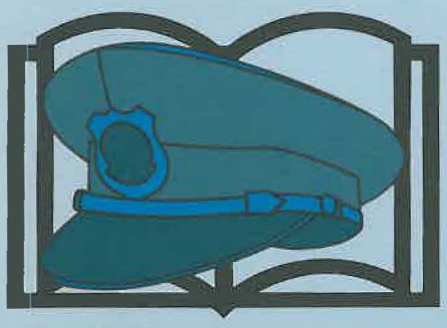

ISSUES OF INTEREST

VOLUME NO. 27

Justice Institute of British Columbia
POLICE ACADEMY
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CHARTER OF RIGHTS AND FREEDOMS
EXCLUSIONARY RULE - GROUNDS
FOR DRUG-SEARCH AND CHOKING SUSPECT

Collins v. The Queen -
Supreme Court of Canada, April 1987

In 1983, the B.C. Court of Appeal considered Collins' appeal* in regard to her conviction for possessing heroin. The admissibility of the evidence, the heroin, became the key issue in the trial, with the application of the exclusionary rule (s. 24(2) of the Charter) being centre-stage.

Police had Mr. and Mrs. Collins under observation in a pub, as they were suspected to traffic in heroin. Mr. Collins, and another person left the pub, and the officers tailed them, leaving Mrs. Collins behind. The tailing paid off and Mr. Collins and others were apprehended with balloons containing heroin in their possession. Police then returned to the pub, and conceding not to have any reasonable and probable grounds for believing that Mrs. Collins was in possession of any contraband, they rushed her and grabbed her by the throat to prevent any swallowing. Her mouth was clear, but a balloon containing heroin was found clenched in her hand.

The Crown had failed to show that the officer who conducted the search had the requisite grounds under s. 10 N.C.A. Mrs. Collins appealed her conviction for possession to the B.C. Court of Appeal. She argued that since her right to be secure against unreasonable search or seizure had been infringed, the evidence found as a consequence of this infringement ought to have been excluded from the evidence at her trial.

The B.C. Court of Appeal held that the exclusionary rule created by s. 24(2) of the Charter is not absolute, but conditional. In other words, an infringement of a right or freedom does not automatically call for an exclusion of the evidence which was obtained by the manner that amounted to the infringement. The B.C. Court of Appeal was, at this baby-stage of the Charter (1983), of the opinion that:

> "No longer is all evidence admissible, regardless of the means by which it was obtained. Nor, on the other hand, is all improperly obtained evidence inadmissible. A middle ground has been chosen, but not the middle ground of discretion that has been chosen in many jurisdictions."

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* ***Regina v. Collins***, Volume 12, page 1 of this publication
B.C.C.A. CA 821475

The B.C. Court of Appeal went on to say that instead of admissibility of evidence resulting from an infringement of a right or freedom being at the whim of the judiciary, our Charter has given specific guidelines for considering the matter of admissibility. Our exclusionary rule is conditional and not discretionary or strict said B.C.'s highest court, and had apparently no problems in identifying the conditions.

1. The accused must show on the balance of probabilities that the manner in which the evidence in issue was obtained infringed his right of freedom;

2. The Court must consider the circumstances surrounding the obtaining of the evidence; and

3. The Court must find that admitting the evidence in issue will not bring the administration of justice into disrepute.

The latter condition the B.C. Court of Appeal found to be kernel, and the single objective of the exclusionary rule. The Court emphasized that exclusion could not be invoked to discipline police, but only to disassociate themselves from, and not to be a party to a deliberate and flagrant infringement of a citizen's rights or freedoms by accepting the evidentiary fruit of such an infringement.

Concluded the B.C. Court of Appeal in the Collins' case:

1. The <u>suspicion</u> on the part of the police officers proved correct;

2. The alleged offence was serious;

3. There was no malicious or capricious treatment of Mrs. Collins;

4. The throat hold was to prevent the loss of evidence; and

5. The admission of the evidence was not unfair to the accused.

The B.C. Court of Appeal applied these conditions to subsequent appeals where the exclusionary rule was part of the grounds for appeal. It seems fair to say that a difference of judicial opinion was looming between this B.C. Court and the Supreme Court of Canada. Although one cannot say that the first major case on the exclusionary rule* that reached the Supreme Court of Canada

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

rendered the B.C. Court of Appeal approach to the rule erroneous at law, the Therens' decision (which took many by surprise) did not include any of the conditions summed up above. Therens' right to counsel was infringed and consequently the evidence obtained was excluded - period -. In other words, our highest national court appeared to apply a strict exclusionary rule.

Many members of our judiciary have 'stickhandled' their way around that decision, and it seems that, especially in B.C., the Collins precedent continued to be applied as though it had survived the Therens' judgement.

The inferences one irresistably draws from the Therens' decision (see comments in Volume 21) seem inconsistent with what the Supreme Court of Canada held in this Collins decision. The B.C. Court of Appeal, dealing with the exclusionary rule, when the Charter was still in diapers, gave their general and broad views of this new constitutional law. Many have predicted, particularly in post-Therens' days, that the Supreme Court of Canada would sharply disagree with the B.C. views. However, the majority judgement in this Collins' case indicates "general agreement" with the views of the B.C. Court of Appeal. The history of the exclusionary rule in the U.S. and its consequences, good and bad, had been researched and summed up as the American experience with the strict application of the rule. It was strongly implied that a strict application had led to absurdities, and despite what appeared in the Therens' decision, the Supreme Court of Canada <u>generally agreed</u> that:

1. the exclusionary rule is a conditional one (the Court quoted the above paragraph,"No longer is all evidence admissible..., etc.);

2. it is not open to the Courts in Canada to exclude evidence to discipline the police;

3. it is the admission and not the obtaining of the evidence that is the focus of attention in s. 24(2) of the Charter;

4. evidence improperly obtained is <u>prima facie</u> admissible in evidence unless the person who wishes it excluded shows on the balance of probabilities, not only that it was so obtained, but also that admission would bring the administration of justice into disrepute;*

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* An exception may arise where a warrantless search is involved. The seizure and the search may be presumed "unreasonable" and in conflict with s.8 of the Charter, and the burden to show that it was not unreasonable is then on the Crown. (See ***Hunter v. Southam Inc.*** Volume 18, page 12 of this publication).

5. s. 24(2) of the Charter does not confer a discretion on the judges, but a duty to admit or exclude evidence, based on his frindings;

6. exclusion is also a means to avoid the administration of justice from being brought into disrepute;

7. the question whether or not to exclude evidence is one of law and therefore to be determined by the trial judge (not the jury), by means of a voir dire (if the decision is based on a matter of credibility of witness then, of course, the matter cannot be appealed);

8. evidence cannot be excluded as a "remedy" under s. 24(1) of the Charter, but only under subsection (2); and

9. where the evidence on the issue of admissibility does not establish whether or not the accused's rights were infringed, the Court must conclude that they were not infringed;

The issues then in this Collins appeal were if the search was reasonable, and if not, would admission cause disrepute to be brought on the administration of justice considering all the circumstances in which the search and seizure took place?

The Supreme Court of Canada opened its consideration on these issues and particularly the issue of reasonableness, by saying:

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

In this case, the authorization for the search of Mrs. Collins should be found in s. 10 of the Narcotics Control Act. The officer had to have reasonable and probable grounds for believing that there were narcotics in the pub. By their own admission the officers had no beliefs based on such grounds. Suspicion was the best description of their reason for the search. Hence, the search and the choking of Mrs. Collins were unreasonable. Added the Supreme Court in the same breath:

> "Of course, if he is lawfully searching a person whom he believes on reasonable grounds to be a 'drug handler' then the 'throat hold' would not be unreasonable."

The Crown had failed to establish grounds prerequisite to an authorized search and, consequently, the Appeal Courts could only find that the search was unreasonable. However, the Supreme Court of Canada was critical of what happened during the trial when the issue of 'grounds' arose and implied that possibly police had the prerequisite beliefs to a reasonable search if the two counsel and the trial judge had adhered to and applied the relevant law.

Crown Counsel had asked the officer who conducted the search: "Where...when did you formulate those suspicions? The officer replied: "We were advised..." He did not get any further as defence counsel was on his feet and objected. He cut the officer off by submitting that the evidence of what he was advised was hearsay and inadmissirble. This matter was then dropped, and, of course, it should not have been dropped. For the purpose of establishing reasonable and probable grounds to testify what one has been told, is perfectly permissible and does not "infringe the hearsay rule". The Supreme Court of Canada seemed puzzled why this crucial issue was not further pursued during the trial. The question was not withdrawn, and the trial judge made no ruling on the objection. The issue simply faded away in the proceedings and caused this Court to find that the search was unreasonable.

Then the Supreme Court of Canada addressed the matter of "disrepute". The views of a community are important in this consideration, but the mood of the community is a factor. A distraught or angry community must not be accommodated by the Courts. Its rulings must not be aimed to make the Court popular with the community. The community, which is to judge whether or not the administration of justice is brought into disrepute, must be a reasonable community. If this was no so, the lynch practice would be accommodated by an institution that has impartiality as one of its mandatory characteristics. Again, we must look for the reasonable dispassionate person in a reasonable community, who is fully apprised of <u>all the circumstances</u>, who must consider:

- what kind of evidence was obtained?
- what charter right was infringed?
- was the Charter violation serious, or was it of a merely technical nature?
- was the infringement deliberate, wilful, flagrant, or advertent, or was it committed in good faith?
- did it occur in circumstances of urgency or necessity?
- were there other investigatory techniques available?
- would the evidence have been obtained in any event?
- is the offence serious?
- is the evidence essential to substantiate the charge?
- are other remedies available?..., etc.

Concluding this issue, the Supreme Court of Canada emphasized how a trial is the key part of the administration of justice, and that fairness must be the tenor of a trial and is, therefore, "the major source of the repute of the system". Said the Court:

> "If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute, and subject to a consideration of the other factors, the evidence generally should be excluded."

The Court strongly implied that "the nature of the evidence obtained" will be very relevant to the consideration if evidence is admissible where a violation of a right is involved. Just because there was a violation is, by itself, rarely a reason to exclude real evidence, particularly evidence that existed already. This is different from evidence that arises from an infringement; evidence that did not exist prior to the violation of a right. The Court did, of course, refer to confessions and self- incriminating matters. Said the Court:

> "The use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded."... "It may also be relevant, in certain circumstances, that the evidence would have been obtained, in any event, without the violation of the Charter."

In relation to means alternative to Charter violations to obtain evidence, the Court observed:

> "...the availability of other investigatory techniques, and the fact that the evidence could have been obtained without the violation of the Charter, tend to render the Charter violation more serious. ...their (the authorities') failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the Charter, which is a factor supporting the exclusion of the evidence."

Such exclusion is not to discipline the authorities, but to ensure the fairness of the trial.

The Supreme Court of Canada readily found that not admitting evidence can also bring the administration of justice into disrepute.

> "In my view, the administration of justice would be brought into disrepute by the exclusion of evidence essential to substantiate the charge, and thus the acquittal of the accused because of a trivial breach of the Charter. Such disrepute would be greater if the offence was more serious."

Reiterating that fairness is the kernel issue, agreeing that evidence is more likely to be excluded if the offence is less serious, and conversely, more likely to be admitted where the allegation is one of considerable gravity, particularly where the evidence is an essential ingredient to the charge, the Court said:

> "I hasten to add, however, that if the admission of the evidence would result in an unfair trial, the seriousness of the offence could not render that evidence admissible."

As a matter of fact, if fairness of the trial is at stake, then the opposite is the case; the more serious the charge the more damaging admission would be to the repute of the administration of justice.

The Supreme Court of Canada also gave some guidelines to "trickery". Many courts have applied the Charter's exclusion provisions where, for instance,- tricks were used to obtain a statement from a suspect or others. Sometimes the very statement was evidence, or it resulted in the discovery of evidence. Unless such a trick is "dirty", the court thought that resorting to a trick is not in the least unlawful to obtain a statement, and "should not result in the exclusion of a free and voluntary statement". The Court clarified that a dirty trick is one that would shock the community. The "community shock" is a higher threshold than the one to test, if the administration of justice would be brought into disrepute. The former is the absence of an unlawful act on the part of the authorities, while the latter only arises when there is a violation of the most important and fundamental law of the land.

An additional reason for the "repute" test being one of a low threshold is that where the French and English wordings of law differ, then the one most beneficial to an accused must be applied. (see Interpretation Act). The English version of s.24(2) of the Charter states that evidence must be excluded where admission would bring the administration of justice into disrepute. The French version creates a much lower threshold in that it

states that exclusion must follow if the administration of justice could be brought into disrepute. The Supreme Court of Canada concluded that the French version must be applied as it best protects the fairness of a trial. It did so with these words:

> "Section 24(2) should thus be read as 'the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings could bring the administration of justice into disrepute'."

Needless to say that between the 'would' and 'could' is a vast difference with the former being a considerable lower threshold than the latter. It will, therefore, be less onerous for an accused to show cause for excluding Crown evidence.

Applying all this law to the Collins appeal, the Supreme Court of Canada had no alternative but to find that there were no requisite reasonable and probable grounds upon which the officer conducted the search. The Crown could probably have shown such grounds, but the officer was inappropriately prevented from completing his testimony as to what he knew when he conducted the search. Needless to say, this did not assist the Crown in this appeal. The evidence showed suspicion only on the part of the officer, and that made his aggressive action a flagrant and serious violation of Mrs. Collins' rights. Said the Court:

> "Indeed, we cannot accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs."

Despite the fact that the evidence was real and existed at the time of the infringement of Collins' right, the Court could not hold that the evidence should have been admitted.

For ordering a new trial, the Court observed that the officer may well be able to show that he had the necessary grounds to conduct the search.

Appeal allowed - Conviction set aside - New trial ordered.

Comment:

This publication is supposed to contain synopses of cases that may be of interest to those in the front-lines of the criminal justice system. The length of this Collins decision by the Supreme Court of Canada hardly seems an abbreviated version of reasons for judgement. However, the exclusionary rule is, in terms of legal history, brand new in Canada, and ought to be of crucial interest to practicing investigators. Not being interested is the equivalent to a professional athlete not being interested in rules of the game in which he participates. This was the second time that the only institution, that can tell us what s. 24 of the Charter means, dealt with the issue. In terms of guidance or judicial law making the first one (Therens' case) was of very little assistance. Only those favouring a strict application of the exclusionary rule had reason to be optimistic. Some of them even claimed victory. This time, in terms of law making, trendsetting and guidance (comments not directly related to the narrow legal question before the court), the Supreme Court of Canada did do considerably better than it did in Therens.

An issue that will be of considerable interest is the consideration of exclusion of evidence where the person, whose rights were infringed, is one other than the accused. For example, if an unreasonable search of a home yields real evidence against a person who does not reside there, and was not present at the time of the search. Firstly, the real evidence existed separate from the infringement; in other words, it was not created by it. Secondly, if fairness is a main consideration, the unreasonable search was perhaps unfair (at least) to the occupant of the home, and he could seek a remedy under subsection (1) of section 24 of the Charter. It could, with some validity, be argued that in such circumstances the accused, regardless of the means by which the evidence was obtained, would have a fair trial. The only threshold the Crown may encounter is the argument that by accepting the evidence, the courts seem to become a party to, or give a nod to the illegal means by which it was obtained.

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WRIT OF ASSISTANCE - THROAT-HOLD - SEARCH OF DWELLING HOUSE - UNREASONABLE SEARCH? - ADMISSIBILITY OF EVIDENCE

Hamill v. The Queen* -
Supreme Court of Canada, May 1987

Armed with a writ of assistance, police searched the accused's home. As he was suspected to possess drugs, and to be violent, the officers rushed in, shouted "police", and seized the accused by the throat. Although nothing was found in his mouth, plenty of drugs and paraphernalia were found in his home.

The trial judge had found writs of assistance unconstitutional documents and consequently found that the search was unreasonable, and he did not admit the evidence. The B.C. Court of Appeal questioned the constitutional validity of writs, but held that, even if the trial judge was correct admitting the evidence would not bring the administration of justice into disrepute and ordered a new trial.

Hamill took this B.C. decision to the Supreme Court of Canada which promptly applied their Collins decision. (See page 1 of this Volume). It noted that Writs at the time were legal documents backed by statute. Whether or not they were constitutional had no bearing on the issue before the trial court in regard to admissibility of evidence. The officers had acted in good faith.

Hamill's appeal dismissed
Order of new trial upheld

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* See Volume 17, page 26 of this publication

CONVERSATIONS WITH PERSONS IN AUTHORITY AND VOIR DIRES

Between *JOSEPH and The Queen*, County Court of Vancouver
Registry No. CC861272, November 1986

The accused was involved in an accident and, at the scene, there was a conversation between the accused and the investigating constable. The officer told the accused he believed the accused had been drinking and that he was going to suspend his driver's licence for 24 hours unless he (the accused) voluntarily supplied a sample of breath, the analysis of which would show a blood-alcohol content less than "50 mlg". The accused had, by means of words, indicated he understood the law and had said words to the effect of: "Yes, I would like to go and give a breath sample." The reading was in excess of "80 mlg" and this resulted in a conviction of "over 80 mlg" under the relevant provisions of the criminal code. The accused appealed the conviction (on grounds one would not expect in the circumstances) on the basis that no voir dire had been held to determine the admissibility of the evidence of the conversation between the accused and the officer.

Conversations are always sensitive when the recipient of a verbal communication from an accused person relates that communication to the Court in testimony. Firstly, if the communication is adduced to prove the truth of its content (not merely the fact that something was said), the witness cannot vouch for that truth, hence the evidence is hearsay. An exemption to the hearsay rule allows such evidence to be admissible. However, if the person who received the communication and testifies to it, was in the mind of the accused at the time he made the statement, a person in authority (one who may effect the path of prosecution), then a prerequisite to the admissibility of that statement in evidence is voluntariness on the part of the accused. An involuntary statement cannot be relied upon if the objective is to prove the truth of its content or to rely in any way on that content.

Prior to 1971, the Courts reasoned that voluntariness was only an issue when the statement was in any way an admission or a confession (inculpatory). If it amounted to denial, it could not possibly harm the accused and therefore such exculpatory statement was admissible in evidence without having to try the issue (voir dire) of voluntariness.

In the sixties of this century, however, a Mrs. Piche* allegedly murdered her husband and she made several exculpatory statements to persons in authority but each was different. The Crown adduced all of the statements, and no doubt Mrs. Piche did not look very credible to the jury and appeared quite guilty having to tell several different versions of incidents to continue her denials. The Supreme Court of Canada reasoned that the Crown relied upon the exculpatory statements to prove her guilt, and held that all statements made to a person in authority are inadmissible unless it has, by means of a trial

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* *PICHE v. The Queen*, [1971] S.C.R. 23

of the issue, been proved that it was given voluntarily. In the Erven* decision, some eight years later, the Supreme Court of Canada added that to determine voluntariness a voir dire is always required, whether or not the statement was made at some investigatory or preliminary level or was volunteered. The only exception to this rule is when the accused waives the right to a voir dire or where the statement is part of res gestae. (In this case, something said that was so closely related to an act that it is part of that act.)

On the surface it seems that the Supreme Court of Canada said if a trial Court fails to conduct a voir dire to test the voluntariness of any utterance made to a person in authority, then an Appeal Court (which cannot conduct such a trial of an issue) must consider the words spoken inadmissible and of no weight. In other words, the statement would be involuntary in an appeal process simply because no voir dire was conducted. Such was the situation in this Joseph case.

Firstly, this County Court Judge was of the opinion that the Erven precedent need not be applied stringently. In the Erven reasons for judgement, one of the Supreme Court Justices had observed that a voir dire is only a means to an end and the main issue always is whether the statement was proven to have been made voluntarily by whatever proper means. In some circumstances, not conducting a voir dire is merely a technical breach. The Court cited a number of scenarios in which it would be superfluous, if not ridiculous, to conduct a voir dire. For instance, when a person is tried for failing to give a breath sample and refusal was by means of the spoken word, then what he said constitutes the very offence alleged against him. Any simple questions such as the response to: "Is this your driver's licence?"; the accused requesting the use of washroom facilities; his request to use the telephone; etc. "The question is, where is the line to be drawn?", said this Appeal Court Judge. Another sensitivity is that not conducting a voir dire deprives the accused from taking the stand on the issue to be tried alone. However, the Court held that a statement relating facts to a person in authority and responding to a proposition to accompany an officer to give a sample of breath to avoid a road-side suspension, are quite distinct from one another and the Judge concluded no voir dire was necessary in the circumstances.

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* ***ERVEN v. THE QUEEN,*** [1979] 44 C.C.C. (2d) 76

STOPPING A SUSPICIOUS CAR - CAPRICIOUS INTERFERENCE WITH FREEDOM - QUESTIONING SUSPECT ON ROADSIDE RE: SUSPICION AND RIGHT TO COUNSEL

Regina* v. *RELLIN and PARK, County Court of Vancouver
No. CC851870, December 1986

At 4.20 a.m. a patrol officer saw three young men in an old car coming out of a street where there are predominantly warehouses and industrial sites. Break-ins had been prevalent in this zone. The officer stopped the car and shone his light inside it and saw a pry bar and bolt cutters on the floor as well as many sealed packages of cigarettes. The officer checked the driver's licence and registration papers and enquired where the young men had been. The answers were: "Driving around." "Coming from a friends place", or words to this effect. The officer then took the appellant, Park, aside, warned him regarding his right to remain silent and asked bluntly, "Where did you guys break in?" There was at first no reply and the officer made some suggestions where the place of crime may have been and said finally, "Was it a catering truck?" Park first said, "Maybe" and then "Yes". All these youths had also bulging pants' pockets with change. All this resulted in Rellin and Park appealing their conviction for theft over $200. They argued that the officer had capriciously and arbitrarily interfered with their right to go about freely. Secondly, the trial judge had allowed Park's statement in evidence while the infringement of his right to be informed of his right to counsel should have resulted in the statement being inadmissible in evidence.

The Crown argued that the officer had a right to stop a car under s. 67 of the Motor Vehicle Act of B.C. whether or not a traffic law or rule was violated. In respect to right to counsel, the Crown did not agree that Park was arrested or detained at the time he had a conversation with the officer on the side of the road.

The defence rebutted that <u>if</u> s. 67 of the Motor Vehicle act was enacted to provide police with authority to arbitrarily interfere with and detain motorists for any or no reason, then it cannot survive a constitutional test of demonstrable justification in a free and democratic society (see s.1 of the Charter). He implied the section could only survive if it was intended for police to identify traffic law offenders or violators. The driver of the car involved had not committed any such offence and the stop was strictly arbitrary and because of suspicion regarding criminal activities. B.C. traffic laws nor our federal criminal laws have a conduit from the one to the other and each has its own specific provisions to pursue its objectives.

The defence also drew the Court's attention to recent deliberations by Courts of superior jurisdiction which have established that, when a person is in any way delayed and asked questions by a person in authority, then he is in a

position requiring legal advice as to his rights and options. The provisions of the Charter dealing with rights to counsel apply to a scenario as the appellants, in this case, found themselves in. The officer thought it necessary to make Park aware of his right to remain silent. This proves, implied the defence, that the officer was detaining Park. Only after Park made his confession did the officer effect the arrest and he then made him aware of his right to counsel. Detention had occurred long before the arrest.

The trial judge had held that s. 67 of the M.V. Act gives police the unfettered authority to carry out routine checks for whatever reason. He had also held that the conversation between the officer and Park on the side of the road was merely part of a preliminary phase of an investigation into what appeared a possible breach of the criminal law.

The Appeal Court Judge agreed with the defence that the trial Judge had been too expansive in his interpretation of the authority section 67 of the M.V. Act grants police. He quoted from the well known 1985 decision by the Supreme Court of Canada* in which it reviewed police authority in general and specifically to conduct roadblocks, and held that:

> "... police powers arising from a specific provincial statute must be exercised only for the purpose indicated in that statute and for no other purpose as a subterfuge or pretext...."

In other words, s. 67 of the M.V. Act was of no assistance to justify the stopping of the car the officer believed to be suspicious, considering all circumstances.

As the Supreme Court of Canada did in 1985 to find the roadblock in that case justified, this County Court turned to the wealth of the common law on this subject. (Author's note: It cannot be said often enough that the Canadian Constable, regardless of rank, is <u>not</u> like his counterpart in the U.S. or in most other nations. Regrettably, unbeknown to the majority of them, they have the common law status of a surrogate citizen.

> "At common law the principle duties of police officers are the preservation of peace, the prevention of crime, and the protection of life and property, from which is derived the duty to control traffic on the public roads."

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* *R. v. DEDMAN*, 20 C.C.C. (3d) 97, or see Volume 22 page 17 of this publication.

All powers granted by statute or common law are subject to the application of the doctrine of ancillary powers. This simply means that if one is authorized by law to do something then that includes authorization to do everything necessary to carry out the duty. The Supreme Court of Canada* applied this doctrine when it was asked if the authorization to intercept private communications in a private place included authorization to break-in to that place and plant the equipment. The answer was "Yes". It was then an ancillary authorization. (This doctrine does not exist exclusively at common law. The Interpretation Act (federal) refers to it as well).

Applying this doctrine of ancillary authority to the common law mandate of a constable, the Supreme Court of Canada had said:

> "Provided the powers exercised in any given instance are reasonably necessary to carry out general police duties, the common law basis of police power has been derived from the nature and scope of police duty."

In reiterating words, the Appeal Judge added:

> ".....the rationale of this authority is that it is an ancillary powers doctrine to enable the police to perform such reasonable acts as are necessary for the due execution of their duties."

The Court concluded that a test devised by the Supreme Court of Canada in 1963** (Waterfield test) is still valid and a means to determine if the actions of a constable (reference to his/her office and not to the rank) are a reasonable limitation "demonstrably justified in a free and democratic society." (see s.1 of Charter).

Basically, the test is as follows:

(a) Was the conduct of the officer within general scope of any duty imposed by statute or one recognized at common law; AND

(b) Was that conduct, in the circumstances, a justifiable use of powers associated with the duty?

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* Constitutional Reference to Supreme Court of Canada re: Enforcement of Privacy Act, see Volume 20 page 13 of this publication.

** *R. v. Waterfield*, [1963] 3 ALL E.R. 659

The test simply deals with discretion; it recognizes the duties of constables, makes it clear that the execution of these general duties involves interference with the person or his or her private property, and that the powers are simply not unlimited.

In the circumstances of this case, the Court found that the stopping of the car was not covered by the M.V. Act. It was ancillary to the common law authority of the constable. He had not acted capriciously and had justifiable reasons (considering his common law role) to do what he did. His actions were well balanced considering the appellant's freedoms on the one hand, and the public interest on the other. The "stop" was simply not objectionable.

The Appeal Judge did have little difficulty in concluding that the occupants were detained after the officer saw in plain view the incriminating evidence in the car and that, particularly, Park, who was singled out to be questioned, should have been informed of his right to counsel at least at the outset of the questioning. The whole matter of infringements of rights and whether or not the evidence ought to be excluded and, particularly, the matter of good faith on the part of the officer, were not addressed at trial. Hence -

Park's appeal was allowed and a new trial was ordered
Rellin's appeal was dismissed

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MURDER BY A U.S. CITIZEN ABOARD A FOREIGN REGISTERED SHIP ON CANADIAN TERRITORIAL WATERS DESTINED FOR A U.S. PORT - EXTRATERRITORIAL JURISDICTION - JURISDICTION OF CANADIAN COURT

The Queen v. ***FRISBEE***, B.C. Supreme Court - Victoria 39562, November 1986

The accused was awaiting trial for allegedly having murdered his elderly employer aboard a luxury liner enroute from Victoria, B.C. to San Francisco. The Supreme Court Justice, assigned to preside over the trial, anticipated issues of territorial jurisdiction to be raised and he therefore took it upon himself "to deal with the matter of jurisdiction." After giving counsel the opportunity to submit their arguments, the Justice gave reasons for judgement on those issues.*

Section 433 (1) provides that where a person, whether or not he is a Canadian citizen, on the territorial sea of Canada commits an offence, that offence is within the competence of and shall be tried by the Court having jurisdiction in respect of similar offenses in the territorial division nearest to the place where the offence was committed. This section seems to say it all and leave little room to argue that the accused could not be tried by a Court of superior jurisdiction in Victoria, B.C. However, defence counsel argued that:

1. The territorial waters of Canada are outside of Canada;

2. No one can be tried in Canada for an offence committed outside of Canada unless the law specifically provides that the offence is extraterritorial. (Murder is not one of them); and

3. Therefore, section 433 (1) C.C. is only a section which provides for the place of trial (venue) when an extraterritorial offence has been committed on Canadian territorial seas.

If this was not so, submitted defence counsel, then why does the Criminal Code of Canada provide that no-one shall be convicted of an offence committed outside Canada? "The sovereignty of the Queen stops at the low water mark", reminded the defence lawyer**. Declaration of a 200 mile zone of territorial seas from canada's shores is for defence, resources and like purposes, but not to assume criminal jurisdiction, said he. Fisheries provisions are a prime example of this he argued. In any event, he submitted that, before a Canadian Court has jurisdiction over offence below that low water mark, the offence

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* Jurisdiction for a Court to sit with a jury, to so proceed prior to trial can be found in s. 574 (5) C.C.

** *The Queen* v. ***KEYN***, [1876] 2 Ex. D.63

must be extraterritorial (forging a passport - conspiracy, etc.).The Supreme Court agreed that in 1878 the Courts in England held that territorial jurisdiction stops at low tide. However, the British House of Commons reacted immediately and superseded the Courts by enacting Territorial Waters Jurisdiction Act. The Court concluded that the territorial seas of Canada are Canadian territory and the offenses committed by anyone in whatever registered ship on those Canadian territorial seas can be tried for that offence, whether extraterritorial or not, in the jurisdiction nearest to the location where the offence was committed.

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ASSAULTING LIQUOR STORE EMPLOYEE WHILE REMOVING INTOXICATED CUSTOMER. WEAPON DANGEROUS TO THE PUBLIC PEACE

Regina v. SILLARS, County Court of Yale - Vernon Registry 15665, December 1986

The accused was in an intoxicated condition in a Government Liquor Store. As this is contrary to the Liquor Control and Licensing Act, the store's Assistant Manager "escorted" the accused to the exit without, in the Court's view, using excessive or unreasonable force. The accused returned immediately, threatening to come back with weapons and do very uncivilized things to the store's personnel. When asked again to leave, the accused punched the Assistant Manager in the face, causing breaking of the skin and bleeding. Another employee put a headlock on the accused to subdue him while police were called. Bystanders observed how the accused, while being in the embrace, had an unopened jack-knife in his hand. Before it was opened (if that was the accused's intent), two people wrestled the knife away from the accused. Shortly after, police arrived, an arrest was effected and the accused was prosecuted for assault causing bodily harm and possession of a weapon dangerous to the public peace.

One would expect that the legality of the accused's removal from the premises would be considered under the trespass provisions in the criminal code in regards to real property (s. 41 C.C.). However, defence counsel steered the trial Judge in the direction of the provincial liquor laws to consider the issue. He argued that the Assistant Manager had no authority to remove the accused from the liquor store and therefore the accused, despite his intoxicated condition, was justified in resisting the Assistant Manager. Even if the store is a public place, the manager, who is not a peace officer, is not authorized to arrest an intoxicated person (s. 43 [2] L.C. + L. Act). This Act does authorize a licensee or his employees to forbid an intoxicated person from entering or remaining on the premises. Defence counsel argued that a liquor store is not licensed premises and, again, it did not authorize the assistant manager to remove the accused as he did.

The Court agreed in regard to the category of the premises, but reasoned:

> "He knew that he was not allowed to sell or give liquor to an intoxicated person. It was obvious to him that Mr. Sillars (the accused) was intoxicated at that particular time. I am satisfied that the powers that are granted to a licensee, or an employee of a licensed establishment, to request a person to leave, is the same power, and within reasonableness in this particular case, to permit Mr. Griffin (the assistant manager) to request Mr. Sillars, as an intoxicated person, to leave the liquor store."

This, in addition to the assistant manager acting reasonably and without excessive force, he was justified in removing the accused.

The defence argument in regard to the knife not being a weapon in the circumstances as the Crown could not show intent to use it as a weapon, or sufficient time to form such an intent, was, particularly in view of the threats uttered before and during exhibiting the knife, rejected.

Accused was convicted of both allegations

Comment:

Considering the specificity of the L.D., and L. Act, it seems the Judge went perhaps too far afield in finding authorization under that Act for the removal. Section 41 C.C. seems the appropriate enactment to rely on in these circumstances.

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VIDEO TAPING SUSPECTED CRIMINAL ACTIVITIES
EDITING - WHAT EVIDENCE MUST COMPLIMENT THE TAPE

MILLER and The Queen, County Court of Westminster - No. X017367, November 1986

The accused, a cashier for the Liquor Control Board of B.C., was convicted of two counts of theft from her employer. She appealed the convictions. For a number of hours on two different days, a van equipped with "one way" glass and a video camera was parked outside the window in front of which the cash register assigned the accused, was situated. A number of transactions between the accused as her employer's agent and customers were taped. The Crown alleged that, particularly, two of those transactions amounted to thefts on the part of the accused. The cash register was a computerized one, commonly seen in stores. When the purchase is rung up a monitor displays to the customer the individual amounts for each item and the aggregate sum he/she has to pay. The registers the accused used were of a kind that allowed the cashier to scan the price list in the event the item the customer presented was not properly marked. When this is done, the price will be displayed on the monitor, the cash drawer will open and the register's tape will record the query as a "no sale." The customer is not likely to be aware that the sale is not recorded as, for the layman there appears to be no distinction between the events that amount to a properly registered sale and the scan.

The camera man taped various transactions and stopped his machine when there were no customers or when persons obstructed the lense's path of vision. In cross-examination, defence counsel extracted the following answers from the camera man in respect to him stopping the filming from time to time:

"I feel a responsibility to make the tape pertinent to what my client wants to see, keeping in mind that I don't want to bore him to tears....." This, of course, begged the subsequent questions: "Who are you to say what is pertinent? Is that the function of the Court?" And: "You have only shown us an edited...your edited version of what happened." ....."You actually cut it down where you didn't think it was appropriate, is that correct?" When the witness did not agree with the "appropriate" aspect the questions suggested, he clarified: "Not pleasant to watch."....etc.

Never did the Crown bring out evidence to show that (in respect to the transactions where sales were not recorded due to the alleged feigned procedure followed by the accused) what was presented on the tape was the entire transaction in respect to each instance the Crown claimed amounted to theft. Without that evidence and, in this case, the issue being compounded by a Crown witness who agreed that what the Court saw on the video screen was his edited version of the events, the video tapes were inadmissible. Said the Court:

"...if the camera operator had said with respect to each of these instances that this portion of the video tape contains a true and accurate reproduction of the scene as it was that day without gap or interruption by my turning the camera off and if, on viewing the tape, the learned trial judge concluded that there was no gap or interruption and that the tape truly and accurately portrayed the transaction (all of the transaction) then....at least that portion of the videotape could have been admitted."

(Emphases are mine)

For this and other reasons, the accused's appeal was allowed. Acquittal was directed.

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CONSTITUTIONAL PROPRIETY OF THE PRESUMPTION THAT ONE WHO POSSESSES OR UTTERS COUNTERFEIT MONEY, IS GUILTY OF THAT POSSESSION UNLESS HE SHOWS LAWFUL JUSTIFICATION OR EXCUSE

Regina* v. *BURGE, B.C. Court of Appeal -
CA 004363, November 14, 1986
(See also Volume 22, Page 16 of this publication)

The accused had been found to possess one counterfeit U.S. one hundred dollar bill. He was charged with possession and uttering counterfeit money. He entered a plea of not guilty and immediately attacked the constitutionality of sections 408 and 410 of the Criminal Code which place the burden of proving that there was a lawful justification or excuse for possessing or uttering counterfeit money on the person accused. He argued that the sections are inconsistent with the presumption of innocence. The County Court Judge, before whom the accused appeared for trial, agreed and quashed the indictment. He had reasoned that the presumption of knowledge that money is counterfeit cannot rationally arise from simple possession. When a person possesses counterfeit money, knowledge of the counterfeit nature is not a probable consequence.* It often requires an expert to determine if money is counterfeit and it was therefore not justified in the circumstances to shift the onus to prove lawful justification or excuse on to the accused. The Court seemed to imply that, had the accused, for instance, been caught with a suitcase full of counterfeit money, it would be proper to reverse the onus of proof in respect to "knowledge". The Crown appealed the quashing of the indictment and the issue was argued before the B.C. Court of Appeal.

In summing up the substance of the legal debate, the B.C. Court of Appeal said it simply had to decide if:

(a) knowledge that the money an accused had in his possession or uttered was counterfeit, is an essential element of the charge that has to be proved beyond a reasonable doubt by the Crown, or

(b) knowledge that the money is counterfeit may be presumed upon proof that the accused possessed or uttered counterfeit money, and then the accused, in his defence, can show on the balance of probabilities that the possession was innocent in that he did not know of the counterfeit nature of the money. Innocent possession, of course, is a lawful justification or excuse.

Even prior to the Charter coming into effect, there was doubt about the meaning of the sections in question. As a matter of fact, the Ontario Court

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* See *R.* v. *OAKES*, Volume 23, Page 16 of this publication.

of Appeal followed (a) above in 1973* and (b) in 1976**. In 1978***, one of the Justices of the B.C. Court of Appeal made an off-the-cuff statement that he disagreed with the 1976 decision by the Ontario Court of Appeal. However, the trial Judge, in this case, based his reasons on the Charter arguments and precedents.

The B.C. Court of Appeal decided that knowledge of the nature of the money is part of "lawful justification or excuse". If one is unaware that money he possesses is counterfeit, the possession is innocent, but he is obliged to show unawareness of the fact that the money was counterfeit. The burden of that proof, of course, is on the balance of probabilities. To arrive at this conclusion, the Court observed that:

(a) it is not difficult to prove lack of knowledge.... "unless indeed he had such knowledge"....;

(b) possession of counterfeit money supports the inference of knowledge and therefore there is a rational connection between possession and guilty knowledge;

(c) sections 408 and 410 of the criminal code do not demand an accused to disprove an essential element of the offences they create; and that

(e) ...."this is not a case where the burden of proof with respect to some essential ingredient of the offence is placed on the accused without first requiring the Crown to produce some evidence with respect to that ingredient."

Crown's Appeal allowed Indictment restored.
Trial to continue.

Comment:

Reading the Supreme Court of Canada's views on reversed onus clauses and the tests that were devised in ***R. v. Oakes*** (see Volume 23, page 16)r, I predict that this B.C. decision would not survive an appeal to the Supreme Court of Canada.

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* ***Regina v. CACCAMO and CACCAMO***, [1973] 21 C.R.N.S. 83

** ***Regina v. SANTERAMO***, [1976] 36 C.R.N.S.

*** ***R. v. SAGLIOCCO***, [1978] 3 WWR 193

RESTORATION OF SEIZED GOODS

TAYLOR, HANSON & STEWART and THE QUEEN, B.C. Supreme Court - Nos. X0110 79-80-81 and 82, October 1986

In February of 1982 a robbery took place at a food supermarket that yielded the perpetrators $50,000. In January of 1983, a number of search warrants were executed by police and virtually thousands of articles were seized, as well as $13,000 in cash, from the residences and storage lockers of the three applicants. In early 1984, the applicants were convicted in the B.C. Supreme Court in regard to possessing the "thousands of articles" and given substantial jail sentences. They had also been charged with the robbery, but the Crown stayed proceedings. The $13,000 was not tendered in evidence. The order of the Justice of the Peace, issued upon the seizure of all the goods and funds, stipulated that one police officer was to detain everything seized. In 1984, after the stay of proceedings was entered on the robbery charge, and subsequent to the sentencing of the applicants, re the possession charges, the insurance company, which had honored the $50,000 claim by the food supermarket, applied for the $13,000 seized from the applicants. In September of 1984, without any notice to the applicants or application to the Justice of the Peace who had ordered the funds detained, police turned the money over to the insurance company. When the applicants became aware of this transaction, they filed a notice of motion with the Supreme Court of B.C. seeking the return of $13,000 to them.

Things did get a little complicated in that the goods were properly seized and detained under the old s. 446 C.C. while the application and supporting arguments were under the provisions contained in the new s. 446 C.C. It seems the applicants petitioned the Supreme Court (instead of applying to the Justice of the Peace who had granted the warrants and issued the retention order) as a continuation or aftermath of their criminal trial over which the petitioned Justice presided.

The Supreme Court Justice considered this a questionable honor and, to say the least, was reluctant to deal with the petition. The criminal code is quite clear that in these circumstances (see s. 446 (7) (C) C.C.), the Justice of the Peace had jurisdiction to deal with the application. However, a court of superior jurisdiction has inherent jurisdiction over all matters assigned to inferior courts. Being very cognizant of the dangerous precedent he was setting and the possibility that he would affront the dignity of the Justice of the Peace, the Supreme Court Justice agreed to sit as Justice of the Peace to avoid a waste of precious court time.

It must be remembered that the applicants were not suing the Crown or the Police Department for $13,000 in a civil dispute over an indebtedness. There was nothing to prevent them from doing so. However, they petitioned for the return of <u>the</u> money seized from them, <u>the very</u> money ordered detained by the Justice of the Peace and <u>the</u> money that was released unauthorized to make restitution. Section 446 C.C. is part of the criminal process and does

deal with compensation for articles seized, but the return and restoration of the very articles taken and detained. The same applies to funds seized in a criminal investigation. The very money is detained and, unless continuity is preserved, it is not admissible in evidence; or if a restoration order is made, it can only be in relation to that very money. The criminal process (with very few exceptions) deals with restoration and not compensation.

Firstly, the applicants based their petition on the provisions in subsections (10) and (11) of s. 446 C.C. These subsections are provided for persons who are the lawful owners or lawfully entitled to possession of items seized (not necessarily from them). They filed no documents supporting or claiming either status and changed their applicant standing to those recognized under subsections (7) and (9) which refers to "persons from whom anything has been seized." Hence, the provision in subsection (11) (d) of s. 446 C.C., the only provision for compensation to the lawful owner of a person entitled to lawful possession in lieu of restoration of the very article seized, did not apply to the applicants.

The applicants' counsel suggested the Supreme Court Justice, having inherent jurisdiction over civil disputes, order compensation in the sum of $13,000. The Justice declined and reminded counsel he was sitting as a Justice of the Peace who has no jurisdiction in such disputes. Furthermore, a process is in place if the applicants wish to proceed civilly.

Applications dismissed.

Note:

Another area in which similar provisions apply in respect to "tracing" is in the event of "cash" bail. Release of a prisoner upon deposit of money and the restoration of those funds, when the prisoner has lived up to the conditions of the bail, are interesting and can be found in some pretty ancient cases.

Firstly, where money is deposited and the prisoner released, the depositor is not entitled to a receipt for those funds. The liberty of the prisoner, in other words his body, is the receipt. When the depositor claims the bail money at the appropriate time (or wishes to abandon the bail where the depositor and the prisoner are not one and the same), he must receive the very money he deposited.

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CARE AND CONTROL OF A MOTOR VEHICLE

Regina* v. *REID, County Court of Westminster - No. X017053, November 1986

The accused left a drinking establishment in early morning hours. He quickly discovered that he was in worse shape than he thought and parked his pick-up truck on a parking lot, stretched out on the seat and went to sleep with his feet in the pedal recess below the steering wheel.

The truck was properly secured in that the lights were off, the brakes and transmission properly set. The keys were in the ignition. A couple of hours later (after parking the truck) police attended at the scene and demanded a breath test and nearly three hours after parking the truck, the accused blew a ".170 mlg". Consequently, the accused was tried for "over .80 mlg while in care and control" and impaired driving. He was acquitted of the latter charge, but convicted of the former. He appealed that conviction claiming that the certificate of analysis, in the absence of additional evidence, was only capable of proving the blood-alcohol content any time within two hours preceding the giving of the breath sample. It was established that the admitted driving was done more than two hours previous to the test. The accused consequently argued that there was no evidence to support the conviction of "over .80 mlg" as he did not have the care or control of his truck when the police officer attended the parking lot and made the demand. He, of course, relied heavily on the Supreme Court of Canada decision in September of 1985* in the B.C. Toew's case, in which our highest Court said that the wrongful and culpable act is the assuming of care or control when the blood-alcohol level is "over 80 mlg". The accused argued that instead of assuming that control, he had done the opposite and abandoned it.

The constable who made the demand of the accused, stood by while the latter removed the keys from the ignition and locked the truck up. Apparently, the Crown drew these actions to the Court's attention as being evidence of care and control within two hours from the breath test. The Court commented:

> "....these acts were done upon the express suggestion of Constable C., and in his presence, I would exclude them from the kind of acts....referred to in Toews."

The County Court Judge who heard the appeal, agreed with the accused, firstly, that the issue of care or control is "almost precisely" the situation as arose in the Toew's case and, secondly, that the certificate was only capable of proving the blood-alcohol level for the two hours preceding the taking of the breath sample. The truck had been parked at 1:25 a.m; the demand was made at

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* *R. v. TOEWS*, see Volume 22, Page 24 of this publication

3:30 a.m. when the officer found the accused in the truck in such circumstances which did not amount to "care and control" and the breath sample that indicated ".170 mlg" was taken at 4:04 a.m. The certificate was therefore of no assistance to prove the blood-alcohol level at 1:25 a.m. when the accused did have the care and control of the truck.

Appeal allowed;
Requital directed.

Comment:

Although this was not argued, the certificate actually had no evidentiary value at all as the demand was made two hours and five minutes after the offence of "over .80 mlg - care and control" occurred. It may be of interest as well that the Appeal Judge was more than subtle in expressing surprise that the Trial Judge had acquitted the accused of impaired driving. Apparently, he felt that there had been ample evidence to convict on that charge. However, that acquittal was not for him to review as the Crown had not appealed it.

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LEGAL TID-BITS

APPLICATION FOR RELEASE OF MURDER INVESTIGATION FILE

The accused was convicted of murdering one woman in November 1984 and another in March of 1985. While the accused was in custody, in December of 1985, a third woman was murdered in a jurisdiction near by the one in which the murders occurred for which the accused was convicted. The last murder bears a remarkable similarity, in circumstances, to the first two, leading one to believe that all three were committed by one and the same person. The accused appealed the convictions which includes an application to the B.C. Court of Appeal for access to the evidence of the third murder. Although police were cooperative with the appellant's counsel, they refused to show their file to him. Counsel, in a preliminary application, asked for an order from the B.C. Court of Appeal that the investigation file be released to him. The B.C. Court of Appeal did not dismiss the application but neither did it grant the order. It, instead, asked for the Crown and Defence Counsel to agree on a statement of fact which would obviate the necessity for police to release a confidential file. Then, when dealing with the pending appeal, the Court would review the application for presentation of new evidence and all matter ancillary thereto.

The Queen and EVANS, B.C. Court of Appeal, Vancouver CA 005498 - November 1986

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ADMISSIBILITY OF EXPERT EVIDENCE

The accused called a psychologist as an expert witness on. "Eye witness testimony." The criminal allegation was armed robbery and the defence was that the Crown had failed to prove, beyond a reasonable doubt, that the accused was the person who committed the crime. The victim of the robbery, and a customer in the store in which the crime took place, identified the accused in a line-up held two weeks after the robbery. The line-up had not been all it could be or should be, particularly in the accused's height being different from the other participants in the identification parade. He had been the only one over six feet. The psychologist had testified that the line-up was instead a "show-up". The trial Judge had ruled the expert's testimony superfluous and inadmissible. He held the jury was capable of

coming to a proper conclusion on the identification evidence without the assistance of the expert in that his testimony (during the voir dire, in the absence of the jury) did not contain any scientific information likely outside the experience and knowledge of the jury or the judge.

The B.C. Court of Appeal agreed with the Supreme Court Trial Justice on this point and dismissed the accused appeal regarding his conviction of armed robbery.

Regina v. BROWN, B.C. Court of Appeal - Vancouver 004199, February 1987

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"GIVE BLOOD....OR ELSE" - ADMISSIBILITY OF ANALYSIS

The accused was involved in a serious accident and treated for injuries. The investigating officer asked if he was willing to give a sample of his blood and responded to the accused's: "What if I don't?", that refusal would trigger a demand for such a sample. The accused had said the demand was not necessary and gave a sample that proved to contain 352 milligrams of alcohol per 100 millilitres of blood. In other words, the accused was in an advanced state of intoxication and he was consequently convicted of impaired driving. He appealed the conviction and argued that he had not voluntarily given the sample as he had said, "What if I don't?" He had then given the sample only because of the threat, "If you don't, I'll make a demand." Therefore, there was no consent to the taking of the sample and the results of the analysis are therefore inadmissible in evidence.

The Court rejected the accused's submissions. The officer had the right to make the demand and simply had informed the accused of that law and that he would use it. There is no threat in that and hence the sample was voluntarily given. Furthermore, the accused had been informed of his rights and did not raise the issue of understanding his options due to his advanced state of intoxication.

Appeal Dismissed

Regina v. MATE, County Court of Yale - Revelstoke 04228, November 1986

Note:

Since the date of the offence in this Mate case, the Courts have struck down s. 220.2 (1) C.C. under which the officer intended to make the demand. See ***Regina v. Chatham and Ketole,*** [1986] 23 C.C.C. (3d) 434.

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IS A MOTORIST WHO COMPLIES WITH ROADSIDE SOBRIETY EXERCISES, DETAINED?

The accused was asked to alight from his car and do some physical tests to determine his level of sobriety. He complied and failed badly. When he was tried for a criminal code drinking-driving offence, the accused argued that he was detained while performing the tests. He was not informed of right to counsel and, consequently, his right to be so informed was infringed and the evidence of the failure should not have been admitted in evidence, argued the accused, when he appealed his conviction to the County Court of Yale (B.C.). The reasons for judgement by the trial Judge already indicate that he placed considerable weight on the evidence of impairment demonstrated in the sobriety test in issue. As a matter of fact, without that evidence, the trial court had no other evidence to rely on to conclude the accused drove while his ability to do so was impaired.

There is no legal obligation to comply with the request to perform a sobriety test for diagnostic purposes. As a matter of fact, it is a voluntary activity that either exonerates the suspect or by means of which evidence adverse to the suspect's interest is supplied. However, the County Court Judge found that whether there is detention depends on the circumstances. If one does not wish to perform the tests, but does so because of the conduct of the police officer, then there is detention. On the other hand, one may be pleased to comply to show he is not impaired and, clearly, then there is no detention. In this case, there was nothing in the circumstances that caused the compliance with the request to render the accused detained at the time.

Even if "I am wrong", said the Appeal Court Judge, the evidence should be admitted as there was good faith on the part of the officer and admitting the evidence would not bring the administration of justice into disrepute.

The appeal was dismissed.

R. v. BONOGOFSKI, County Court of Yale -
Kelowna 86/35, December 1986

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SUBJECTIVITY

Many issues in law are subject to tests, some of which are subjective and others objective in nature. For instance, if a suspect makes a statement to an under-cover officer, then he or she spoke to a person in authority if we apply an objective test. It would then follow that "voluntariness" is a prerequisite to such a statement. However, the test, whether the officer is a person in authority, is a subjective one; what the suspect (accused) believed the person he spoke to, to be, determines the officer's status. If he did not realize he was speaking to a person "who will effect the path of prosecution", then the officer was not a person in authority in the issue of the statement's admissibility in evidence.

When the act of an accused is judged for excuse or justification (defence of necessity), the test again is a subjective one. What appeared to be to the actor is paramount to establish his mind to determine if there was an excuse or justification.

Subjectivity determines what is real, but does not guarantee reality; it is a means to establish reliability but fails to ensure validity; it mirrors what appears to be, but not necessarily what is.

AUTHOR

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ACCUSED'S ENTITLEMENT TO ACCESS TO AFFIDAVIT SUPPORTING APPLICATION FOR AUTHORIZATION TO INTERCEPT THEIR PRIVATE COMMUNICATION

While tried for drug related offenses, two of the accused applied for access to the affidavit that supported the Crown's application for judicial authorization to intercept their private communication. The Crown intended to rely on the evidence resulting from the interception and one of the persons mentioned in the authorization as a target was on the Crown's witness list. Unless they could gain access to the content of the affidavit, they were unable to prepare a full answer and defence to the allegations. In pre-Charter days the Courts would not allow the opening of the packet containing all the documents related to the authorization. If a packet was opened, it was most certainly for cause and not as of right. Cause, particularly in respect to the affidavit, would be such things as misleading information, non disclosure, fraud or material error on the part of the police or Crown. The trend in the post-Charter days is leading to access by an accused as of right. Section 7 of the Charter is always quoted as a reason for that right. (No deprivation other than by a process based on the principles of fundamental justice). This Court did not quite go that far, and said that the accused, in

this case, had a right to the affidavit because one of the targets, named in the authorization, was to be a Crown witness. In other words, the Disclosure Order this Vancouver Court Judge granted was for cause. Furthermore, opening a packet for disclosure of content of affidavit and opening it for the purpose to determine justification for and/or validity of authorization, are quite distinct from one another in consideration whether to open a packet. The Order for Disclosure was granted with the proviso that Crown counsel firstly could, in Chambers, make submissions regarding the editing of the affidavit.

Another case, quite similar in terms of legal issues, was at about the same time before the Westminster County Court. At first, Defence Counsel applied for the packet to be opened to challenge the authorization, but then switched to an application based on s. 7 of the Charter giving right to disclosure of all pertinent information to make a full defence. Said the Judge of the Westminster County Court when granting the accused access to an edited version of the packet:

> "It appears that the trend now is that the opening of the packet expresses concern for accountability and accessibility, but not to the extent of harming the innocent, disclosing identity of informants or impairing the efficiency of police methods of investigation. In my view, there should be no difficulty, subject to the above, of disclosing to an accused all information which might be of value in producing his defence."

Regina v. BICKNELL, CURRIE, GRANT, and KYHL, Vancouver Registry C.C. 860297, November 1986
Regina v. BRAKER et al, New Westminster Registry X016910, October 1986

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"CHARTERING" OBLIGATIONS ON POLICE IN EVENT OF "ANCILLARY" DETENTION

The accused was arrested on September 6 for aggravated assault which occurred on the same date. His custody continued until at least September 20 and possibly beyond. The detective in charge of the aggravated assault charge spoke to a couple of his colleagues who were investigating a murder that was committed in a hotel room sometime between August 29 and September 4, and advised them to speak to the accused about the murder. He predicted that an interview would meet with success. Furthermore, the accused's palm print was

found in the room and a shoe print, similar to the print the accused's shoes would leave, was found on the floor. On September 20, the two detectives ordered the accused to be brought to an interview room. One of the officers had a tape recorder secreted on him and a conversation which was not prefaced by any warnings regarding rights took place. The Crown sought to have this conversation admitted at the accused's trial for murder in the B.C. Supreme Court and a voire dire was conducted for this purpose. The Crown relied on the accused having been "chartered" and warned when he was arrested on September 6. His arrest and detention had been uninterrupted since that date when he was interviewed on September 20. Defence Counsel argued that the interview amounted to an "ancillary" detention and that the chartering and warning of September 6 could not serve as evidence of compliance with the accused's right in respect to this separate detention regarding the murder charge.

The Court found that there was a detention separate from the one in respect to the unrelated aggravated assault charge. Detention is not only physical but also measured on whether the circumstances are such that the detainee may be in need of legal counsel. Applying a subjective test, the Court found that the accused had not likely believed he had any choice in staying in the room for the interview. He was detained on a matter separate and distinct from the matter for which he was already in detention. The latter, as it were, was only convenient to accommodate the former. Hence, s. 10 of the Charter applied separately and the "voluntary" statement was ruled inadmissible because of that Charter violation.

Regina v. ***BROWN***, Vancouver C.C. 850003, February 1986

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NOT SHOWING RADAR READING TO SPEEDER - BEST EVIDENCE RULE

An alleged speeder alighted from his car when stopped and demanded from the officer to see the radar reading. The officer said then, and testified that he could not do as was requested because the reading was already erased. The speeder appealed the finding by the Justice of the Peace that the speeding took place, arguing that he had been deprived of a full answer and defence to what was alleged and that the Crown failed to present the best possible evidence.

In 1745, an English Lord said: ".....there is but one general rule of evidence, the best the nature of the case will allow." This has become known as "the best evidence rule." The erasing of the radar reading did not only deprive the alleged speeder of a defence but also the Crown from adducing the

best possible evidence the nature of this case did allow. The Appeal Judge (the County Court of Vancouver) held that "best" in this rule does not mean "the most perfect", but means the "most reliable" the nature of the case permits. This has often meant that where the primary evidence was available and secondary evidence was adduced, it should, despite its apparent reliability, be decided (by the trier of facts) what weight should be given to such secondary evidence. If the radar evidence was primary, and the officer's admissible evidence about the radar reading secondary, then, particularly since the alleged speeder did not contradict the officer's evidence, the Justice of the Peace was entitled to act upon that secondary evidence. The County Court Judge seemed to warn where the evidence is contradicted or where it is shown that it was erased to suppress or conceal evidence, such premature erasure could become a "matter of concern" at trial. In the absence of such contradiction or deliberate erasure to deprive the speeder of evidence, the grounds for appeal failed.

ELLISON and The Queen, Vancouver Registry C.C. 861747, February 1987

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Violence while stealing can be robbery, as well as attempted murder. Convictions of both arising from one act of violence are permissible.

The accused had broken into the apartment of a 69 year old woman. He had beaten her badly and had taken things of value out of the apartment. He pleaded guilty to break and enter, and robbery, but found himself charged, subsequently, with attempted murder. The B.C. Court of Appeal held that any violence while stealing is sufficient to constitute robbery. The measure of violence, in this case, was such that it amounted to attempted murder as well. A further appeal to the Supreme Court of Canada was to no avail. The violence had been such that it was distinguishable from the intent when applying violence to accommodate a theft to constitute robbery. Therefore, two charges could properly arise from the one incident of applying violence. However, due to a ruling by the Supreme Court of Canada on the matter of intent for attempted murder (specific intent to cause death), which was not concluded at the time of the accused's trial, the matter was inadequately addressed at trial to support a conviction of attempted murder. The Supreme Court of Canada did substitute a conviction of causing bodily harm with intent to endanger life as an included offence to attempted murder.

Wigman v. The Queen, Supreme Court of Canada, April 1987
See Volume 15, page 32 for B.C.C.A. judgement.