were kept and attempted to steal the cars by pointing the rifle at an employee. Police disarmed him and Krug was charged with: (1) attempted armed robbery; (2) using a firearm in the commission of an indictable offence; (3) having unlawful possession of a weapon (dangerous to the public peace); and (4) unlawfully pointing a firearm. He pleaded guilty to attempted armed robbery and was convicted upon trial of using a firearm in the commission of an indictable offence and pointing a firearm.

The accused appealed the convictions except the one of attempted armed robbery. He did not only depend on the Kienapple principle that no multiple convictions must result from one delict, but also on s. 7 of the Charter. He argued that the multiple convictions were contrary to the principles of fundamental justice.

The Supreme Court of Canada reasoned that s. 83 C.C. refers to "the use" of a firearm. If one commits a theft while armed, he commits armed robbery. The weapon, however, does not need to be a firearm. The offence created in s. 83 C.C. is separate and distinct from armed robbery, as the use of a firearm is an ingredient additional to what needs to be proved for a conviction of armed robbery. In other words, if one steals while armed with a firearm, he commits armed robbery only. If he uses the firearm while committing the theft, an additional conviction under s. 83 C.C. is appropriate and does not breach the meaning of s. 7 of the Charter. The very use of the firearm in this case, was the "pointing" and therefore (in accordance with the Kienapple principle) the conviction for that offence could not stand.

The Supreme Court of Canada demonstrated (by allowing the appeal in relation to the pointing of the firearm) and warned that where the

* See [1982] 1 S.C.R. 284. Also see page 25 of Volume 5 of this publication.

actual use of a firearm is an essential ingredient of an indictable offence, then it would be improper to also convict under s. 83 C.C. As indicated above, armed robbery does not have the use of a firearm as an essential ingredient.

> Accused's appeal in regards to pointing a firearm was allowed. In respect to the other matters his appeal was dismissed.

Comment: The Kienapple decision was handed down in 1975 and has often been applied and argued in criminal proceedings. It has also been the topic of many articles by legal scholars. Yet it has appeared difficult at times for the Supreme Court of Canada to give greater clarification to the principle it created.

In this case the Supreme Court of Canada again explained and applied its own Kienapple creation. It reasoned and reasoned and did, in my view, tell us that an additional conviction arising from one act of wrongdoing is improper where the commission of the main offence (first conviction) cannot be completed without committing the offence(s) of which the accused was convicted in addition.

If my interpretation of this Krug decision is correct, we have nearly come full circle and the old method to determine if multiple convictions arising from one incident are appropriate does not seem as absolete as we thought it was for the last decade. However, though that method may not be completely obsolete, neither do I believe it to be fool proof. For instance, Kienapple (as the law then was) raped a female person who happened to be under 14 years old. When rape was proven there was nothing left to be tried for the carnal knowledge charge. Another example is a person driving with a blood-alcohol level of 120 mlg. who is consequently convicted of impaired driving. Nothing would have to be proved in addition to show the offence of "over 80 mlg.". Yet, carnal knowledge was not an offence included in rape and "over 80 mlg." is not an offence included in impaired driving. The Kienapple decision has prohibited multiple convictions in these overlapping offences. However, if you read the Kienapple decision it was supposed to do more. The decision appears designed to remedy issues that are not addressed by applying the "included offences" test. Reading the Krug case it leads you to wonder if the Kienapple principle is now of lesser significance than it appeared to be in 1975.

* * * * *

IS EVIDENCE THAT TWO SAMPLES OF BREATH WERE TAKEN, A CONDITION OF ADMISSIBILITY OF A CERTIFICATE OF ANALYSES.

Regina v. Schlegel, B. C. Court of Appeal, Vancouver CA 003000, October 1985

Mr. Schlegel, the accused, was charged with "over 80 mlg.". The arresting officer was the only witness at trial. He testified how the qualified technician had demanded "he (the accused) provide a sample of his breath". In describing how the accused complied the officer attested: "He supplied a sample of his breath..." (singular).

The certificate of analyses indicated that two samples were analysed. This discrepancy, argued defence counsel, amounted to "evidence to the contrary" which prevented the certificate from being proof of the accused blood alcohol level at the time of driving (s.237(1)(c)C.C.). The Provincial and County Courts did not buy the accused's arguments and he took his plight to the B. C. Court of Appeal.

The County Court Judge had recognized that the certificate itself showed that two samples, as required by law, were analyzed. This was sufficient evidence to prove that the prerequisite conditions to admissibility of the certificate in evidence were met.

The accused argued before the B. C. Court of Appeal that the County Court Judge's reasoning was wrong in law. How can a Court consider any part of a document as evidence before it has admitted that document in evidence? In other words, "Can the Court have any regard to the certificate in deciding on its admissibility"? The accused relied on a decision by the New Brunswick Court of Appeal* which stipulated that before the certificate of analyses can be admitted in evidence there must be evidence that a demand was made and that more than one sample of breath was taken.

The B. C. Court of Appeal agreed that only a certificate that indicates that more than one breath sample was analyzed is capable of proving the blood alcohol level at the time of driving. However, the court disagreed with its New Brunswick counterpart that a judge, in deciding on the admissibility of a document, may not have regard to its content. There are many precedents that support a judge to consider the content of a document when considering its admissibility in evidence.

* R. v. Richard 60 N.B.R. (2d)

If this was not so, the legislation allowing proof by certificates would be defeated in respect to its intent. The officer's testimony proved that a sample of breath was taken. The document proved that at least two samples of breath were analyzed. If proof of two samples was prerequisite to admissibility of the certificate in evidence, the legislation would be for naught, reasoned the B. C. Court of Appeal. The accused's suggestion that evidence of the giving of samples of breath are prerequisite to the admissibility of the certificate would amount to reading into the statute

> "... technical requirements which do not flow from the language used by Parliament; and by ignoring the mischief aimed at by the sections".

Accused's appeal dismissed.

* * * * *

PERJUROUS ALIBI EVIDENCE - CROWN FAILING TO REBUT IS CHARGE OF PERJURY PROPER?

Crdic v. The Queen 19 C.C.C. (3d) 289, Supreme Court of Canada

Police Officers testified how they stopped the accused in the early evening hours of a certain date. A demand was made of him for samples of breath which resulted in charges of impaired driving and "over 80 mlg". The accused testified and said that at the time the officers claimed he was driving, he was home with his daughter. He said he had been stopped that date around noon, but not in the early evening hours. His daughter also testified backing up the accused's alibi.

The trial judge, referring to the defence testimony, said he was sure that perjury had been committed, but added that the matter was not his responsibility to deal with. However, he acquitted the accused when the Crown failed to ask for an adjournment to rebut the apparent perjurous evidence. The accused was then charged with perjury.

The accused raised a unique defence to the perjury allegation. He argued that the trial judge had adjudicated the matter in respect of his testimony. The acquittal was proof that, at least his defence testimony had created a reasonable doubt. "In view of that adjudication the courts are estopped from trying that very issue again" argued the accused. When the B. C. Court of Appeal did not agree with the accused, he took his case to the Supreme Court of Canada.

By a majority judgment (5 to 4) the Supreme Court of Canada allowed the accused's appeal and ordered an acquittal on the allegation of perjury. The only defence the accused raised in his impaired driving trial was alibi. The acquittal came as a result of that defence and the alibi matter was therefore resolved in favour of the accused. The Crown prosecuted the accused for perjury by adducing the exact same evidence as it did at the impaired driving trial. The Court held that the matter could, on that basis, not be litigated again.

Our common law dictates that if one commits perjury the Courts are not estopped from trying the matter the witness testified to again. However, in addition to what the accused's testimony, there must be evidence sufficient to prove the accused knowingly gave false testimony with the intent to mislead the court. Therefore, the defence the accused raised in respect to perjury would not have been available to him had the Crown adduced evidence in addition to what was presented at trial. If the evidence of the officers had not been capable to overcome the accused's perjurous testimony in one trial, the same testimony should not be subject to adjudication in subsequent proceedings. In other words, if there is at the trial for perjury evidence in addition to what was adduced at the original trial, the Courts are not estopped from trying the matter again.

The Supreme Court of Canada reasoned that the Crown has an additional matter to prove to show perjury. The Crown must show it had been reasonably diligent in rebutting the alleged perjurous evidence as an immediate response at trial, or it must show that no rebuttal evidence was available at the time of the first trial. In this case the additional evidence the Crown adduced during the perjury trial was available at the time of the impaired driving trial. Therefore the

Accused's appeal was allowed.
Acquittal entered.

Comment: There is something about this judgment that seems out of step with logic and equality. Is it too simple to reason that the crime of perjury ought to be complete when a person deliberately and knowingly gives false testimony with the intent to mislead the Court? Where is the relevance in whether the Court believed the perjurer; or that the other party to the proceedings applying reasonable diligence could have rebutted the perjurous testimony; or to give significance to the point in time the Crown became aware that the testimony was perjurous.

Does this mean that a witness can perjure himself with impunity as long as "the other party" can rebut his evidence and is aware of the falsehood, while the witness who perjured himself and is discovered subsequent to the proceedings, is criminally liable?

If I have interpreted the reasons for judgment in this Crdic case correctly, the Court process will be less accurate and reliable in respect to fact finding. Should anyone infer that these comments are slanted in favour of the prosecution's side of the process, he or she should consider that the same principle may apply to Crown witnesses who perjure themselves.

* * * * *

MEANING OF "REMOVED OR OBLITERATED" IDENTIFICAION NUMBER OF A MOTOR VEHICLE OR PARTS OF IT - PRESUMPTION OF GUILTY KNOWLEDGE

Regina v. Hodgkins, 19 C.C.C. (3d) 109
Ontario Court of Appeal

The accused was found to be in possession of a Harley Davidson engine, worth about $500. He claimed to have purchased it from a party unknown for $35. The identification number was altered by changing a "C" to an "O", and a "3" to an "8".

The law presumes (s. 312(2) C.C.) that a person in possession of such parts the identification number of which is in whole or in part "obliterated" or "removed" knows (in the absence of evidence to the contrary) that such parts were obtained by the commission of an indictable offence and that he has knowledge of that fact.

The trial judge had held that the presumption did not apply, as the numbers were altered and not "obliterated or removed". The Ontario Court of Appeal did not agree with him and held that changing the identification numbers is what Parliament intended to be included in the presumption of guilty knowledge. Said the Court:

> "... the word 'obliterate' fairly comprehends the destruction of the integrity of the original vehicle identification number by altering some of the numbers and letters comprising it to produce a new and spurious vehicle identification number by the method used to accomplish that result in the present case."

Crown's appeal allowed.
New trial ordered.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS

MOBILE BREATHALYZER - NO TELEPHONE - NO COUNSEL

Regina v. Blades, County Court of Westminster, No. X015010, October 1985

Police were approximately 10 miles from their office with the "BAT Mobile". The accused was stopped and as he showed symptoms of impairment, a demand for breath samples was made. The accused was informed of his rights to counsel but made no attempts to exercise that right. The police officers had not done anything by gesture, demeanor or words to discourage or hinder the accused to seek legal advice. However, had the accused wanted to contact a lawyer prior to giving the breath samples, he could not have done so from the location where the samples were taken. The accused testified that he realized this. His lawyer submitted that it would have been useless to make any specific request; therefore, the circumstances and the setting had deprived his client of his right to counsel.

Recently the Supreme Court of Canada decided in the Therens* case that a person under demand to give samples of breath is detained and must consequently be informed of his right to counsel. Therens had not been so informed and our highest court held that the infringement prevented the certificate of analysis from being included in the evidence to be considered. Defence counsel in this Blades' case strongly argued that the claimed infringement of his client's right to counsel left the Court no alternative but to comply with the precedent set in the Therens decision.

The County Court Judge (who heard the accused's appeal in relation to "over 80 mlg.") held that the accused's right to counsel had not been infringed. The accused had not attempted to exercise his right and the police had not interfered with that right.

Accused's conviction was upheld.

* * * * *

* R. v. Therens (1985) 18 C.C.C. (3d) 481 - Also see page 1 of Volume 21 of this publication.

CHARTER OF RIGHTS AND FREEDOMS
WHO WAS DRIVING? - ADMISSIBILITY OF TRANSCRIPT OF EVIDENCE DURING TRIAL - OBSTRUCTING JUSTICE

The Queen v. Stegmaier, Robertson and King, County Court of Westminster, No. X014607, September 1985

From the reasons for judgement it appears that during a trial it had been essential to prove "who was driving and who was not". The two accused apparently were witnesses at that trial and were consequently charged with obstructing justice. The Crown sought to put the transcripts of their testimony in evidence and a voir dire was held whether the transcripts were admissible.

Defence counsel argued that admitting the evidence would be contrary to section 13 of the Charter. That section provides that no evidence a witness gives may be used in any other proceedings to criminate that witness, other than for the purpose of supporting an allegation of perjury or having given contradictory evidence. In this case obstructing justice was alleged.

The County Court Judge reasoned that the provisions of the Charter were designed not to protect a person where the giving of the original testimony constitutes the very offence alleged in subsequent proceedings.

For instance, if the answer to a question put to a witness involves him in an offence or renders him liable, then the Charter protects the witness. However, where the giving of the evidence constitutes a crime then the Charter, despite its specificity (perjury or contradictory evidence), does not protect the witness, held the court.

In this case the Crown apparently (the judgement is not specific) alleged that the two accused had obstructed justice by their testimony given at a trial at which the Crown attempted to establish who was driving. Said the Court:

> "... I have come to the conclusion ... that it (the exemption from the Charter protection) can be extended... where in fact it is the giving of the testimony that constitute the offence."

Transcripts admitted in evidence.

* * * * *

YOUTH COURT ONLY HAS JURISDICTION OVER "YOUNG PERSONS"
MUST THE CROWN IN EACH CASE PROVE AGE BEFORE COURT HAS JURISDICTION?

Between R... and C... B. C. Court of Appeal CA002902, November 1985

The accused youths and other young persons were charged under the provisions of the Young Offenders Act with assault causing bodily harm. One of the mothers testified before a plea was taken that her accused son was 15 years old on the day of the alleged assault. Counsel for the others conceded that their clients were "young persons" on that date. All this was noted on the "information" and after pleas of "not guilty" a trial date was set. Having heard all the evidence the trial judge convicted the youth whose mother had testified as to his age; he acquitted the others as there was no proof that they were in fact young persons. In other words, defence counsel's admission of age was inadequate for the Court to assume jurisdiction.

The Crown appealed this decision of the Youth Court to the B. C. Court of Appeal. It was obvious that the trial judge had relied on a decision by the B. C. Supreme Court in 1982* under the Juvenile Delinquents Act. The Supreme Court held that proof of age is not only fundamental to jurisdiction, but is, in addition, an ingredient of the allegation to be proven by the Crown.

The B. C. Court of Appeal indicated it to be pointless to determine if the decision regarding the Juvenile Delinquents Act by the B. C. Supreme Court was correct as "the language of the Young Offenders Act is completely different". That the accused youths were "young persons" was established when the proceedings commenced said the B.C. Court of Appeal. Whether, in addition, the Crown should have proven the ages of the accused young persons (whose lawyer conceded them to be so) the Court of Appeal said:

"In my opinion it did not".

Verdicts of "guilty" entered.

* * * * *

* R. v. Hernandez, Hernandez and Skinner, Nelson Registry S.C. 287/82

MUST "EVIDENCE TO THE CONTRARY" TO THE PRESUMPTION OF EQUALIZATION IN RELATION TO BLOOD-ALCOHOL LEVEL, CREATE A REASONABLE DOUBT ONLY?

Regina v. Hoffman, County Court of Vancouver, No. CC850747, October 1985

By means of a certificate of analyses and testimony by the breathalyzer technician, the Crown proved that the accused's blood-alcohol level was "over 80 mlg." at the time she drove her car. In rebuttal to the presumption that the blood-alcohol levels at the time of analyses and driving were the same, witnesses testified that the accused had only one glass of beer and 8 oz. of wine. This, a defence expert swore, is an inadequate quantity of alcoholic beverages to attain a reading of "80 mlg." let alone the recorded readings of 130 and 140 mlg. The trial judge had been satisfied that the breathalyzer had accurately analyzed the breath samples and held that rebuttal evidence had failed to rebut the presumption of equalization. The accused appealed the conviction of "over 80 mlg.".

The County Court Judge observed that the trial judge had not rejected the evidence of the defence witnesses, nor did he say whether the testimony had raised a reasonable doubt. He said to be satisfied upon the technician's testimony that the instrument was working properly. He should have considered the credibility of the rebuttal evidence and whether it had raised a reasonable doubt.

New trial ordered.

* * * * *

DANGEROUS OFFENDER
PROOF AND BURDEN OF PROOF

The Queen v. Burroughs, Vancouver County Court, No. CC841565, Vancouver June 1985

Within four months, in 1979, the 29 year old Burroughs committed three rapes in a public park. Besides threatening the victims with and subjecting them to violence, he took all the funds they had in their possession. He served a sentence of 4 1/2 years for those offences. Very shortly after his release, he grabbed a young woman in the same park, showed her a knife and promised that any screaming would result in him slitting her throat. He then forced her to perform oral sex with him and forced intercourse. She then had to perform fellatio again and when it was all over he took the $12 she had on her. When he entered a plea of guilty in relation to this sexual assault the Crown applied that Burroughs be declared a dangerous offender under s. 689(1) C.C.

The Crown, in support of its application, introduced the convictions and all of the circumstances of the rapes in 1979. It also adduced evidence of Burroughs' psychiatric therapy during his prison term. He was described by the medical staff as being a pathological liar; insincere; lacking remorse or shame, having poor judgement and failing to learn from experience; he has a capability to feel sorry, but only for himself. As Burroughs' prognosis was very poor, he was removed from the group program at the request of medical staff. Although the defence psychiatrist was critical that no individual therapy was attempted, he said that after a five year period of treatment Mr. Burroughs could "possibly be cured, not probably be cured".

To determine if the Crown had adduced evidence sufficient to support its application for Burroughs to be placed in custody as a dangerous offender, the Court reviewed what the Crown had to prove; the burden of proof, and what in fact the evidence supported.

To show that a person is a dangerous offender the Crown must "establish to the satisfaction of the Court" (which means must prove beyond a reasonable doubt):

1. that the conviction upon which the application under s. 687(b) C.C. is made, is a "serious personal injury offence"; and;

2. that the subject has demonstrated by his conduct (including his conduct when he committed the offences) that he cannot control his sexual impulses and that there is a likelihood that because of this failure, he will again cause evil, pain or injury to other persons.

The Court concluded that the offence of which he was convicted and the circumstances of that offence made it a "serious personal injury offence". Considering the evidence of the psychiatric experts and Mr. Burrough's response to the treatment he received the Court thought it likely that he would not be able to control his sexual impulses and would commit a similar offence in the future. Consequently he was declared a dangerous offender.

Due to the unpredictability of the results, if any, from treatment, the sentence was one of indeterminate detention.

* * * * *

CONSTITUTIONALITY OF PRESUMPTION THAT PERSON WHO POSSESSES COUNTERFEIT MONEY HAS KNOWLEDGE THAT THE CURRENCY IS COUNTERFEIT

Regina v. Burge, County Court of Yale, Kamloops CCC914
May 1985

The accused was charged with possessing and uttering a counterfeit U.S. $100 bill. At the outset of his trial the accused questioned the constitutional validity of the sections under which he was charged (s. 408 and 410 C.C.). These sections in essence say that if one does possess or utter counterfeit money without being able to prove some lawful justification or excuse, then he or she is guilty of an indictable offence. This, claimed the accused, contravenes the presumption of innocence (s. 11(d) Charter). The meaning of that presumption is that the Crown must prove guilt beyond a reasonable doubt while the accused has the right to remain silent.

Since the Charter came into effect the Courts have held that a statute or common law presumption of fact or guilt can only survive the "constitutional test", if the facts prerequisite to the presumption make the presumed fact a consequential probability.

Applying this test to sections 408 and 410 of the Criminal Code, one could encounter some problems. For instance, if a person, who is not an expert on currency, receives a counterfeit bill in the normal course of his business and passes it on again, he hardly can be considered to have a criminal intent. Therefore, possession or uttering do not have guilty knowledge (the kernel requisite ingredient to the crime) as a probability. In other words there is no rational connection between the proven (possession and uttering) and the presumed facts (guilty knowledge). The Court concluded that the sections (408 and 410 C.C.) do contravene the presumption of innocence and are therefore unconstitutional.

* * * * *

ROAD CHECKS - RANDOM STOPPING OF CARS TO FERRET OUT IMPAIRED DRIVERS - LAWFULNESS OF POLICE ACTION

Regina v. Dedman, Supreme Court of Canada
20 C.C.C. (3d) 97

Mr. Dedman was stopped in a police spot check, which was part of a much publicized police action to reduce the devastation drinking drivers cause on our highways. There was nothing about Mr. Dedman's driving that made police stop him. He simply happened to come along when one of the officers involved in the road check was clear to stop the next car.

A strong smell indicated that Mr. Dedman had been drinking and it was demanded of him to give a sample of his breath in a roadside device (A.L.E.R.T.). He made several apparently fake attempts to blow but whatever he donated was inadequate to analyze. He was not arrested but was issued an appearance notice for failing or refusing to blow.

The Ontario Provincial Court* acquitted the accused and held that police had neither a statutory nor common law authority to pull cars over at random. Therefore the grounds to make the demand for the breath sample were derived from an unauthorized act by the police and consequently the accused was not a person upon whom a demand could be made.

The Supreme Court of Ontario also found that the police had no authority to stop the accused in a road check and held that the accused had a reasonable excuse for failing to give a sample of breath.

Upon further appeal the Ontario Court of Appeal held that the accused had no excuse to fail to blow. It was immaterial whether the officers were within the lawful performance of their duty. Stopping the accused was not a crime or tort. The accused did stop, and was found to have been drinking. The demand was properly made and was compelling on the accused. The Court set the acquittal aside and Mr. Dedman appealed to the Supreme Court of Canada.

Of the seven Justices deciding the case four decided that Mr. Dedman's appeal should be dismissed. The Supreme Court of Canada disagreed with the Ontario Court of Appeal despite the fact that both Courts reached the same conclusion. The fact that the accused had stopped did not alter the legal basis which justified the police action. A policeman's actions may be unlawful if unauthorized despite the fact

* R. v. Dedman. See page 8 of Volume 2 of this publication.

they did not amount to a crime or a tort. When we test the lawfulness of a police officer's action we do so by examining if there is a specific provision in statute or common law that authorized the taking of the action. This is necessary because of "the authoritative and coercive character of police action".

The public may be uncertain about police powers. If, therefore, someone complies with an unauthorized direction of a policeman that compliance cannot be regarded as voluntary. It then follows that if the road check was unauthorized by statute or common law, the stopping of Mr. Dedman was unlawful and affected the validity of the subsequent demand for a breath sample, reasoned the majority of our highest court.

The Court observed that it was in the public's interest to comply with the signals by police officers. In many cases it is for the protection of the persons travelling in the vehicle. Nonetheless:

> "A person should not be penalized for compliance with a signal to stop by having it treated as a waiver or renunciation of rights, or as supplying a want of authority for the stop"

said the Court.

But was the road check which was part of a police programme to reduce impaired driving, unlawful? The Ontario Highway Traffic Act, like its counterparts in other provinces, provides that motorists must obey directions given by police officers and it also provides that a driver is obliged to give his driver's licence and other vehicle documents upon demand to a policeman for the purpose of inspection.

The Crown conceded it could not rely on the former provision for an authorization for road checks to find impaired drivers and the Court rejected the notion that the duty imposed on a driver to produce documents gives a power to a police officer. A power must be expressly conferred, held the Court. If the stopping is for the purpose of inspecting documents, that does not include the purpose for which the accused was stopped. Drinking drivers were the principal targets and the inspection of document was no more than a means to an end.

The Court then turned to the common law and statutory duties of police officers. Of course these are to preserve peace, prevent crime, and apprehend perpetrators. In this case police had interfered with the accused's "liberty" to drive freely on the streets. However, that "liberty" to drive is not a fundamental or constitutional liberty. It is a licensed activity subject to many regulations for the protection of all. Although the random stopping of cars seems, on the surface,

to be unauthorized in the absence of a specific provision for it the Court said:

> "I do not think there can be any doubt that it fell within the general scope of the duties of a police officer to prevent crime and to protect life and property by the control of traffic. These were the very objects of the ... programme, which is a measure to improve the deterrence and detection of impaired driving, a notorious cause of injury and death".

The Court recognized the inconvenience to the law abiding public and the objectionable nature of a random check. Weighing this off against the necessity for these measures to ensure public safety, the practice of the road checks is not an unreasonable interference with the public's liberty.

Said the Court:

> "I would accordingly hold that there was common law authority for the random vehicle stop for the purpose contemplated by the . . . programme*."

Accused's appeal dismissed.

* * * * *

* R.I.D.E. programme - Reduce Impaired Driving Everywhere.

CHARTER OF RIGHTS AND FREEDOMS
DETENTION - TO BE INFORMED OF RIGHT TO COUNSEL

Regina v. Rosenbush and Rosenbush, B. C. Court of Appeal, No. CA002265, June 1985.

The two accused are a middle aged married couple who performed a courier service for a cousin who imported cocaine. They travelled from Vancouver Island to Seattle and met as arranged, two men who turned two large suitcases over to them. Unbeknownst to the accused they and these men were at all times under police surveillance. The phone call by means of which Mr. Rosenbush received his instructions for the trip had been intercepted and police had alerted the Canadian Customs officials. When the couple arrived at the border they declared some children's clothing and were sent to the office. The custom's officer who dealt with the accused had already been told by his superior what the accused were carrying.

The accused were taken to an inspection room while the suitcases were searched in another room. The conversation between the Custom's officer and the accused was very general, casual, and mainly about Custom exemptions. The officer was then informed that a large quantity of cocaine was found in the linings of the suitcases (street value of $1.6 million). He was instructed to question the accused about the origin of the suitcases and then arrest them.

The accused said they bought the suitcases in a secondhand store on Vancouver Island. This, of course, was a blatant lie and helped to show that the accused had knowledge that the suitcases contained contraband. After this lie, the accused were arrested.

When tried for importing cocaine, the trial judge had allowed the conversation between the Custom's officer and the accused in evidence. He held the accused were not detained until arrested. Therefore, there was no need to inform them of their rights to counsel. Furthermore, the statements were voluntarily given. The accused were convicted and appealed to the B. C. Court of Appeal.

Since the trial of the accused, but prior to the B. C. Court of Appeal dealing with their appeal, the Supreme Court of Canada made its landmark decision in relation to "detention" in the Therens case*. That decision rendered erroneous the ruling by the trial judge that the accused were not detained when they had their apparent innocuous conversation with the Custom's officer. This, particularly when they told the damaging lie about the suitcases. The Custom's officer knew about the cocaine and was going to effect the arrest. He simply delayed the arrest, likely to avoid having

* R. v. Therens. See page 1, Volume 21 of this publication - 18 C.C.C. (3d) 481.

to comply with his duty to inform the accused of their rights. The B. C. Court of Appeal held that considering all the circumstances and the knowledge on the part of the Custom's official about the contraband meant that the accused were detained when they made their damaging statement. Their rights had consequently been infringed deliberately and not innocently or in good faith.

The remaining question was whether admitting the statements would bring the administration of justice into disrepute. The B. C. Court of Appeal held that the deliberate actions of the Custom's officials and the lack of good faith would cause disrepute to the administration of justice if the statements were allowed.

Accused's appeal allowed - new trial ordered.

Comment

The Therens decision caused concern that the Courts would consider that decision to have created a strict exclusionary rule. The B. C. Court of Appeal did not apply the strict rule and seemed to have gone out of its way to dispel that. At least, the Court appears to let it be known that it will not apply the rule strictly.

The B. C. Justices unanimously reiterated what they held in the Collins case*:

> When we are deciding whether or not a party who wished evidence to be excluded has established that its admission would bring the administration of justice into disrepute we must heed the lessons drawn from our past and from the experience of others. The major lesson is that the administration of justice will not be held in high regard if we regularly exclude evidence. I agree with the trial judge that the cases in which the evidence should be excluded will be rare."
>
> (the emphasis is the Court's)

This message is quite clear and leaves one to infer that the B. C. Court of Appeal does consider that their decision in Collins did survive the Therens' decision by the Supreme Court of Canada.

* R. v. Collins. Page 1, Volume 12 of this publication - (1983) 5 C.C.C. (3d) 141.

In other words, the B. C. Court of Appeal did apply the new "detention" definition but did indicate not to be prepared to hold that the Therens' decision created a strict exclusionary rule.

On September the 18th, the B. C. Court of Appeal again had an opportunity to relate its interpretation of the Therens decision by the Supreme Court of Canada when it gave its reason for judgement in the following drug case: Regina v. Gladstone - B. C. Court of Appeal - CA 000941 - September 1985*.

Gladstone arrived at the Vancouver Airport in May of 1982 (one month after the Charter of Rights and Freedoms came into effect) from Lima. He did fit the description of and was named on the "watch for" list. Custom's officers referred him to a secondary clearance. This meant that his baggage was to be checked. As far as the Custom's officers were concerned he was detained when he was referred. As he did, in all aspects, fit the profile of a drug courier and did in addition return from a very short stay in a "source" country the accused was asked if he objected to a personal search. This came after he was asked to read the provisions of the Customs Act which empower custom officers to conduct such searches and also gives the suspect an option to have the decision to search reviewed by a chief officer for reasonable cause. The accused had not objected to the search.

Five packages of white power (later analyzed to be cocaine) were found inside the waistband of his trousers. The accused failed to say what the powder was but was arrested for bringing a narcotic into Canada. He was then, for the first time, informed of his right to counsel. Appealing his conviction for importing the accused claimed that:

1. the personal search was unreasonable and not consented to;
2. the evidence was obtained by means linked to an infringement of the accused's rights in that he was detained long before the arrest and was not informed of his rights to counsel;
3. the provisions of the Customs Act empowering the officers to search are unconstitutional; and
4. that based on the above, the evidence of the drugs being found on the accused should have been excluded.

If one considers the letter of the Therens decision, and the fact that the search was warrantless it seemed inevitable that the B. C. Court of Appeal would allow the appeal. However, it did not and seems to have lawyered its way out of applying the apparent precedent established in the Therens case. The Court recognized that by the standards now set in Therens the accused was detained and should have been informed of his rights if the same situation would arise now. However, by the legal precedents valid at the time the search took place the accused was not detained. Although the Charter was the same then as it is now and perhaps ought to have been applied then the way our highest Court recently decreed, the officers acted

* R. v. Gladstone - See page 21 of Volume 14 of this publication.

in good faith. There was no wilfulness or malice in the way they handled the accused and if there was an infringement of the accused's right it was not done with any intent.

One could argue that this was also the case with the officers who processed Mr. Therens. They also complied with the law as it then was and yet the Supreme Court of Canada remarked that the failure to inform Therens of his right to Counsel was a flagrant infringement of Therens' right. Our B. C. Court of Appeal had an answer for that question. It observed that defence counsel had put in evidence a directive (in force at the time of the Therens' apprehension) to all police in the province of Saskatchewan, that persons under demand to give breath samples must be considered detained and must be told of their right to counsel. The B. C. Court of Appeal reasoned that it was the non compliance with that directive that must have caused the Supreme Court of Canada to say that the infringement was a flagrant one. No similar directive existed for the Custom's officers at the time and therefore the B. C. Courts could find that what was done by the Custom's officers was done in good faith.

In addition, the B. C. Court of Appeal commented that the Therens decision does <u>not</u> say that when the authorities fail to advise a detained person of his right to counsel, exclusion of evidence is a must. It rather reasoned that where the charge is not one of considerable gravity and the infringement is flagrant, then exclusion is the sole remedy.

A drinking driving offence which is usually prosecuted by way of summary conviction (that was the charge against Therens) or an importing of a narcotic differ immensely in terms of gravity.

In conclusion the B. C. Court of Appeal reasoned to be sure that the Supreme Court of Canada had no intention to create a strict or automatic exclusionary rule.

Accused's appeal dismissed.

* * * * *

CARE AND CONTROL OF A MOTOR VEHICLE

Regina v. Toews* Supreme Court of Canada, September 1985

In 1981 (pre-Charter days) the Supreme Court of Canada reviewed a case where a Mr. Ford, at trial, was acquitted of "over 80 mlg." while having the care and control of a motor vehicle**. Ford and his girlfriend attended an open air party. It was cold and the participants returned from time to time to their cars to get warmed up. Evidence showed that Ford had an arrangement that his girlfriend (who had refrained from drinking for that purpose) would drive the car afterwards. On one of their "warm-up sessions", police arrived and found Ford behind the wheel of his parked car; the engine was running to have the benefit of the car heater. The Supreme Court held that the girlfriend's testimony was merely a rebuttal of the presumption that Ford did have the care and control of the car; it fell short of establishing innocence. When an accused establishes that he mounted a vehicle for purposes other than driving, he simply shifts the burden of care or control back to the Crown to prove the essential ingredients of care and control. The presumption of care and control in s. 237 C.C. is not exhaustive and was not enacted to import "an intention to drive" as an essential ingredient to "care and control". There are other means to prove care and control than by means of the presumption. A person can have care and control without having any intention to drive. Said the Supreme Court of Canada:

> "Care and control may be exercised without such intent where an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion, creating the danger the section is designed to prevent".

In 1983 a Mr. Toews attended a party put on by a friend. He too had an arrangement to be driven home, but the contract did not come to fruition. Toews' pick-up truck was parked on the land of his host and as he felt he was in no condition to drive he crawled in a sleeping bag on the truck seat. His head was near the passenger door and his feet under the steering wheel. The key was in the ignition and in the courtesy position so the stereo would function. After four hours of sleep Toews was awakened by police and a conviction of "over 80 mlg." resulted. The B. C. Court of Appeal found that mounting a vehicle for the purpose of sleeping is different from performing "acts involving the use of the car, its fittings, or equipment". Mr. Ford had used the equipment of the car (engine and heater) and therefore that case was distinct from what was to be considered

* R. v. Toews, page 29 of Volume 11 of this publication.
** Ford v. The Queen, page 23 of Volume 5 of this publication.

in this Toews' case. The accused had not wanted to use the vehicle as a motor vehicle but rather as a bedroom. Therefore, care and control was not proved and Toews was acquitted.

It seems that the B. C. Court of Appeal maneuvered its way around the Ford decision. It would not be surprising if the justices of that Court were sympathetic towards Toews and felt that the police had used poor discretion in arresting him. It seems the law was not designed to prevent or remedy what occurred in this situation. However, the helpful Ford decision had been watered down for B. C. as "well enough" had not been left alone. The Crown appealed the acquittal to the Supreme Court of Canada which had to assess its own decision in the Ford case for post Charter validity.

At the outset, the Supreme Court of Canada, reiterated the fundamentals established in the Ford decision.

1. The wrongful act is the intentionally assuming of control of the motor vehicle;

2. The absence of intent to drive does not afford a defence;

3. Care and control must involve some use of the car, or its fittings or equipment or some conduct that would involve risk of putting the vehicle in motion.

After 11 pages of reviewing law and reasoning, the Supreme Court of Canada concluded that what they decided in the Ford case is still the interpretation of the statutory presumption of care and control (s. 237 C.C.). Applying that interpretation to this Toews' scenario, he was not, in fact, and had not been, in control of his pick-up truck either by the provisions of s. 237 C.C. or the common law for the following reasons:

1. the use (or lack of it) of the fittings or equipment of the car or any other conduct of the accused, did not involve a risk of putting the vehicle in motion;

2. the accused had not occupied the driver's seat, therefore the presumption in s. 237 C.C. did not apply and the Crown had to rely on evidence of acts of care and control;

3. the accused was unconscious when found by police and there was no evidence of what occurred prior to their arrival; he was clearly not in control at that time; and

4. all circumstances and evidence (particularly the accused being in a sleeping bag) supported the contention that the cab of the truck was merely used as a place to sleep.

The accused simply had not committed the alleged actus reus (the wrongful or prohibited act) as he had not performed any acts amounting to assuming care or control of the truck.

Crown's appeal dismissed.
Acquittal upheld.

* * * * *

Comment: One cannot help but infer that there must have been other circumstances that lead to the arrest of Toews. My comments in Volume 29 are still valid in that this case has taken away from the supportive Ford decision. The Court's explanation of what does constitute care and control is now somewhat confusing.

It is also inevitable that readers will wonder about the weight of the keys being in the ignition. Here is an implement requisite to operating the vehicle (and a common means of assuming care and control) inserted in a "fitting" of the truck that activates the major "instrument" of the truck as well as giving access (in most modern automobiles) to nearly all functions including control of the gearshift lever. Here it appears, is where the lawyering by the judges came into play to acquit an accused caught in circumstances the law was not designed to remedy.

Toews had not driven his pick-up truck to the party. The Court said on this point:

> "The evidence further revealed, and it was unquestioned, that the respondent had been driven by a friend from his home... to the house... where his truck was parked and where the party was being held".

Therefore, the accused was not the person who parked the truck where it was found and he was not the last driver. The Crown did not lead any evidence who placed the keys in the ignition or who turned the key in the courtesy position so the stereo would function. This meant that the Court could not draw any inference from "the key in the ignition" evidence that was adverse to the accused.

The Supreme Court of Canada closed its reasons for judgement with this comment:

> "It has not been shown that the respondent (Toews) performed any acts of care or control and he has therefore not performed the actus reus".

* * * * *

RIGHT TO COUNSEL - EXCLUSION OF EVIDENCE

Regina v. Dawson Court of Appeal of Yukon Territory, October 1985, Vancouver C.A. Registry Y40-83.

Police investigated the break, entry and theft of an office. A safe (containing $15,000) and some tools were taken. Two days after the offence police arrested the accused (in an advanced state of intoxication) for the B & E. He was informed of his right to Counsel and he said he understood what he was told. It was late in the evening and the accused's attempts to contact a lawyer were in vain; he phoned six lawyers and only spoke to one who declined to act for him. He was placed in cells with the assurance that the investigating officer knew that a lawyer was to be contacted. Not at any time did the accused ask for a phone or mention he wanted a lawyer. In the middle of the night the accused was taken out of cells and interviewed. His condition was such that the interview was impossible. Thirteen minutes later he was back in his cell until about midmorning when he was interviewed again. He was not again informed of his right to counsel. He was obviously "hung-over" but did nonetheless deny any knowledge of the B & E. Five interviews were conducted and in the late afternoon he, in answer to: "Let's get things cleared so everyone can get on their way" took police to where some of the proceeds of the crime were kept. The accused also gave answers to leading questions when told that he would be released "once we get all this over with".

The trial judge would not allow the statement by the accused in evidence and found that:

1. the accused did not understand that he had a right to counsel;
2. the accused was not given a reasonable opportunity to retain and instruct counsel; and
3. the police had been negligent in respect to their constitutional mandate.

The Court would not allow the evidence of what was found at the place where the accused took police. He did so awarding the accused a remedy pursuant to s. 24(1) of the Charter. This avoided a decision whether the administration of justice would be brought into disrepute. If, despite their negligence, the officers had acted in good faith, did not need consideration under s. 24(1) of the Charter. Having excluded all the statements and evidence there was nothing left to consider and the accused was acquitted. The Crown appealed this acquittal. The tenor of the reasons for judgement by the Court of Appeal are nearly harsh and quite critical of the trial judge's findings and rulings on various points of law.

The Court of Appeal mainly discussed the propriety of excluding evidence as a remedy to an infringement of a right or freedom under s. 24(1) of the Charter. The Justices also discussed whether disallowing a statement because of a Charter infringement would mean that all subsequent evidence

(the finding of stolen property upon direction of the accused) must be excluded as well. They implied that this was erroneous in law. On the first point the Court pointed out that the Supreme Court of Canada* had, by a good majority, decided that s. 24(1) of the Charter was not appropriate to use for the exclusion of evidence. Good faith on the part of police and disrepute of the administration of justice must be considered. Furthermore, the specificity of s. 24(2) of the Charter made it the only subsection to use for the purpose of excluding evidence.

The Court of Appeal also seemed to have doubts if police had violated the accused's right to counsel. The Court agreed with a decision made by their Ontario counterpart** which held that in respect to s. 10(b) of the Charter (informing a detained person of his right to counsel) a peace officer must:

1. communicate clearly to the detainee that he has a right to retain and instruct counsel without delay;

2. make certain that detainee understands that right considering the mental condition of that person (handicap, shock, drunkenness, etc.); and

3. if the detainee indicates in any manner that he chooses to invoke that right, he must: (a) accommodate the detainee with an opportunity to do so; and (b) cease questionning the prisoner until after the opportunity has been provided.

If the detainee does not request such an opportunity and speaks to the peace officer, the statement obtained is not inconsistent with the Charter. The Court seemed to have difficulty in agreeing with the trial judge that the officers had infringed the accused's rights or had been negligent in respect to those rights. From the evidence, the Court could not draw the same inferrences as the trial judge did.

In respect to the voluntariness of the statement, the Court of Appeal found that the trial judge had concluded that when the accused asked when he would be released the officers had implied a threat or a promise that he would not be released unless he confessed. If that was so, the exclusion of the statements because of involuntariness was correct but did that mean that the subsequent facts (the stolen goods) also had to be excluded?

Mainly because of the exclusion of evidence was granted to the accused as a remedy under subsection (1) instead of subsection (2) of section 24 of the Charter,

> the Crown's appeal was allowed and a new trial was ordered.

* * * * *

* R. v. Therens page 1 of Volume 21 of this publication.
** R. v. Anderson (1984) 45 Ontario Reports (2d) 225.

ENTRAPMENT

Is entrapment available as a defence or is it an aspect of "abuse of the process of the Court"?

Regina v. Mack B. C. Court of Appeal, November 1985, CA000997.

To state it as basically as possible, entrapment was not a defence in Canadian criminal law. When agents of the state had enticed a person to commit an offence, then, if their methods were so repulsive that trying the entrapped person for that offence would bring disrepute on the Courts, the judiciary were obliged to preserve the dignity of the Court and prevent the abuse of its process by ordering a stay of proceedings. In 1977 a decision by the Supreme Court of Canada* created some doubts about the Court's discretion to stay proceedings, particularly in respect to Courts of inferior jurisdiction. Subsequently, decisions by the Supreme Court of Canada in 1979** and 1985*** seemed to create the defence of entrapment or at least, made it an aspect of the abuse of process and entrenched "abuse of process" in the criminal law respectively. In some provinces the defence of entrapment has been available since the 1979 decision, while Courts in other Provinces have held that the Supreme Court of Canada did not quite go that far. When this Mack case reached the B. C. Court of Appeal it had to determine by applying and interpreting the rulings by the Supreme Court of Canada in the Jewitt case, what the remedy for entrapment is and what the procedural requirements are.

Before attempting to explain the Mack decision by the B. C. Court of Appeal, it seems essential to explore the issues in the recent Jewitt case decided by the Supreme Court of Canada. The Mack case is, in fact, B. C.'s reaction to the fundamentals established by the reasoning of the Supreme Court of Canada in Jewitt. In the Mack case a number of interesting questions relevant to entrapment were placed before the B. C. Court of Appeal. If, therefore, this is to explain anything, sequence is important.

Regina v. Jewitt - Supreme Court of Canada, September 1985.

Jewitt was tried for selling a pound of marihuana to an undercover police officer. He had done so upon persuasion by a person working with police. When tried by a B. C. County Court jury, the trial judge had held that the

* Rourke v. The Queen (1977) 35 C.C.C. (2d) 129.
** R. v. Amato (1979) 51 CC.C. (2d) 401 (Seems to create the defence of entrapment).
*** R. v. Jewitt (unreported Sept. 1985).
(Entrenched abuse of process in criminal law).

defence of entrapment is available in Canada and instructed the jury to decide if Jewitt had been unlawfully entrapped. The Jury said he had been, and the trial judge, to prevent the process of the Court from being abused, ordered that a stay of proceedings be entered on the record. The Attorney General of B. C. appealed this decision but the B. C. Court of Appeal found that it lacked jurisdiction to deal with the matter as a stay of proceedings is not an acquittal (see s. 605(1)(c) C.C.). The Attorney General then took the matter to the Supreme Court of Canada to decide if the trial judge had authority to stay the proceedings and if a judicial stay of proceedings is the equivalent of an acquittal and can be appealed as such.

Firstly the Supreme Court of Canada shed some light on its own decisions that had made uncertain if the courts had any jurisdiction of "controlling prosecution behaviour which operates prejudicially to accused persons". This, of course, was the doctrine fundamental to the court's discretion to stay proceedings. Particularly one decision in 1978* created outright confusion on this issue and the provincial courts of appeal have been all over the place on this doctrine. The Jewitt case was the Supreme Court's opportunity to clarify its views. Needless to say, that entrapment is nearly always the issue. After all these years of confusion the Supreme Court said:

> "It seems to me desirable and timely to end the uncertainty which surrounds the availability of a stay of proceedings to remedy abuse of process".

Having said this, the Supreme Court of Canada entrenched "abuse of process" in criminal proceedings by holding:

> "I would adopt... and affirm that 'there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of the court's process through oppressive or vexatious proceedings'. I would also adopt the caveat... that this is a power which can be exercised only in the 'clearest of cases'".

The Supreme Court of Canada also held that a judicial stay of proceedings for abuse of process is the equivalent to an acquittal and that the provincial courts of appeal have jurisdiction to deal with such a stay under s. 605(1)(a) C.C.

* Bourke v. The Queen [1978] 1 S.C.R. 1021.

Now back to the Mack case before the B. C. Court of Appeal. Mack, the accused, appealed his conviction for possession of cocaine for the purpose of trafficking. He claimed that he was entrapped and asked the highest court in B. C. if entrapment is a defence or an aspect of the abuse of process; is the onus to prove entrapment on the accused or must the Crown show there was no entrapment; and, of course, what is entrapment and was there entrapment in this case?

The facts in this case unfolded from the Crown's evidence but it seems that on the issue of entrapment most details came from the accused's testimony.

A Mr. M. from Ontario was placed under police handlers in B. C. in their investigation of the accused. Police officers conceded that M. was difficult to handle. He apparently had his own ideas on how to collect the evidence. The B. C. Court of Appeal concluded that if the onus of proof beyond a reasonable ground was on the Crown to show that there was no entrapment then the Court would have a reasonable doubt that the methods adopted were free of entrapment.

The accused had been approached by M. to become a supplier of drugs but was rejected. After another solicitation the accused had asked to be left alone, but the phone calls persisted. The accused testified that he was eventually terrified of M. and had kept a "rendezvous" out of fear. On one occasion M. took the accused for a walk in the woods and produced a gun and had said "a person could get lost". M. had referred to the remote area they were in. On another occasion M. had summoned the accused to a hotel room. On route, he had been followed, said the accused. M. also had other men with him which the accused took to be associates of the illegal syndicate M. had implied he headed up. The accused testified that he finally had given in and had gone to a supplier of drugs he then knew (the supplier had died by the time of trial) and to provide as much cocaine as he could for him around $40,000 per pound. This, he had told the supplier, was strictly to get M. off his back. A 12 oz. sample was taken to M. by the accused. This delivery resulted in the accused's arrest.

The trial judge had concluded that the accused's involvement was for profit and not out of fear or because of persistent inducement on the part of M. Police had simply provided an opportunity for the accused, a man with a lengthy criminal record and a propensity for such transactions. He had not been forced into doing anything he did not want to do. This (along with the specific questions he put to the Court in relation to entrapment) is what the accused challenged.

Considering the trend created by the decisions of the Supreme Court of Canada, the B. C. Court of Appeal held, in respect to its previous views that entrapment could not be used to stay proceedings, that

> "... we must now reject this view and conclude that entrapment is available as a defence, not in the normal sense of that word, but as an aspect of abuse of process".

The Court concluded that when the entrapment scheme is so shocking and outrageous (please note that this was not considered under the Charter to remedy infringements of rights or freedoms) as to bring the administration of justice into disrepute then the Crown is disentitled to a conviction despite the fact that on the merits the accused may not be entitled to an acquittal.

Some very interesting aspects of entrapment were discussed in these reasons for judgement. In the U. S. the matter of subjectivity v. objectivity had been debated some time ago. The distinction is that when the test is an objective one, then the actions of the authorities are considered in isolation to determine if there was entrapment. If the test is a subjective one then the predisposition of the accused may justify the methods used. Despite some precedents, the tendency of many courts in the U. S. is to apply the objective test. If a subjective test is applied then entrapment is a question of fact and a jury (judge of the facts) should decide if the accused was entrapped. If the test is objective, then entrapment is a question of law and a judge must decide the issue. A problem, of course, is that if entrapment is an abuse of the process of the Court, it ought to be exclusively within the ambit of the judiciary to decide on, like all other issues related to the process of the Court. It seems to follow then, that if entrapment must be decided subjectively (by a jury) then one could reason that it is a substantive defence.

The B. C. Court of Appeal decided that entrapment is a question of law and must be determined by a judge. In other words entrapment is not a substantive defence, but an aspect of abuse of process which may result in a judicial stay of prosecution.

Is the onus to show entrapment on the accused or must the crown as an essential ingredient to its case show that there was no entrapment?

The B. C. Court of Appeal held that an accused who does not claim he is innocent on the merits, but claims that the trial should not continue because the outragious and shocking practices of the state (by means of which he was entrapped to commit the alleged offence) would bring disrepute on the administration of justice (like is required for the exclusionary rule under the Charter)

> "... should have the responsibility of establishing on a preponderance of evidence that the conduct of the police or its representatives is an abuse of the court's process".

The Court also agreed with the trial judge that there was no entrapment in this case. It quoted from the trial judge's reasons why the accused had become involved to reap profits rather than out of fear and inducement.

> "Given his record and the alacrity with which he produced on seeing the $50,000.... I find it more probable that he then saw a situation of profit and acted upon it".

Though an opportunity had been created by police for the accused to be involved, the tactics

> "... fall short of entrapping a person into the commission of an act that he had no intention of doing".

(Reason for my emphasis are in my comments following).

In summary:

1. Entrapment is available as a defence but only as an aspect of an abuse of process;

2. Entrapment is a question of law and not a question of fact (to be decided by a judge and not a jury); and

3. Entrapment must be established by the accused on the balance of probabilities; and

4. Entrapment can only result in the exercise of the power to enter a stay of proceedings in "the clearest cases".

Accused's appeal dismissed.

Comment: It does seem accurate to say that the definition of entrapment is unchanged but not its application. In essence, creating an opportunity for a person to commit a crime he is predisposed to commit is not necessarily entrapment.

The Court of Appeal opted for the objective test to determine whether there was entrapment. In the manner in which the justices reasoned they accepted entrapment as a defence as an aspect of an abuse of process rather than as a substantive defence as it is in the U. S.

As explained above, when you apply the objective test the actions of police must be weighed in isolation from the predisposition, inclinations, propensities or activities of the accused. From the Crown's point of view, that may be the only down side to the objective test. Our B. C. Court of Appeal, however, reasoned that the U. S. approach does not completely ignore the predisposition of the accused. Furthermore it found support in the Supreme Court of Canada giving some indication that the accused's propensities could not be ignored. By agreeing with the trial judge's reasoning in determining that there was no entrapment in this case, and quoting those portions of his reasons for judgement that took the accused's

records, alacrity and intention into account, it seems safe to say that our B. C. Court of Appeal has included "predisposition" in the objective test to determine whether there was entrapment.

It seems also significant that the Supreme Court of Canada did not say (like some judges did) that the judiciary have an inherent right to protect the abuse of the processes of the court but only have a "residual discretion" to do so. In some previous cases the superior courts have expressed a concern that judicial interference in prosecutions would lead to abuses. After all, the persons accused who have been entrapped are, likely on the merits, guilty of the alleged crime. It is in certain ways, like the exclusionary rule, imposing discipline on authorities by excusing the offender for his wrongdoing. Possibly our judiciary have feared absurd definitions, rulings and consequences. Although this is conjecture on my part, by assuming to have "residual discretion" only, the Court may envision parliament's intervention in the event of judicial abuses. By saying that the discretion is "residual" the Court seems to concede that the judiciary only have this power as it has not been assigned or has not been defined or provided for in any statute. Unless specifically superseded by our elected representatives the judiciary are the creators and in charge of the process of the court. This means that anything not provided by our law makers is "residue" and within the ambit of the judges.

The apparent fear of possible consequences of this "abuse of process" issue, we may not be able to afford in our fallible society, is also reflected by the emphasis by the Supreme Court of Canada, that this judicial discretion may only be exercised in the "clearest of cases". Again this seems to warn those of the judiciary inclined to create legal luxuries we cannot afford this side of the pearly gates, not to get carried away with this new law.

Finally, it may be of interest to note that nearly all cases historical to this landmark decision by the Supreme Court of Canada originated in B. C.

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B. C. TRAFFIC VIOLATION REPORTS AND THE CHARTER

Regina v. Langhorne and Regina v. Boshard, B. C. Provincial Court, Vancouver, B. C. November 1985, A1454708 and A1430060, respectively.

Recently, concern has been expressed by members about some apparent technical points in law that rendered traffic violation reports invalid. Some rather puzzling rulings in our local Traffic Court triggered this concern.

Both accused apparently appeared on the same day before the same Provincial Court Judge. Both were represented by the same counsel. Mr. Langhorne and Mr. Boshard received a TVR which could result in demerit points being registered against their B. C. Driver's Licences. This, in turn, would mean increased insurance premiums and possibly suspension of the driver's licences.

Mr. Langhorne, who was dealt with first, argued that the traffic laws were aimed at all drivers on British Columbia highways. Yet a person from out of province who drives on our highways, would receive a TTI, pay a fine or plead not guilty, and, without having to deposit any funds, have a right to be tried. Mr. Langhorne claimed that this was discriminatory. The judge imposed a stay of proceedings to remedy the unconstitutional discrimination Mr. Langhorne was the victim of.

Seemingly, a little later in the day, Mr. Boshard challenged the validity of the TVR served on him. In addition to the arguments advanced in the Langhorne case, Mr. Boshard claimed that the provisions of the Motor Vehicle Act which require that $10 be deposited by a person who wishes to dispute the alleged traffic violation is contrary to the Charter. He claimed to have a right to a trial, and, despite the fact that the deposit would be returned upon his appearance for the hearing, he still had to purchase that right. This provision also discriminates against impoverized citizens he claimed. He also argued that the provisions create inequality "before and under the law", which, of course, is also contrary to the Charter. The trial judge rejected all of Mr. Boshard's Charter arguments but concluded that he was at least entitled to a stay of proceedings as was entered on the records for Mr. Langhorne.

There seems little doubt that the government either has to make some significant amendments to the Motor Vehicle Act or has to challenge the constitutional arguments that were advanced in these cases. For numerous reasons, the latter is predicted.

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DEMAND - DETENTION - REFUSAL - RIGHT TO COUNSEL

Regina v. MacKinnon 21 C.C.C. (3d) 264
Prince Edward Island Supreme Court, Appeal Division

The accused, who rode a motorcycle was stopped and a demand for breath samples was made of him while he sat in the rear of the police car. The accused promptly refused and the officer considered this to be the end of the matter. He drove the accused to his girlfriend and issued an Appearance Notice for refusing to comply with the demand. The accused was acquitted and the Crown appealed.

Needless to say that the Therens decision* by the Supreme Court of Canada was relied on heavily by the defence. Therens had complied with the demand but had at no time been informed of his rights to counsel. The Supreme Court of Canada held that when a demand is made of a person to supply samples of breath he or she is detained and must consequently be informed of the right to counsel.

The Crown argued that the circumstances in this MacKinnon case made it distinct from Therens. Figuretively speaking, the immediate response to the demand was "No" and the officer's reaction was "O.K." in that case you must appear to plead to the offence of refusing and I'll drive you to where you want to go". At what point in time was there detention?

The Appeal Division of the Prince Edward Island Supreme Court disagreed with the Crown's submissions. It held that detention came the moment the demand was conveyed to the accused. He had a decision to make; compliance would probably lead to prosecution and so would refusal. The accused made that decision without the benefit of being informed of his right to firstly consult counsel. The Court held that the infringement of the accused's right had given him a reasonable excuse (as per s. 235(2) C.C.) to refuse giving breath samples.

Crown's appeal dismissed.

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* See page 1 of Volume 21 of this publication (1985) 18 C.C.C. (3d) 481.

LEGAL TID BITS

Possession For the Purpose...

The Ontario Court of Appeal had to decide whether the accused should stand trial for possessing narcotics for the purpose of trafficking. Her committal for trial had been quashed. A quantity of narcotics, sufficient to infer that they were for the purpose of trafficking, were found in the accused's bedroom which she shared with her boyfriend. They were charged jointly but apparently there was no proof that the accused owned the narcotics. Most of the evidence had identified the boyfriend as the person who brought the contraband into the apartment and distributed it among his customers.

The Court reasoned that the narcotics were in the accused's bedroom with her consent. The power to so consent or to withhold or withdraw that consent may amount to control over the narcotics. She therefore did possess the narcotics (see s. 3(4) C.C.) and was a party to the offence.

Committal for trial restored.

20 C.C.C. (3d) 440. Chambers and the Queen.

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Alibi

The accused appealed his conviction of break, enter and theft. After committal for trial upon the preliminary hearing he gave police all particulars of an alibi, including the identity of witnesses who could verify it. The trial judge told the jury, that if they believed the accused and his witnesses in respect to the alibi they had to render a verdict of not guilty. If they did not accept that evidence they had to consider the Crown's evidence only to determine their verdict. The trial judge had also told the jury that they should take in consideration the late disclosure of an alibi by the accused. "Why did he not right off tell police that he was elsewhere at the time of the crime"?

The Ontario Court of Appeal held that the trial judge had given inadequate instruction to the jury. He should also have told them that if they had doubts about the accused's alibi, they should acquit him.

Furthermore, late disclosure of an alibi, is not detrimental to an accused unless he gives it when there is inadequate time to investigate it. No inference of guilt may be drawn from failure to disclose an alibi. Cross examination by Crown Counsel on this point had demeaned the accused's right to remain silent and had left the impression with the jury that he was obliged to disclose his alibi at the earliest possible moment.

New trial ordered.

20 C.C.C. (3d) 184 Regina v. Parrington

Strip Search

The accused had been properly arrested for theft of groceries from an apartment. She was turned over to a policewoman who, as a matter of routine and policy, had strip searched the accused. Marijuana was found on her and she was charged accordingly. The groceries had already been recovered at her home and the accused argued that the strip search had been excessive and unreasonable. Consequently the marijuana found on her should be inadmissible in evidence. The trial judge had gone along and acquitted the accused. The Crown appealed to no avail, to the Ontario High Court of Justice. Although police are empowered to search an arrested person for evidence or anything with which the prisoner may do harm or make good an escape, that power is not unlimited or immune from the test of reasonableness as stipulated in s. 8 of the Charter. A perfectly lawful search can by its extent or manner be unreasonable, after all, the Charter does not only control the content but also the application of law. An ordinary search would have been justified in these circumstances. There were no grounds that would make the finding of evidence or weapons on the accused a probability. This rendered the routine strip search excessive and unreasonable. As the community is not prepared to accept routine searches or arrest, acceptance of the evidence found on the accused by means of the unreasonable search would bring the administration of justice into disrepute.

Crown's appeal dismissed. Acquittal upheld.

20 C.C.C. (3d) 180. Regina v. Morrison.

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Intercepting Communications/Public Telephone

Police were authorized to intercept the accused's communications at any place he resorted to. He was seen to use the same public telephone several times and when they intercepted the accused's communications via that phone valuable evidence was discovered. When this evidence was adduced at his trial he objected claiming that "any place he may resort to" is too broad. For instance, should a person mentioned in an authorization use a public phone once, then the innocent public may have its communication intercepted by the authorities. The B. C. Court of Appeal rejected the defence arguments and held that specificity is not required of the Crown in regards to what telephone may be tapped. Parliament recognizes that innocent conversations will be intercepted. However, the remedy lies in the trial proceedings where those communications can be rejected as irrelevant.

Crown's appeal allowed and a new trial was ordered.

20 C.C.C. (3d) 173. Regina v. Leclerc.

Civil Action to Have Funds Seized Under N.C.A. Restituted

The accused applied under s. 10(5) of the Narcotic Control Act for return of money seized from him pursuant to 10(1) of that Act. His application was denied and he then took civil action based on a right to ownership of the money. The Federal Court held that when an application under s. 10 N.C.A. is denied, the applicant is estopped from taking civil action to get the money.

Aimonetti v. The Queen 19 C.C.C. (3d) 481.

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Drunkenness and Assault

The accused appealed his conviction for sexual assault causing bodily harm. He claimed that he was too drunk to comprehend what he was doing and therefore could not form the specific intent to commit the assault. The Ontario Court of Appeal upheld the conviction by ruling that the offence is one of general intent and self induced drunkenness is not an available defence.

Regina v. Bernard 18 C.C.C. (3d) 574.

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Burden of Proof re Admissibility of Statement

The accused was arrested at gun point for armed robbery. He had made a statement and at his trial a voir dire was conducted to determine the admissibility of the statement. Police testified how they had placed the accused under arrest , told him what the charge was, and also informed him of his right to counsel. The accused testified that if he was told of his rights it had not penetrated. He had also asked to be given an opportunity to phone his lawyer, but he was refused. The trial judge had not rendered judgement. He simply held that the Crown had failed to prove beyond a reasonable doubt that the accused's rights had not been infringed and excluded the accused's confession (please note that the issue was not voluntariness) under s. 24(2) of the Charter.

The Crown appealed to the Manitoba Court of Appeal which held that to have a statement admitted in evidence the burden of proof is on the Crown to prove beyond a reasonable doubt that the statement was voluntary. However, where the defence seeks exclusion of a statement because the accused's rights were denied him or infringed, the burden of proof is on the defence to prove on the balance of probabilities that there was such denial or

infringement. Despite the trial judge's error the Court of Appeal inferred from the transcript of the trial that the accused's testimony had, in fact, showed to the judge on the balance of probabilities that he had been denied his right to counsel. That would have brought the administration of justice into disrepute. Therefore, despite the error in law by the trial judge, the Crown's appeal was dismissed and the acquittal was upheld.

Regina v. Lundrigan 19 C.C.C. (3d) 490.

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Specificity in Information re Trafficking

The accused was charged that he "did unlawfully traffic in a narcotic, to wit: cocaine "contrary to s. 40 of the Narcotic Control Act".

The trial judge quashed the indictment for want of specificity in that it did not say in what manner the accused did traffic. As the quashing was done for want of detail and not as a determination of the charge on the merits, it was not the equivalent to an acquittal and therefore the Crown could not appeal the decision (see s. 605(1)(a) C.C.). The only way open to the Crown was to apply to the Supreme Court of B. C. for an order compelling the Provincial Court Judge to proceed with the trial. In its application the Crown claimed that the indictment was adequate and even if it was not, the Judge should have given the opportunity for the Crown to amend it.

The defence simply submitted that the Supreme Court in these circumstances could not issue the order the Crown sought. The Supreme Court held it could and did. The indictment did not need to set out the nature or method of the trafficking (see R. v. Peebles (1975) 24 C.C.C. (2d) 144. B. C. Court of Appeal).

The Attorney General and Judge Govan of the Provincial Court of B. C. Vancouver Registry CC 850472.

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Sufficiency of One Fingerprint

The accused escaped from a correctional institute and at about the same time a car was stolen from nearby. The car was found abandoned and one fingerprint belonging to the accused was found on the rearview mirror. Was this sufficient to hold that the accused had stolen the car? The County Court of Vancouver Island held that it was. Considering the irresistable inference one must draw from the facts, opportunity and circumstances, the one only fingerprint is overwhelming. The evidence was simply consistent with guilt and inconcistent with any other rational conclusion.

Regina v. March June 1985, Victoria Registry 36001

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Inference from Quantity of Drug Transported

The accused who consumes a certain drug at the rate of "one hit a week" had a large enough quantity of it on his person when he entered Canada, that it would last him for years. He told the Court that he had run into a real bargain in San Francisco and had purchased such a quantity strictly for his own personal use.

He was charged with possession and trafficking. The Court had to infer that the transport of the drug amounted to trafficking or that the quantity justified a finding that he possessed the drug for that purpose of trafficking. In regards to the former, the Court held that it would have to be shown that the purpose of the transportation was delivery or disposition to third parties. There was no such evidence. In respect to the latter, the Vancouver Island County Court held not to have any reason not to believe the accused. "Consequently, I am unable to say that the charge of trafficking has been proved".

Regina v. Plant County Court of Vancouver Island, May 1985, Victoria 34383.

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Reasonable Search/Right to Counsel

While on patrol in a marked up police car, the officer saw a group of youths, some of whom were drinking beer. The officer talked to them and took the accused aside to take particulars. He observed a bulge under the accused's shirt and poked at it with his pen believing it was a bottle or can containing an alcoholic beverage . As the bulge gave way he looked under the shirt and saw plastic. When he pulled it out he found it to be a bag containing smaller bags of marihuana. Because of what the accused said, and the packaging, he was charged with possession for the purpose of trafficking. Defence counsel claimed that the bag had been found by unreasonable search contrary to the Charter. She claimed there was no authority to search the accused. The Court held that in the circumstances, sections 42 and 67 of the B. C. Liquor Control and Licensing Act had made the search lawful while there was nothing unreasonable about it. The police officer, although he had informed the accused of his right, had not provided him with a phone and phonebook and had thereby violated the accused's right to counsel, said his lawyer. The Court observed that the accused had not asked for such opportunity or indicated that he wanted to phone a lawyer and held that police do not have to go as far as the defence lawyer suggested. In any event, even if there were Charter infringements, the administration of justice would not be brought into disrepute by admitting the evidence. Accused was convicted.

R. v. Miller February 1985, Victoria Registry 34557.

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Lawyer Phoning to Assist Client

The accused, under demand to give a sample of breath, accompanied police to the station. The accused's wife phoned a lawyer who, in turn phoned police. He identified himself as the accused's lawyer, and said he called to assist his client. He was told that the accused could not come to the phone but would phone him back. From memory the lawyer claims he waited 30 minutes (approximately) for the call. It was found as a fact that the accused returned the call between the two breath samples he gave. This showed on the balance of probabilities that the message to the accused was delayed and therefore his right to counsel without delay was infringed. However, had police intended to infringe the accused's right, they would have delayed giving the message until after the second test was taken. Therefore, the administration of justice would not be brought into disrepute if the evidence was admitted reasoned the trial judge, and he convicted for "over 80 mlg.". The accused appealed, strongly arguing that the trial judge was wrong and that no value may be attached to the fact that after his consultation with his lawyer he still gave a second sample of breath.

The County Court of Westminster found counsel's attitude on the phone had not placed any urgency on the matter. Perhaps there was some tardiness in relaying a message, but no infringement of a right, held the Court. There was nothing "flagrant" (R. v. Therens) about the police actions. Appeal dismissed.

R. v. Topping June 1985, New Westminster Registry X015394.

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Rented Video Equipment - Theft by Conversion

Within one week the accused rented, from two different outlets, a video recorder. The first one by using someone else's identification. He pawned both machines. One of them was pawned by his taxi-driver. The contract with the video shops provided for additional rental fees for each additional day he kept the machine and the pawn-broker's contracts gave the client 30 days to redeem the article upon payment of the outstanding amount. The accused was arrested on two counts of theft prior to the expiration of the 30 day period. He claimed that he had every intention of redeeming the machines prior to the due date, return them to the video outlets and pay the accumulated rental fees. Defence counsel claimed that the Crown could not prove fraudulent intent for this "theft by conversion" allegations, despite the accused's total inability (from a financial point of view) to do as he said he intended to. After an interesting reasoning by the Court dealing with whether conversion to his own use had been complete at the time of arrest and the misrepresentations with regard to rented equipment, the accused was convicted of both counts.

R. v. Hyndman County Court of Vancouver Island, September 30, 1985, Victoria Registry 35346.

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Police Board's Discretion to Conduct Public Enquiry

Section 40 of the B. C. Police Act seems to dictate that a Police Board at a certain stage of the disciplinary process shall conduct a public inquiry when requested to do so by a person who complained of a disciplinary default against a municipal constable. At least, the language of the section is compelling throughout. The Supreme Court of B. C., however, held that since the complainant must set out the reasons for the request, the Police Board has discretion in the matter. It made this ruling upon a petition by the municipal constable complained about, for an order to quash the order for his conduct to be subject to a public inquiry.

The constable had been charged criminally as a result of the incident complained about, and a public trial during which no less than 24 witnesses testified (including the complainant) was conducted. In view of the discretion the Police Board has, and the fact that the constable's acquittal was on the merits, the Court granted the order.

Between S. J. Wood and the Attorney General et. al. November 1985, Vancouver Registry CC851161.

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