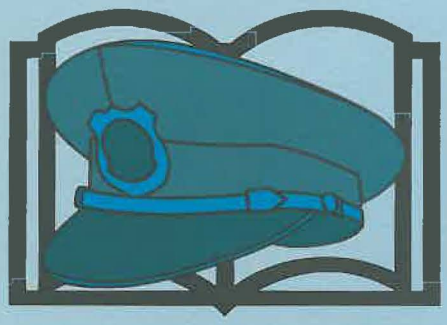

ISSUES OF INTEREST

VOLUME NO. 31

Justice Institute of British Columbia
POLICE ACADEMY
4180 West 4th Avenue, Vancouver, British Columbia, V6R 4J5

ISSUES OF INTEREST

VOLUME NO. 31

Written by John M. Post

July 1988

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PRELUDE TO *R. v. Waltz*, *R. v. Kruize*, *R. v. McLennan*, *Thompson v. The Queen and Hufsky v. The Queen* (Pages 2 to 13 Inclusive)

These four reasons for judgement ought to be of considerable interest to practicing police officers who encounter and process drinking drivers. The last of these judgements, by the Supreme Court of Canada is of interest in that it finally answers in addition to questions about roadside breath tests the crucial question if stopping motorist without specific reason causes arbitrary detention.

The roadside breath test is not practiced in British Columbia, but as is hinted in the arguments before the B.C. Court of Appeal in the McLennan case it and the roadside physical sobriety test may, in law, have similarities despite the substantial differences between the two: the one being compulsory upon demand and the other being voluntary and not provided for in law.

Regrettably the B.C. Court of Appeal did not have the benefit of the Supreme Court of Canada decision on implied practical considerations despite the detention triggered by the stopping, demand for roadside breath, or as in the B.C. case a request to perform certain physical tests. Had the B.C. Court of Appeal had that benefit it may well have gone further afield on this issue.

In any event the grouping and sequence of the cases is to demonstrate the legal problems with this matter of detention upon being stopped and the response of the Supreme Court of Canada and our B.C. Court of Appeal to these issues.

IS THERE ANY DIFFERENCE, IN TERMS OF DETENTION, BETWEEN A SOBRIETY TEST RESULTING IN A 24 HOUR ROADSIDE SUSPENSION AND ONE LEADING TO A DEMAND FOR BREATH SAMPLES?

Regina* v. *WALTZ - Vancouver County Court - Vancouver CA870950 - April 1988

Police saw a drunken passenger alight from a car. Assuming that where there is a drunken passenger there may be a drinking driver, they stopped the car. Consumption of alcohol had affected the driver and he was prohibited from driving for a 24 hour period which he apparently ignored as he was found driving a few minutes later. The prerequisite beliefs the peace officer must have to impose a 24 hour suspension, were obtained by having the suspect perform some sobriety tests. The accused simply claimed that he was detained when stopped and asked to perform the tests. The officers had not advised him of his rights to counsel and this infringement of his right should cause the suppression of the test results. This meant that the officer had no proof of his grounds to suspend, and therefore, there was no suspension and his conviction of driving while prohibited was not founded in law argued the accused in the Vancouver County Court.

To support his arguments based on the Charter infringement and consequential exclusion of evidence the accused relied heavily on a decision by the B.C. Court of Appeal.* That court held that the roadside sobriety test was due to a lack of advice of right to counsel, inadmissible in evidence, and consequently, a criminal allegation of impaired driving failed to result in a conviction. After all, if the reasonable and probable grounds to make the demand arise from the physical performance of a suspect while performing the sobriety test, then exclusion of the evidence also erases the justification for the demand, reasoned the accused.

This County Court judge did not agree with the accused's argument. He aligned himself with other judicial opinions particularly where persons are charged with "over 80 mlg". In the case decided by the B.C. Court of Appeal the evidence became inadmissible to prove the impairment, but not to invalidate the demand for breath samples. For instance, police may make a demand based on information from what they consider to be a reliable third party. Such is then only evidence to prove prerequisites for the demand and not to prove guilt in respect to impaired driving or "over 80 mlg". Should this reasoning be erroneous in law the question is: whether without the evidence resulting from road test, were there reasonable and probable grounds for the officer to impose the 24 hour suspension? The answer was "No", and consequently, the situation here was indistinguishable from the binding precedent set by the B.C. Court of Appeal in Bonogofski. Not knowing what the sobriety will lead to (either a 24 hour suspension or demand for breath samples) results in the person who is only prohibited from driving being detained during the test,

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* *R. v. BONOGOFSKI*. See Volume 29 page 1 of this publication. Also 19 B.C.L.R. (2d) 360.

like those who because they failed the test are subjected to a demand for breath samples. Due to the Charter violation the accused's appeal was allowed.

Conviction for Driving While Prohibited Set Aside.

RIGHTS GIVEN AFTER ROADSIDE SOBRIETY TEST
WHEN DID THE OFFICER FORM THE OPINION PREREQUISITE TO THE DEMAND?

Regina v. KRUIZE - County Court of Westminster
Chilliwack No. 16808 - March 1988.

The officer stopped the accused for speeding and erratic driving. The constable knew the accused and testified that he found him to be different from "normal times when I've seen him sober" and cited all the usual symptoms of impairment he had detected. He then requested the accused to perform a roadside sobriety test, after which he read him the usual Charter right and made a demand for samples of his breath which he refused to provide. This resulted in a conviction for doing so.

The accused appealed arguing that the constable's evidence of the demand should not have been admitted. The prerequisite grounds for making that demand were obtained by a means that had infringed the accused's right to counsel. When he was told to perform the sobriety test he was detained and should have been made aware of his rights at that time.

There were two issues in this appeal. If the constable had formed the opinion that the accused was impaired prior to the sobriety test, the demand he made may be valid despite the subsequent infringement of the accused's right to counsel. If, however, the prerequisite opinion to the demand was formed due to what the officer observed during the roadside sobriety test then that evidence was obtained directly in a manner that infringed a guaranteed right.

The constable did testify: "Well, I definitely believed that he was impaired" but failed to say when he formed that opinion.

The Court held that the transcript of the trial was of no assistance in determining these points. Furthermore, even if the opinion was formed prior to the sobriety test, the trial court must determine if the subsequent infringement of the accused's right to counsel would affect the admissibility of the demand.

Appeal Allowed.
New Trial Ordered.

Comment:

Defence counsel in this case relied on the decision by the B.C. Court of Appeal that a person asked to perform a roadside sobriety test is detained.* In that case the Court of Appeal reiterated that where an officer complies

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* *R. v. Bonogofski*, Volume 29, page 1 of this publication.

with the law as it is at the time, he/she acts in good faith.* Usually such a finding will result in evidence being admitted despite the fact that since that time precedent rendered the officer's actions contrary to the Charter or common law.

However, in this as well as the Bonogofski case decided by the B.C. Court of Appeal, the issues surrounded the detention triggered by the roadside sobriety test. At the time the constable in this Kruize case apprehended the accused the B.C. Court of Appeal had not yet set the precedent that performing such a test upon request causes detention. Quite distinct from the Gladstone case where the officers had followed investigative procedures that at the time were in compliance with the common law, the constables in these two drinking/ driving cases were not complying with some precedent that established that suspected impaired drivers are not detained when asked to perform a sobriety test prior to the demand. There was no case law on this point and they only believed that there was no detention at that stage of their investigation--a belief the courts subsequently found to be erroneous in law. That is the reason why the B.C. Court of Appeal did not apply the Gladstone decision, to their decision in the Bonogofski case, according to the County Court Judge.

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A day after the Kruize decision was handed down by the Westminster County Court, the County Court of Vancouver Island decided on a case that appears on all fours with this Kruize case. Needless to say the Judges did not have the benefit of being aware of one another's deliberations.

The Vancouver Island case is ***Regina v. Pare*** (Courtenay No. 87/2107). The accused was stopped in a road block (no issue was made of this), and he and his passenger were found not to be wearing seat belts. While the officer completed the necessary documents for this offence, he noticed the accused's flushed face, the smell of an alcoholic beverage and bloodshot eyes. When asked to do a sobriety test the accused had difficulty in alighting from his car, and when he followed the officer to the police car it was obvious that he was impaired. The officer testified that he had formed the opinion that the accused's ability to drive was impaired by alcohol when the accused was still sitting in his car.

The officer did the same as his colleagues in the Kruize and Bonogofski cases; he asked the accused to perform a sobriety test and then made the demand, followed by making him aware of his right to counsel. This caused the same arguments to arise as in the Kruize case in relation to the validity of the demand. However, here the evidence was clear at what stage the officer formed the beliefs prerequisite to the demand. Nonetheless, defence counsel argued that all evidence be excluded due to the infringement of the accused's right by detaining him, collecting additional evidence and then telling him of his Charter right. The trial judge had agreed and the Crown appealed the acquittal that came as a consequence.

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* ***R. v. Gladstone***, Volume 22, page 22 of this publication.

Though it is generally established that a detained person should not be required to do anything that may incriminate him/her unless the detainee has been given the right to speak with a lawyer, it was held by another Vancouver Island County Court Judge* that where the officer does have the grounds prerequisite to the demand prior to the roadside sobriety test, then the results of the breathalyzer tests and the certificate of analyses are still admissible so long as prior to the breath samples being taken the accused was made aware of his Charter right to counsel.

Apparently accepting the finding of his brother judge, it was held that the trial judge had been wrong in not allowing the analyst's certificate in evidence. The trial judge had found as a fact that the officer's opinion was formed before any sobriety tests. Therefore excluding the roadside sobriety test from the evidence did not deprive the Crown's Case from evidence that may prove that the officer had the necessary grounds to make the demand.

This County Court Judge in the Pare case raised another interesting point that in his opinion must receive consideration in circumstances like these. When an officer believes on reasonable and probable grounds that a person is committing or has in the last two hours committed one of the well known drinking/driving offences, he "may" make a demand forthwith. The "may" refers to whether or not he feels he needs the analyses of breath or blood and does not refer to the "forthwith". In this case the officer had his grounds, but took another five minutes to conduct a sobriety test before he made the demand. The test was not something, in the circumstances, that could be considered to be included in the alternative to "forthwith", "as soon as practicable". The latter was put into the law to take care of extenuating circumstances. Such a delay is capable of invalidating a demand for breath samples, reasoned the Court. As these and other matters had been inadequately considered, the Crown's Appeal was allowed.

New Trial was Directed.

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* ***Pelletier v. The Queen***, December 18, 1987, Victoria 42298.

ADMISSIBILITY OF "ROADSIDE SOBRIETY TEST EVIDENCE"

Regina v.McLENNAN - B.C. Court of Appeal - Vancouver CA 008490

An alert was put out to locate a car the driver of which was reported to be impaired. The car was spotted and shortly after found parked with the accused behind the wheel. After failing a roadside sobriety test, the accused was demanded to give samples of his breath and was arrested for impaired driving when he refused to accompany the officer. He was then made aware of his right to counsel.

The officer testified that he did not believe he had sufficient grounds to make his demand until he saw the accused's failing performance of the physical test on the side of the road, hence the test was for the purpose of collecting evidence. The trial judge had held that during the sobriety test the accused was not detained, and therefore, the officer had not infringed the accused's Charter right. The evidence of the test was admitted and the accused was convicted of both charges. He appealed the convictions.

Just five months before the B.C. Court of Appeal gave its decision in this case it handed down its reasons for judgement in a nearly identical case.*

Summing up what it decided with that previous case the Court of Appeal said:

> "...where an accused has been detained and where a police constable thereafter is engaged in obtaining evidence to support a charge of impaired driving and required the accused to perform road-side physical tests, if the accused is not informed of his section 10(b) rights prior to the demand to perform the road-side physical tests, the evidence of the results of those tests is not admissible".

The B.C. Court of Appeal decided that the accused was in fact detained when he performed his physical tests. He had not been made aware of his rights to counsel at that point, and therefore, this right had been infringed. For the purpose of supporting the allegation of impaired driving the evidence of the road test was inadmissible.

The question remaining was whether the evidence of the roadside physical test was admissible to show the officer had grounds to make the demand for breath samples. This in turn, would cause this evidence to support the charge of refusing to give such samples. In the Bonogofski case the charge had been one of impaired driving.

The Crown had expressed considerable concern over this issue. The roadside sobriety test is no different from other police investigations where an

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* ***Regina v. BONOGOFSKI***, unreported, Volume 29 page 1 of this publication.

officer asks questions and makes observations in an attempt to discover if an offence has been committed and to identify the author of it. By the officer's own evidence he attempted to determine if there were grounds to make the demand for breath samples. The test is similar in purpose to the demand for a breath sample in a roadside screening device in other provinces (this device and the law providing for its use is not applied in B.C.). A number of cases* have established in Saskatchewan, Ontario, Manitoba, Nova Scotia and Alberta that a person is not detained when demanded to give a sample of breath for analysis in a roadside screening device. If inquiries to determine the existence of grounds constitute detention then such interpretation of the Charter is excessive, extravagant and leads to absurdities that paralyze law enforcement argued the Crown. The cases involving roadside screening device tests emphasize that the demand may be made upon suspicion and that the law providing for it clearly attempts to remedy the omnipresent grey area between suspicion and the reasonable and probable grounds prerequisite to the demand, for breath samples for analysis by the breathalyzer. If the latter is the case there is no doubt of detention** and a right to the advice that a lawyer may be consulted. The heart of the issue the Crown placed before the B.C. Court of Appeal is: "What is the difference?" In terms of purpose the roadside physical test in this case was indistinguishable from the purposes for which the roadside screening devices were used in all the cases where it was found that at that stage there is no detention. The law and the application of the Charter as outlined in those cases has struck the perfect balance between the Charter rights of the individual and the legitimate objectives of society to deter the drinking driving habits of some (many?).

The B.C. Court of Appeal declined to belabour the issue of the distinction (if any) between the physical roadside test and that done by means of the screening device. However, the Court held that the physical test triggered detention and by implication seemed to hold that an infringement of the right to counsel at that stage, also justifies suppression of the evidence gathered by that test to support the legitimacy of the demand for a "real" breath test.

Not specifically dealing with the roadside test issue the Court gratuitously commented that it is understandable that officers may forget to issue the Charter advice when making the demand for submission to the real breath test. This can be remedied by overlooking an initial refusal, repeating the demand and then advising the suspect of his rights.

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* ***Regina v. TALBOURDET*** (1984) 12 C.C.C. (3d) 173. (Saskatchewan)
Regina v. BURKHART (1986) 49 C.R. (3d) 376. (Manitoba)
Regina v. DRAPEAU (1986) 48 C.R. (3d) 185. (Nova Scotia)
Regina v. PHILLIPS; R. v. REID (1986) 26 C.C.C. (3d) 60. (Alberta)
Regina v. SEO (1986) 25 C.C.C. (3d) 385. (Ontario)

** ***R. v. Therens***. Volume 21 page 1 of this publication (Supreme Court of Canada).

Accused's Appeal Allowed.
Acquittal's Directed for Both Counts.

Comment:

The B.C. Court of Appeal has been rather conservative in applying the Charter as compared to its counterparts in other provinces. In this issue the situation is reversed. The media recently reported that the Ontario Court of Appeal had held that the physical roadside test in the absence of an arrest having been effected, does not constitute detention regardless of the purpose of test.

RANDOM STOPPING OF CARS - ROADSIDE BREATHTESTS - RIGHT TO COUNSEL
UNREASONABLE SEARCH AND THE CHARTER AND BILL OF RIGHTS

***Thompson* v. *The Queen and the Attorney General of Canada* -**
***Hufsky* v. *The Queen and the Attorney General of Canada* -**
Supreme Court of Canada - April 1988

Mr. Thompson was stopped by a constable who was engaged in spot checks of vehicles. He stopped the Thompson car because it had one headlight out and detected a strong smell of alcohol on Thompson's breath. A demand to blow into a roadside screening device was met by a blunt refusal. The officer explained his reasons for making the demand, but was again told that no breath for the purpose of analysis in the A.L.E.R.T. instrument was forthcoming. There was no arrest and no advice as to his right to counsel. An appearance notice was served on Mr. Thompson and his driver's licence was suspended temporarily. No arrest was effected at any time.

Mr. Thompson eventually took his case to the Supreme Court of Canada claiming that the officer had detained him and that his right to counsel had been infringed.

Mr. Hufsky was stopped by police for no reason at all and a demand for a sample of his breath to be used in a roadside screening device was made. He also refused. He was made aware of the offence he committed by refusing and was then told of his right to counsel. No arrest was effected he too was served with an appearance notice in regard to the refusal. Mr. Hufsky also took his plight to the Supreme Court of Canada. His grounds for appeal were:

(1) Section 234.1 C.C. is not universally proclaimed in Canada. Consequently there are provinces where the refusal could not be an offence. This constitutes inequality before the law contrary to the Bill of Rights (1960);

(2) Random stopping of cars infringes the right not to be arbitrarily detained; and

(3) The spot check by police amounted to an infringement of the right to be secure against unreasonable search.

The purpose of the spot checks had been to check the documents (i.e. drivers' licenses, registration and insurance), the mechanical fitness of the car, and the driver's sobriety. In the Hufsky case a number of officers were involved and the officers testified that cars were stopped randomly at the discretion of the officers without guidelines, criteria, standards or procedural policies to determine what vehicles should be stopped. The officer had during his eight month assignment of this kind of work stopped at least 500 cars and performed numerous roadside breath tests as a result.

In the provinces of British Columbia and Quebec, the provisions of s. 234.2 are not in force. The Supreme Court of Canada held that this was done for

valid federal objectives that does not violate the 1960 Bill of Rights (which assures all Canadians of equality before the law).

To make its case that the spot check infringed the right not to be arbitrarily detained, the defence had the Supreme Court of Canada decision in ***Dedman*** **v.** ***The Queen**** as a threshold. Reference was made to the Ontario Highway Traffic Act's provisions that compel drivers to carry the well known documents and to produce them for inspection upon demand of a peace officer. This act authorizes police officers to stop motor vehicles, creates an offence for those who do not comply, and specifically provides that a police officer may stop motor vehicles to determine whether there is evidence to make a demand for a roadside breath test under s. 234.1 C.C.

The Supreme Court of Canada unanimously concluded that being stopped by police caused Mr. Hufsky to be detained. Police assumed control over his movements, and there were significant and possibly legal consequences for him. Then there was the demand for a roadside breath test and needless to say that also caused detention, quite distinct from the stopping itself. Refusing constitutes an offence and the accused was in a position where he had a right to legal advice. Despite the fact that the results of a roadside breath analysis "could not be introduced against the appellant" it might lead to a demand for breath samples under s. 235(1) C.C.; the stopping and the demand separately caused detention. Consequently the appellants (Thompson and Hufsky) seemed entitled to have been advised of their right to counsel. Needless to say that at a roadside the exercise of such right would in many cases be impossible and render the objectives of s. 234.1(1) C.C. ineffective.

To deal with this issue the Supreme Court of Canada turned to section 1 of the Charter. This section guarantees the rights and freedoms set out in the Charter and states that any law that limits those rights and freedoms must be reasonable and be justified in a free and democratic society. This would make one believe that only statute law and regulations can be tested against this section. However, the Supreme Court of Canada held that also operational requirements and the application of common law are subject to the "s. 1 test". The Court concluded:

> "It need not be an explicit limitation of a particular right or freedom."

Section 234.1 C.C. stipulates compliance with a demand for a breath sample "forthwith", where s. 235(1) C.C. dictates compliance as soon as practicable and within two hours, etc. The self explanatory, implied, operational requirements under s.234.1 C.C. are a limitation of the right to counsel (considering that the demand triggers detention) as there is simply no opportunity for contact with counsel prior to giving the breath sample at the "roadside". Now the question is whether this operational requirement is a reasonable limitation of the right to counsel in a free and democratic society.

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* ***Dedman*** **v.** ***The Queen*** [1985] 2 S.C.R.2, or Volume 22, page 17 of this publication.

The drinking driver is a serious, recognized problem in traffic, not only in Canada, but anywhere. This problem has not been controlled and must be addressed with urgent measures to prevent the serious injuries caused by the drinking drivers. Increased penalties are ineffective while probability of apprehension is the most effective deterrent. The provisions contained in and implied by the roadside breath test laws are, therefore, a reasonable limitation to the right to counsel when a demand is made for a roadside breath sample held the court.

The officer had a reason for stopping him. However, in Hufsky's situation the stop, and hence the detention, were completely at random, and consequently, appeared to be a violation of the Charter right not to be arbitrarily detained. The Ontario traffic laws, as they do in most provinces, authorize the stopping of motor vehicles without any prerequisite conditions or grounds. The road check was therefore an implicit operational requirement of this legislative provision, and therefore, also subject to the s. 1 (Charter) test.

The Supreme Court of Canada recognized that driving is a licensed activity that requires rigid monitoring and firm enforcement considering what citizens do to each other on our highways. Considering also that many infractions have no external manifestations, reasonable cause as a prerequisite to stopping a motor vehicle would render enforcement of many regulations impossible. How can we tell from observation, that a driver is not licensed, or that there is no insurance, that the automobile is defective, or indeed that the driver has been drinking? Again, only the perceived risk of detection is an essential deterrent to comply with the laws that reduce the perils of using the public roads. Rejecting the American juris prudence of reasonable cause, our highest Court unanimously decided that the provincial traffic laws allowing the stopping of motorists without restrictions, are a reasonable intrusion and a limitation of the right not to be arbitrarily detained that is demonstrably justified in our free and democratic society.

In the Dedman case (supra) the Court had stipulated that road checks were a reasonable limitation of our rights provided it is part of a publicized program. The Court added the following to this rule:

> "As for publicity, which was referred to in Dedman in connection with the common law authority for a random stop for the purposes contemplated by the R.I.D.E. program, I think it may be taken now that the public is well aware of random stop authority both because of its frequent and widespread exercise and its recognition by legislatures."

This left only one issue: is the requirement to produce documents for inspection providing for an unreasonable search? The Supreme Court of Canada held that there is no search involved as the legislation providing for this does not constitute an intrusion on a reasonable expectation of privacy. The documents are required by law, and an inspection of them is not a search as

they indicate a status or "compliance with some legal requirement" connected with the exercise of a privilege or right.

Both Appeals Were Dismissed.

NOTE:

The Dedman decision was decided on the common law function and status of a police constable in Canada and is interesting reading in conjunction with these cases. Also note that the practical operational requirement that justifies suspension of the right to counsel warning in relation to the drinking driver only applies in the case of a roadside breath test.

MURDER - VALIDITY OF SEARCH WARRANT- REASONABLE SEARCH
ADMISSIBILITY OF STATEMENTS - GOOD FAITH ON PART OF POLICE

Regina v. ***MORAN*** - Ontario Court of Appeal
36 C.C.C. (3d) 225

The accused had for years an affair with a married woman who lived not far from his home. The woman was found murdered in the basement of her home. A few days later police phoned the accused and made him aware they were speaking to all people who knew her and they also wanted to speak with him. They offered to come to his home, or if he wished, he could come to their office. An hour later the accused arrived at the police station. He was thanked for coming and he in turn expressed to be pleased to do anything to assist.

The accused told police of his affair with the deceased and that just the day before she met her death he had lunch with her in a restaurant. She had asked him if suicide would affect a life insurance policy. He had admonished her for what she implied. Police had not viewed the accused as a suspect before, during or immediately following the interview.

Four days later the accused was again invited to come to the police station and clear up a few points. An inspector questioned him this time. The accused conceded that he had not told all at the first interview. He told how during the drive the deceased had thrown her glasses on the dashboard and had attempted to jump out of the car. He had, with great difficulty, prevented this. He also told how the deceased phoned him routinely around 1000 hours, but had not done so on the day of her death. In view of what happened the day before, the inspector found it strange that the accused had not phoned her to see if she was alright. He was pressed, if not cross-examined, on this point. Consequently, the accused told how she had phoned him at 1230 hours and had screamed over the phone and had hung up on him. He had rushed over to her house and had found her in a pool of blood in the basement. He had panicked and had gone straight home again.

Police had not advised the accused of his right to remain silent or his right to counsel. The trial judge had found that the accused was not detained during either statement; rather, that they were voluntarily given and were admissible in evidence.

A few weeks later police applied for a search warrant for the accused's house and all buildings on his property. The warrant was apparently executed in relation to a building or shed in the absence of the accused. The murder weapon was found and put back in the same place. Prior to the expiration of the warrant police staked out in the shed to see if the accused would come for the knife. He did come, but prior to him making any move for the weapon, police had to leave or be discovered. When the accused came to the shed the search warrant had expired.

The defence called the Justice of the Peace who had granted the warrant as a defence witness and showed that although there was evidence in the information

defence witness and showed that although there was evidence in the information upon which he could judicially have found that the officer had reasonable and probable grounds to believe that evidence related to the murder could be found on the accused's property, he had not given it such consideration. He had used a seven point checklist which did not include this essential ingredient to a search warrant. No-one questioned the propriety of a member of the judiciary testifying as to his mental processes in making a judicial decision, and the trial judge had found on the basis of that testimony that the warrant was invalid. However, the police had not known this, and therefore, acted in good faith. Despite the search being unreasonable, the evidence was admitted. In regard to the stake out and what the officers had observed the trial judge had found that the accused had failed to show on the balance of probabilities that admitting the evidence of him searching for the material he had hidden in the shed would bring the administration of justice into disrepute. That evidence had also been admitted.

The accused appealed these decisions by the trial judge. In regards to the statements he said he would not have given them if he had known he did not have to do so. He also would have consulted a lawyer if he had been made aware of his right to consult one. Furthermore, in view of the sensitivity in regards to the affair, he had given the statements "off the record".

The Ontario Court of Appeal rejected all the grounds for the accused appealing his conviction of second degree murder. He had a fair trial and the trial judge's decisions were without error.

Accused's Appeal Dismissed.

IS A PERSON WHO IGNORES A "DEMAND", DETAINED?

Regina* v. *SCHMAUTZ - B.C. Court of Appeal - Vancouver CA 006527 - February 1988.

At the scene of a 'hit and run' accident police were told where they could find the offending van and who drove it at the time of the accident. After being informed of his rights the accused was questioned in his living room. He responded to being told to have sideswiped another car and having been followed home: "If somebody followed me, I obviously did it." He said he had a little to drink before the accident, and "a lot" afterwards when he arrived home. He also claimed that he was unaware of the accident; "I didn't feel it" he said.

In response to the demand to accompany the officers and supply samples of his breath the accused said: "You better get a lot of guys because I'm not coming with you." and with that he began to push the officers towards the door. He was then advised that he would receive a summons for failing to supply breath samples, and the officers left.

The accused appealed the conviction for this offence saying that he was inadequately informed of his rights. He was informed of his rights when questioned regarding the hit and run, but not in relation to the demands made of him when the officers formed the opinion that the accused was intoxicated. This left the Court of Appeal to answer two questions:

(1) Was the accused detained, considering his unhesitant reactions and response to the demand made of him?

(2) Was there in the circumstances sufficient compliance with the accused's right to be informed of his right to retain, and instruct counsel?

The case relied on by both parties to this criminal dispute was the Therens decision by the Supreme Court of Canada in 1985.* Mr. Therens complied with the demand to give samples of his breath, but was not told of his right to counsel. No arrest had been made as the compliance with the demand had been without any objections. The Supreme Court of Canada held that there was nonetheless detention within the meaning of s. 10(b) of the Charter. In essence the Supreme Court of Canada said that where a demand is made of a citizen or a direction is given by a person in authority, most will assume it to be lawful and "will err on the side of caution" and comply. This psychological compulsion causes a suspension of freedom of choice. Consequently there can be detention without threats of physical restraint. However, the perceived suspension of freedom on the part of the person to whom the direction was given or of whom the demand was made may effectively prevent

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

that person from exercising his/her right to counsel. Hence the constitutional obligation on the authorities to make any detained person aware of that right.

This case has caused the courts to rule that a demand for breath samples causes detention instantly and the peace officer's duty to make the person aware of his/her right to counsel arises the moment the demand is made. This despite the following passage from the Therens case:

> "...Detention may be effected without the application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choices to do otherwise does not exist."

In other words, the Supreme Court of Canada does not seem to say that the mere making of the demand constitutes detention "regardless of the person's reaction at the time of receiving the demand". Our highest court identified two requirements for detention without arrest: (1) a demand or direction, and (2) that the person submits to the deprivation of liberty in which he reasonably believes he has no choice.

The accused's reaction to the demand was hardly an indication that he submitted himself to a deprivation of his liberty. As a matter of fact he did the opposite. He clearly indicated not to be coerced or in any way to be under any obligation to comply with the demand. He ushered the officers out of his door and was not threatened with arrest or criminal consequences. He remained in his home, "free to sit by his fireside and consume more alcohol or phone his lawyer should he see fit to do so".

The B.C. Court of Appeal reiterated the above described reason for s. 10(b) (make detained persons aware of their right to counsel) of the Charter and said in the same breath that it was not to alert people of legal jeopardy or deter them from committing offenses.

To summarize it can be said that our B.C. Court of Appeal held that in the absence of an arrest being effected;

(1) The mere making of a demand for breath samples does not by itself cause the suspect to be detained;
(2) To be detained subsequent to a demand or lawful direction there must be a restraint of liberty by means of compulsion that causes the person to submit or acquiesce to the restraint; and
(3) The detention must be one which may have significant legal consequences and which may prevent or impede access to counsel.

The accused in this case had considered himself free of any restraints, deprivation or legal obligations, and consequently, he had not been detained at any time during his encounter with police in his home.

Was the one only Charter warning of right to counsel sufficient? The B.C. Court of Appeal answered: "Yes".

> "When one considers the nebulous nature of the circumstances which may in law constitute a detention or arrest, one can appreciate that an officer acting out of an abundance of caution to ensure that the accused is fully aware of his rights, may choose to give the advice at the commencement of an investigation...."

This effectively will remove any doubt that the person was at all times fully aware of his/her right to counsel. Depending how much time has elapsed between contacts with the suspect, one warning may suffice. In this case there was the demand made ten minutes after the warning was given. This satisfied the Court that the accused's right to be informed of his rights to counsel had not been infringed.

Accused's Appeal Dismissed.

Note:

The three Justices who heard this appeal were not unanimous in this decision. One Justice wrote dissenting reasons for judgement and he would have allowed the accused's appeal and have directed a verdict of acquittal. He was of the opinion that the Supreme Court of Canada meant to say that making a demand or giving a lawful direction triggered detention without consideration to the reaction of the person subject to that demand or direction. The dissenting Justice of the Court of Appeal did not disagree with the definition of detention as outlined by his two colleagues; however, he seemed to say that the essential components could exist alternatively to constitute detention where the majority judgement applied them conjunctively. In other words physical control; assumption of control by a demand or direction with significant legal consequences; or psychological compulsion in the form of a reasonably perception of suspension of freedom of choice are capable of triggering detention. In essence the majority of the Court substituted the or for and, and did thereby say that only if all the essentials exist is there detention. Judging by its reiteration of previous decisions on this point in the Thompson and Hufsky cases (see page 3) the dissenting voice in this Schautz case may well be right.

Furthermore, the dissenting member was of the view that the decision of the Court created the unacceptable paradox:

> "A person who complies with the demand is entitled to be told that he may retain counsel to advise him that he is acting in accordance with the law; but a person who refuses to comply with the demand is not entitled to be told that he may retain counsel to advise him that he is acting contrary to law and can expect to be prosecuted."

In terms of the Charter advice the officers gave the accused at the outset of their conversation with him in which they questioned him in regards to the accident first and then (10 minutes later) made the demand for breath samples, was not in compliance with the requirements intended by section 10(b) of the Charter, said the dissenting Justice. The demand was key to the detention that made the Charter advice mandatory. The officers, by not giving the advice again, had failed to link the right to counsel to the demand. The dissenting Justice also concluded that the accused was probably detained when the officers entered his home and questioned him. He agreed with the B.C. Supreme Court* that an already detained person who has been advised of his Charter right to counsel can be newly detained and become entitled to be advised again. (Brown was questioned on an aggravated assault and advised; fourteen days later he was questioned regarding a murder and was not advised).

The fact that the B.C. Court of Appeal was not unanimous, gives the accused an access as of right to the Supreme Court of Canada for further appeal. This issue has also been before the Courts of Appeal of Alberta, Ontario and Prince Edward Island. They all concluded as this dissenting Justice did. That makes B.C. on this and other Charter issues, unique.

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* *R. v. Brown* (1986 B.C.S.C. CC85003).

"THERE COMES A TIME A PERSON IS SO SURROUNDED BY INCRIMINATING CIRCUMSTANCES THAT HE EITHER EXPLAINS OR STANDS CONDEMNED"

Regina* v. *WELTER - B.C. Court of Appeal -
CA 006144 - Vancouver Registry - February 1988

The accused lived together with her common law husband and another woman. The husband is a truck driver and away from home quite frequently.

Police searched the house when only the women were home and found garbage bags of marihuana and all the paraphernalia that someone was trafficking the narcotic. Over seven thousand dollars in cash was found in the accused's purse and a paper bag. No fingerprints belonging to the accused were found on the paraphernalia and she refused to admit knowledge of what the garbage bags contained. She did, however, admit that the money was her's as well as the scales. There was no explanation to police or in testimony where the funds came from or the presence of the marihuana.

The burden is exclusively on the Crown to prove all the ingredients of an alleged offence and the accused has a right to remain silent at all times. That is the presumption of innocence in a nutshell. Consequently, one would presume that the Crown did not have a case against the accused. However, the trial judge had held that living in a house full of narcotics, drugs and equipment to package it for the purpose of sale as well as an unusual quantity of money (the ultimate reward of trafficking) begs for an explanation, in the absence of which the occupant (the accused) had possession and control. Not possession at the exclusion of the other occupants of the house, but possession nonetheless.

The B.C. Court of Appeal agreed with this verdict, and consequently,

The Accused's Appeal was Dismissed.
Conviction of "Possession" was Upheld.

ASSAULT RESULTING IN BODILY HARM
INTENT TO CAUSE BODILY HARM

Regina v. BROOKS - B.C. Court of Appeal -
CA 007016 - March 1988

Mr. C and his family were headed home on B.C.'s lower mainland. They had been on vacation in California in their motorhome. It was around midnight when they were passed by a jeep with three young people in it. The accused was the driver. Mr. C dimmed his headlights when the jeep got in front of him, and put his lights back on high beam when he felt there was sufficient distance between him and the jeep. Apparently the accused did not think the distance was sufficient and stopped. As the motorhome tried to pass the jeep in the lane for opposing traffic, the accused stayed along side the motorhome and prevented it from returning to the right hand lane. The accused drove aggressively and apparently bumped the right rear bumper of the motor home. He then forced the motorhome to stop, opened the driver's door and pulled Mr. C out of the cab. With this, an oncoming car struck both the accused and Mr. C. Both were injured; Mr. C more seriously than the accused.

The accused was convicted of assault causing bodily harm and appealed this conviction. It seems fair to say that the grounds for appeal conceded the assault, but challenged that the Crown had proved that the accused intended or had any objective foreseeability* that bodily harm would result. He, like Vaillencourt, claimed that the consequences of the criminal offence committed must have been at least objectively foreseeable for them to be included in the crime of which he may consequently be convicted. The unintentional accident the accused caused, caused the bodily harm. To be convicted of the accidental consequence of an offence, rather than of what was intended, is contrary to the principles of fundamental justice. Hence his rights under s. 7 of the Charter not to be deprived of his liberty or security of his person other than by a process that applies those principles, was infringed argued defence counsel.

The B.C. Court of Appeal firstly reviewed the distinctions between this case and the Supreme Court of Canada decision in Vaillencourt. The intent required for murder is a reprehensible one and the consequence (death) is the most severe, one human can cause the other. It was for that very reason why the "specific mens rea prerequisite" principle was so stringently applied to the homicide provision in s. 213 C.C.

Conversely, assault is far less severe and in terms of intent not as "highly reprehensible". Furthermore, bodily harm can range from the most minimal harm to the most serious. And our common law has always recognized that "the consequences of an unlawful act may affect the degree of culpability". A good example is the distinction the law provides between attempting to commit an

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* See *R. v. Vaillencourt* - Volume 30, page 1 of this publication.

offence and committing the full offence. In nearly all cases the failure was not due to a lack of intent and from at least a moral point of view, both ought to be equally blameworthy.

In respect to the question if foreseeability of the bodily harm is essential before it can be included in what was intended, the Court reminded counsel for the defence of its decision in 1977 when the identical question was put to this Court.* Said the Court in 1977:

> "...here there is no question that the appellant committed the assault, had the intention to commit the assault and that it caused bodily harm. In my view, all the elements of the offence are thereby made out."

Appeal Dismissed.
Conviction Upheld.

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* *R. v. Martell.* B.C.C.A. November 25, 1977, CA 760977.

"INVASION OF PRIVACY LAWS"
DOES AN ACCUSED HAVE ACCESS AS A MATTER OF RIGHT
TO THE CONTENTS OF THE SEALED PACKET? (s. 178.14(1) C.C.)

Regina v. DERSCH et al - 36 C.C.C. (3d) 435
B.C. Court of Appeal

The accused were charged with various drug offenses and the Crown relied heavily on evidence obtained by means of authorized wiretaps. For the preliminary hearing the accused applied for access to the packet containing the documents and information which supported the applications for the authorizations. They claimed to have, despite the language of the Invasion of Privacy sections in the Criminal Code, access to the package as a matter of right. Their only claim was that they had to be tried by the principles of fundamental justice (s. 7 Charter) which includes access to all information in the armour of the Crown to make a full answer and defence.

They were successful. The County Court Judge did not want to add anymore to the abundance of literature on this issue and simply ordered the Crown to assist in editing the material to protect informers. By using the word "literature" he referred undoubtedly to the numerous cases across Canada that have this issue on center-stage. Most cases are decided favoring the application for full disclosure. The Crown took the matter to the B.C. Supreme Court and was successful in having the County Court decision reversed. The accused in turn appealed to the B.C. Court of Appeal.

The highest court in B.C. observed that the Invasion of Privacy provisions in the Criminal Code includes an exclusionary provision much more stringent than that under the Charter of Rights and Freedoms. The defence strategies now are to gain access to the package by means of the Charter and then use the strict exclusionary rule contained in the Invasion of Privacy provisions of the Criminal Code. If you can find any flaw in the documentation the interception <u>may</u> be declared unlawful and the evidence obtained thereby <u>shall</u> be excluded. There is no consideration for circumstances, gravity of the offence or whether exclusion (or admission for that matter) would bring disrepute on the administration of justice. The Court <u>seemed</u> to imply that there is a dichotomy in our law in that the Charter's exclusionary rule is conditional and that contained in ordinary law is absolute. It <u>implied</u> also that despite the apparent principled reasons that have persuaded members of the judiciary to disclose the edited version of the package contents to the defence is in essence no more than issuing a fishing licence (these are not the court's words). The tenor of the B.C. Court of Appeal judgement on this point is:

> "The broad issue is whether an accused person....is entitled as of right to have access to the contents of the sealed packet in order to explore the possibility of turning up some ground for attacking the validity of the authorization, and thus rendering inadmissible the evidence obtained under it." Further down it added, "... in the hope that the Crown will not be able to prove

> its case and that an acquittal will follow. If the law provides that avenue to acquittal, the accused is entitled to take advantage of it."

The Court said in the same breath, that where the grounds of exclusion of evidence is not connected with the issue of guilt or innocence there is no constitutional protection. The Charter, (used to gain access to the packet) must not be used to broaden that route to acquittal held the B.C. Court of Appeal. What defence counsel is looking for is some procedural error in the way the authorization was issued which is unrelated to the question whether the accused is able to make a full answer and defence. Therefore refusal of access to the packet's content does not necessarily affect the right to defend oneself and is consequently not always a constitutionally protected right. If an accused person can show that the authorization was fraudulently obtained, that there was deliberate non-disclosure in relation to the application, or where it can be shown that the package may contain information that directly, may at least create a reasonable doubt about his guilt (rather than some technical reason for excluding the evidence) then he does have a constitutional right (s. 7 Charter) to access.

The Court said that opening the packet was also justified for an innocent person to seek redress for the invasion of his privacy, particularly if interceptions of his communication did not reveal or support any criminal activities on his part. However, where the intercepted communications indicate involvement in serious crime there are simply no grounds for access to the packet contents for "unjustified breach".

Accused's Appeal Dismissed.

RIGHT TO COUNSEL - PRIVACY

Regina v. *STAMDISH* - B.C. Court of Appeal - Vancouver - 007851 - March 1988

The accused was arrested and demanded to give samples of his breath. In a rather large "booking room" the accused was given an opportunity to seek counsel. Although one constable stayed in the room with the accused there was no evidence that he was within earshot. The accused's efforts were indeed of a "seeking" nature as no lawyer answered the phone in the middle of the night. The accused left a message on an answering machine and did, after complaining of the futility of calling lawyers, give the breath samples without any objection.

The trial judge held that the accused's rights to counsel had been infringed by the presence of the constable in that the accused did not have complete privacy. The fact that no conversation with any lawyer took place was irrelevant he held. The right to counsel is absolute, and privacy is part of that right, "in the full sense of the word, that is; privacy from square one." A County Court Judge agreed with the trial judge and dismissed the Crown's appeal of the acquittal.

The B.C. Court of Appeal held that both judges were in error. Said the Court:

> "The right to privacy established under the Charter does not necessarily start by the attempt to reach a lawyer. It starts after the accused reaches his lawyer and seeks his advice."

The Court of Appeal added that the right to <u>consultation</u> in private is tempered by what circumstances permit. It seems that the Court here predominantly referred to privacy in as far as sight is concerned.

The Court concluded that there was no evidence of an infringement of the accused's right to privacy.

Crown's Appeal Allowed.
New Trial Ordered.

IS "I WAS SCARED" SUFFICIENT TO REBUT PRESUMPTION OF INTENT IN AN ALLEGATION OF HIT AND RUN?

Regina v. BRAUTIGAM - B.C. Court of Appeal - February 1988 - Vancouver CA 003800

The accused "who was not intoxicated" drove on a main road under normal daylight road conditions. He left his lane and went on the paved shoulder of the road knocking a teenaged boy off his bicycle. The boy died instantly. The accused's windshield was smashed, but he nonetheless, did not even brake but accelerated, leaving the scene of the accident. Due to alert witnesses, police apprehended the accused five miles from the scene of the accident. Only after being placed under arrest for hit and run did the accused refer to the incident. He simply said that he would have reported the accident when he got home and: "I realized I should have stopped right away then, but I guess I was scared".

The law states that failing to stop, offer assistance and identifying oneself is in the absence of any evidence to the contrary, proof of intent to escape criminal or civil liability (s. 233(2) C.C.). The accused was convicted in Provincial Court for leaving the scene with the intent to escape such liability.

The accused appealed his conviction to the B.C. Court of Appeal submitting that his claim to being scared was sufficient to be "the evidence to the contrary" to create at least, a reasonable doubt as to the intent that is an essential component of the offence charged.

In a nearly identical case,* the person charged had testified how he had panicked and was reasonably sure that the cyclist he hit was dead. He could not cope with seeing the dead body or the consequences of the accident. The totality of that evidence had been sufficient to displace the presumption of the criminal intent referred to in s. 233(2) C.C. As the Crown had solely relied on the presumption created by that subsection, to prove intent, it apparently fell short of proving its case.

All the accused Brautigam placed before the courts was his statement upon arrest: "I was scared I guess." There was no reason given indicating what he was scared of. Although fright may cause a person to leave the scene in such circumstances for reasons other than to escape civil or criminal liability, it could hardly be said that the accused presented "any evidence to the contrary" that he left for any reason but to escape such liabilities.

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* ***R. v. Emery*** 61 C.C.C. (2d) p. 84.

Said the Court:

> "Being scared describes a man's reaction to the events but does not disclose why he flees....The expression 'I was scared' is not by itself evidence of a lack of intent to escape civil or criminal liability."

Accused's Appeal Dismissed.
Conviction for 'Hit and Run' Upheld.

CONSENSUAL FISTFIGHT RESULTING IN DEATH
MEANING OF CONSENT -- CRIMINAL LIABILITY

Regina v. JOBIDON - 36 C.C.C. (3d) 340 -
Ontario High Court of Justice.

A 25 year old Mr. H was to marry on September 19, 1986. Instead he died on that day due to a senseless but crowd pleasing fist fight during the "stag" party laid on by his friends two days before. The deceased and his party attended a pub and watched a strip show. The discussion among the parties was related to one of their number having been the recipient of a "sucker punch" (an out-of-the-blue unexpected punch) from the accused or one of his brothers. The groom-to-be, who was bigger and heavier than the accused, approached the table of the accused and his party. While standing so close to the accused that he was unable to get up, Mr. H asked, "Is your name Jobidon." When this was confirmed Mr. H invited the accused to step outside, apparently to avenge the aforementioned sucker punch. The accused pushed Mr. H back and the result was a rolling on the floor during which punches were exchanged. The accused obviously lost that contest and sustained a cut lip and bruises. Angry verbal exchanges left everyone with the impression that this was not the end and that the protagonists would meet again at the first conceivable opportunity.

Due to the fight the accused and his brother were asked to leave the pub. While waiting in the parking lot for a ride (according to them) Mr. H and the "bridal party" came out. The accused mustered all his strength in a punch he delivered to the head of Mr. H who was apparently still working on the prelude of the inevitable fight, such as exchanging insults and invitations to this contest. The accused had, during this verbal exchange, lunged forward and delivered that blow to the head of Mr. H which caused him to sag to the ground. The accused followed through with a series of punches to H's head which limblessly bopped from side to side. Some bystanders grabbed the accused and tried to pull him away from H, who was obviously no longer a contestant but a victim. However, the bloodthirsty crowd would not have any part of this and threatened the peace makers. Many witness spectators protested the "break-up" by shouting that it was a "fair fight". The accused was let go and a few more severe blows were delivered to the limbless head.

Mr. H was in a coma for a day and died in the early hours of his wedding day. The accused was charged with second degree murder which was reduced to manslaughter by the provincial court judge who conducted the preliminary inquiry. The indictment alleged that he had "unlawfully" killed Mr. H, and he was tried by a justice of the Ontario High Court of Justice, without jury. The defence was on the controversial issue of consent. Based on the evidence the Court found in terms of mutual intent:

> "....It was a fight in anger, and no friendly sparring contest or test of strength. The object of the fight was to hit the other man as hard as physically possible until he gave up or retreated. Physical injury was intended and contemplated....The accused intentionally hit Rodney

> Hoggart as hard as he could. He believed he was fighting fair, and he did not intentionally depart from the kind of fight that Mr. Hoggart consented to...."

In short, the accused claimed that he was involved in a consensual, but fatal fist fight. In view of that consent he did not assault H nor was he criminally negligent as the indictment implied by alleging that he "unlawfully" killed H. The evidence had not revealed which of the punches caused the severe brain damage that caused H's death.

The law in Canada is not consistent. In some provinces one can consent to having bodily harm inflicted on him which then rebuts any evidence of criminal intent on the part of the person who inflected that harm. In other provinces the courts have prudently placed a limitation of what one can consent to. Bodily harm, for instance, cannot be consented to, and consent is limited to a fair contest and not combat. Such fair contest, like ballroom dancing and requires two willing partners which, except where it creates a disturbance in a public place, is not an offence. However, where one of the partners is no longer capable and renders the contest unbalanced and unfair to him, then consent can no longer be assumed. Then the contest stops and the assault begins. Our consent is simply not unlimited and, for instance, a dual or a fight to the death is not considered suitable for a defence of consent. Even in our gladiatorial sports, consent has been limited by the courts.

In this case the trial judge found that the accused did not intend the death of the victim, or that he intended to cause him bodily harm. He found the loud judgement of the spectators who classified the fight fair, to be significant in terms of the accused's mental element that meets the RES GESTAE test. It was so closely connected to the events in question that it became part of it. The crowd, the accused, and even the "peace corps" found confirmation in the outcry "it's a fair fight" and that the assessment was reasonable if not accurate.

Furthermore, the medical evidence was insufficient to say what blow or combination of blows did cause the death. Reasoned the court:

> "Thus if any of the blows were lawful, the Crown has not established that the accused unlawfully caused the death."

It is obvious that the court reasoned that if the first blow was a lawful one and the subsequent ones to the limbless body unlawful, the Crown must prove that it was the first one that killed Mr. H. Apparently the pathologist could not say.

Concluding that the Crown failed also to show that the accused went beyond the scope of the consent Mr. H implied....

The Accused was Acquitted.

Comment:

Hopefully, our Supreme Court of Canada will not reason similarly when this or another like case comes before them. They are more likely to follow the highest court in England and the different views now established in some of our provinces.

Another matter that seems to flaw this case is the court's description of the fight in terms of what was intended (quoted above) and the conclusion (underlined above) that the accused did not intend to cause H bodily harm.

POLICE OFFICER SPEAKING TO "SUSPICIOUS" PEDESTRIAN
INFRINGEMENT OF RIGHT TO LIBERTY AND SECURITY

R. v. GRAFFE - Ontario Court of Appeal -
36 C.C.C. (3d) 267.

Two police constables in a police car noticed two young pedestrians paying unusual attention to them. Both considered this suspicious. They stopped and according to the youths they were called to the cruiser while the officers recollected yelling out of the car to check them. They were asked for their names. The accused gave his brother's name as there was an outstanding fine for trespassing for him. Later the officers discovered the impersonation and arrested the accused who confessed. He was acquitted of impersonation "with intent to gain advantage for himself to wit: avoid being arrested on a committal warrant." The Ontario Court of Appeal reviewed the Crown's appeal. The defence claimed and the officers conceded that they had nothing on the pedestrians they were suspicious of and had they failed to identify themselves there was little they could have done. Furthermore the pedestrians were detained when called over and there had been no informing of rights to counsel. The Ontario Court of Appeal found that in the circumstances there had been no interference with liberty or security of the person. Said the Court:

> "The law has long recognized that although there is no legal duty there is a moral or social duty on the part of every citizen to answer questions put to him or her by the police and, in that way assist police....Implicit in that moral or social duty is the right of a police officer to ask questions even, in my opinion, when he or she has no belief that an offence has been committed. To be asked questions, in these circumstances, cannot be said to be a deprivation of liberty or security."

Whether or not there was detention, the Court concluded that there was no simple way to determine that.

> "The criteria to which courts have referred include demand or direction as opposed to request, language used and tone of voice, compulsion including psychological compulsion and, it seems to me, place of contact."

The accused and his companion conceded that the request for their identity was polite, but that they nonetheless had felt there was compulsion to answer the questions.

The Court of Appeal rejected the defence submissions. The conversation resulted from a polite invitation in broad daylight on the sidewalk of a busy street. They were not asked to sit in the cruiser and the conversation was very short. Concluding that the Charter does not intend to insulate the public from all contact, including trivial contact, with authorities. The

contact in this case was innocuous; there was no infringement of a right and no evidence should have been excluded (as the trial judge did).

Crown Appeal Allowed.
Acquittal Set Aside.
Trial to be Continued.

Note:

The Court only dealt with the admissibility of the evidence and concluded that the trial must continue with all the evidence admitted. It did not say that impersonation in these circumstances is a criminal act.

PROHIBITED WEAPON AND DEFINITION OF WEAPON

Regina v. COLEMAN - 37 C.C.C. (3d) 568
Alberta Court of Queen's Bench

Police, investigating "a matter" entered a trailer and found the accused sleeping in a bedroom. He had nothing to do with the matter police were investigating and the encounter was a coincidence. The accused was (apparently in plain view) in possession of two sticks connected by a chain. The Crown alleged this to be a "nunchaku" which is listed as a prohibited weapon. He was charged accordingly and was acquitted in Provincial Court. The Crown appealed.

The legal issue involved in this appeal is the application of the 1985 amendment of the definition of "weapon" to the provisions prohibiting and restricting possession of certain weapons.

The definition of weapon was amended

FROM:

> "Offensive weapon" or "weapon" means
>
> (a) anything that is designed to be used as a weapon, or
>
> (b) anything that a person uses or intends to use as a weapon, whether or not it is designed to be used as a weapon, and
>
> without restricting the generality of the foregoing, includes any firearm as defined in section 82.

TO:

> "Weapon" means
>
> (a) anything used or intended for use in causing death or injury to persons whether designed for such purpose or not, or
>
> (b) anything used or intended for use for the purpose of threatening or intimidating any person, and
>
> without restricting the generality of the foregoing, includes any firearm as defined in section 82.

The accused had not used the weapon nor was there any evidence he intended to do so. It had been held at trial that simply having a thing of certain description listed as a prohibited weapon is insufficient to hold that the thing is "a weapon".

It seems that the new definition is designed to make it solely subjective in its application. In other words nothing is a weapon unless it is intended to

be used as one. The removal of "anything that is designed to be used as a weapon" from the definition caused the accused not to be captured by the law as it now is according to the Provincial Court trial judge. Simply put, nothing except a firearm, is a weapon unless the possessor intends to use it as such. The objective test, whether or not the object was designed to be used as a weapon, seems to have been removed.

The Justice of the Court of the Queen's Bench was not prepared to be as restrictive in the interpretation of the new law. He felt that Parliament had left some measure of objectivity in the definition. He held that the words "anything used...for causing death or injury to persons" has the connotation of "anything used by anyone" for such purpose; only the words "anything intended for use" indicate subjectivity on the part of the possessor (what did he intend to do with it?). In short, disjunctive or alternative objective and subjective tests are all provided in subsection (a) of the new definition where in the old definition they were in subsection (a) and (b) respectively.

The nunchaku sticks clearly fall within the objective test the definition provides for...."You possess them; they are a weapon as they have simply no other purpose and are used by anyone else as a weapon; they are listed as a prohibited weapon; the offence is complete."

Crown's Appeal Allowed.
New Trial Ordered.

POLICE DISCIPLINARY PROCEEDINGS AND THE CHARTER

1. ***BURNHAM v. Ackroyd et al*** -
2. ***TRUMBLEY AND PUGH v. Metropolitan Toronto Police Force*** -
3. ***TRIMM v. Durham Regional Police Force*** -

37 C.C.C. (3d) 115 - 118 and 120 respectively - Supreme Court of Canada

1. Mr. Burnham, who was at all material times a member of the Toronto Police, allegedly made a false complaint against a fellow member and was absent from duty without leave.

2. Trumbley and Pugh, members of the Toronto Police allegedly had sexual intercourse with a woman in a police car.

3. Trimm, a member of the Durham Regional Police left his assigned patrol area and thereby neglected his duties and refused to obey a lawful order.

These personnel were charged with relevant disciplinary defaults under the Code of Offenses included in the Ontario Police Act. As they appeared before designated officers to be tried for the alleged defaults, they took objection to the proceedings. It was claimed that their rights under s. 11(d) Charter were infringed as a trial presided over by a superior officer is not a fair or impartial trial. They unsuccessfully sought orders of prohibition against the presiding officers and also failed with their Charter arguments in the Ontario Court of Appeal. Finally they took their plight to the Supreme Court of Canada.

In all the cases it was argued and recognized that in terms of consequences the sentences resulting from a disciplinary process may be far more devastating than those resulting from a criminal trial. Reprimands and suspensions could affect promotional opportunities and in that way be a financial loss and also socially embarrassing. Dismissals need hardly to be explored as to loss of income and career.

Our highest court, however, held that s. 11 of the Charter refers to rights of persons charged with an offence which means a violation of law prosecuted in a criminal or penal proceeding which involves true penal consequences like public fines and imprisonment. Police disciplinary proceedings despite being created by statute are nonetheless administrative and internal in nature and its consequences are civil and not criminal in character. Although the process may be more formal than normal, it is in the realm of employer-employee relationships. Even dismissal is not to deter or reform, but to rid the employer of the burden of an employee who has shown to be unfit.

Consequently the provisions of s. 11 of the Charter do not apply to Police disciplinary proceedings under the Ontario Police Act.

Appeal Dismissed.

The Supreme Court of Canada shortly afterward (Nov. 1987) considered the appeal by Cst. Wigglesworth of the R.C.M.P. (*WIGGLESWORTH v. The Queen*, 37 C.C.C. (3d) 385).

Cst. W had grabbed and slapped a suspected impaired driver until he admitted that he, rather than his sister, was the driver of the car involved in an accident. He was convicted under the R.C.M.P. Act with cruel or unnecessary violence to a person by a disciplinary court and was then also convicted of assault in the public court system. He appealed arguing that his rights under s. 11 of the Charter had been infringed. He apparently did not challenge the impartiality of the discipline court but claimed that his right to be convicted only once of an offence arising from one action (s. 11(h) Charter) had been infringed. This had been rejected by the courts in the province of Saskatchewan. Consequently he was assessed $300.00 by the discipline court and fined $250.00 in the public court system.

The question whether all procedures that have penal consequences are covered by s. 11 Charter has received the narrow and broad approach. Some courts have included all procedures that may have adverse consequences to an individual while other courts have taken the narrow view that only where a person is charged in a public court of record does s. 11 of the Charter apply. As can be seen in the cases under the Ontario Police Act the Supreme Court of Canada takes the latter view, and reiterated that in this case. The broad approach would make s. 11 of the Charter available in proceedings for which the guarantees were not meant; in other words the broader approach would abuse the purpose of the guarantees. Basically an offence (s. 11 Charter only applies where a person is charged with an offence) is a public offence where a person is prosecuted by the state and where there are punitive sanctions if convicted. The tenor of s. 11 clearly indicates that the narrow approach was intended and applies to offenses created to promote public order "and welfare within the public sphere of activity." It does not apply to "private, domestic or disciplinary matters which are regulatory, private, protective or corrective" designed to maintain professional integrity, ethics and discipline in a limited more private sphere.

However, the Supreme court of Canada did not completely close the door to the application of s. 11 of the Charter in private proceedings, where they involve "the imposition of true penal consequences." The constable in this case was charged with a "major service offence" enacted by Parliament with a maximum penalty of one year imprisonment. That is a true criminal consequence as would "a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large...." Because of the penalty of imprisonment for one year, s. 11 of the Charter does apply to major service offenses under the R.C.M. Police Act. Consequently, the matter of double jeopardy needed to be addressed. Or to put it in other words, the true penal consequences of a major disciplinary default under the R.C.M.P. Act make such a default an <u>offence</u> included in s. 11 of the Charter.

Despite the R.C.M.P. constable having the constitutional guarantee not to be convicted more than once for one act of assault, the criminal and private procedures created two distinct offenses (the Criminal Code of Canada and the

R.C.M.P. Act). Disciplinary offenses are separate and distinct from criminal offenses for the purpose of multiple convictions held the Court. The one process is for him to answer to his profession the other to the public.

The Constable's Appeal was Dismissed.

Note:

As no period of incarceration was imposed the constitutionality of a provision for a jail sentence in a private and internal scheme of law had to be left unchallenged.

"OUTBURST" STATEMENT MADE BY ACCUSED DURING HIS TRIAL - ADMISSIBILITY

Regina v. *LAKES* - B.C. Supreme Court - Vancouver C.C. 870976 - April 1988

The accused was being tried for murder before a jury. When a police officer was giving his evidence-in-chief the accused burst out that he was brainwashed by police to believe that he killed his friend. He then said: "I did not kill him." The question was what the trial judge should instruct the jury to do with that statement. Needless to say the statement was unsworn and not testimony. No cross examination was possible unless the accused would take the stand and repeat his allegation of brainwashing and his claim of innocence.

The Supreme Court Justice who had been unable to silence the accused had adjourned the court in the middle of the accused's outburst, and he had to tell the jury what weight if any, to attach to the statement.

Since the statement was not testimony, the court considered it similar to other statements which are all at the discretion of the Crown whether to adduce them into evidence. In this case it was exclusively up to the Crown to say whether it wanted the statement to be considered as evidence. Such application was not made and therefore the jury was instructed not to consider the statement in their deliberations.

Note:

One wonders what the Court would have to do if the statement was inculpatory; for instance, an outburst of repentance and confession. If evidence of a statement of this kind inadvertantly came before a jury via a witness, a finding of a mistrial may result.

USE OF INTERCEPTED COMMUNICATION WHERE ACCUSED IS NOT THE ORIGINATOR OR RECEIVER

Regina v. *NYGAARD and SCHIMMENS* - 36 C.C.C. (3d) 199 - Alberta Court of Appeal

The two accused had clubbed a person to death who had issued a bad cheque to one of them. There was $100.00 involved. While in the process of collecting anyway, they had also taken all the money three visitors in the house of the victim had in their possession.

At their trial for murder, the accused called a witness to give evidence that favoured them. This defence witness had a telephone conversation with a Crown Witness, in which she had contradicted her testimony. Crown counsel had a transcript of this conversation and cross-examined the defence witness on the contradiction, without any proof that the interception of the communication was authorized and lawful. The trial judge had allowed this but had carefully explained to the jury that the evidence of contradiction could only be used for them to determine her credibility and the truthfulness of her testimony. They could not use the evidence of the intercepted communication as proof of its content.

The accused, when appealing their murder conviction, argued that the trial judge erred in allowing the cross-examination without proof of the lawfulness of the interception and that the jury should have been made aware that the prior statements made by the defence witness were part of an intercepted private telephone conversation.

The Alberta Court of Appeal ruled that the exclusionary rule in s.178.16 C.C. had no application as the evidence of the contradiction was not adduced against the originator or the intended receiver of the intercepted communication. It also held that a prior inconsistent statement made by a witness in circumstances as in this case must be treated as any other such statement.

Grounds of Appeal with Respect to the Cross-examination Failed.

Comment:

No attempt was made to have the evidence by means of cross-examination excluded under s.24(2) of the Charter. Unlawful interception is an offence and may well infringe a right under s.7 and/or 8 of the Charter. The evidence of the inconsistent statement could be argued to have probative value against the accused. In other words, the evidence did more than discredit the witness. The inferences a jury may draw from the production of apparently perjurious defence evidence can be very detrimental to the accused. Should the Court find that the interception was a search then according to the

precedent set by the Supreme Court of Canada in October 1984*, the onus is on the Crown to show it was a reasonable search. In this case one could submit that the search was warrantless, which according to the Supreme Court of Canada is an unreasonable search unless the Crown shows that it was reasonable. If the interception was lawfully done upon judicial authorization it is likely also reasonable.

For instance, if one can persuade the Court that the interception was an infringement of the right to security of the person, then the onus is on the accused to show, on the balance of probabilities, that such an infringement occurred.** This then could have opened the door to consideration for suppression of the evidence of inconsistent statements under s.24(2) of the Charter.

There are some other evidentiary hurdles defence counsel may have to overcome, but it seems a defence argument that is not too far fetched, but was not tried in this case.

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* ***Hunter v. Southam Inc.*** - Volume 18, page 12 of this publication.

** ***Collins v. The Queen*** - Volume 27, page 1 of this publication.

ADMISSIBILITY OF STATEMENT
RIGHT TO COUNSEL - DID ACCUSED UNDERSTAND

Baig v. The Queen - 37 C.C.C. (3d) 181
Supreme Court of Canada

Police investigated a murder and arrested the accused at his home. He was immediately told of his right to remain silent and his right to counsel. When asked if he understood the warning and the advice the accused replied: "How can you prove this thing?" As soon as they arrived at the police building the accused was told that three other persons had been arrested as well "...and we know exactly what happened, so you might as well tell us about it." The accused had replied: "Okay, okay, I'll tell you." Before the accused did tell he was asked if he had understood the "caution" he had been given. He had replied: "Yes, I know." Then a standard form was used for the recording of the statement. It was read out to the accused and he answered "Yes" to the questions if he: (1) understood the charge; (2) knew he had a right to remain silent; and (3) had been advised of and understood his right to counsel. He had also signed his statement on that form.

The trial judge had suppressed the statement under s.24(2) of the Charter in that the accused's right to counsel had been violated. Without the statement the Crown had no case and the jury was directed to return a verdict of not guilty. Apparently the trial judge was of the opinion that the officers had not gone far enough in the matter of the accused consulting a lawyer before he incriminated himself in this most serious criminal allegation. In other words, what had happened did not amount to a waiver of the accused's right to counsel. The Crown appealed and the Ontario Court of Appeal ordered a new trial. The accused, in turn, appealed that decision to the Supreme Court of Canada.

The Supreme Court of Canada held that in the absence of an indication that an accused person may not have understood the right to retain and instruct counsel without delay, at the time he was advised of that right, it must be assumed that the advice was understood. Unless, of course, the accused shows "that he asked for the right but it was denied or he was denied an opportunity to even ask for it."

The accused had not shown such apprehension or lack of opportunity, neither does the evidence suggest that there was any hinderance had he wanted to exercise his right to counsel. Said the Court:

> "Absent such circumstances,....once the police have complied with s.10(b), by advising the accused without delay of his right to counsel without delay, there are no correlative duties triggered and cast upon them until the accused, if he so chooses, has indicated his desire to exercise his right to counsel".

Accused's Appeal Dismissed.
Order for a New Trial Upheld.

RIGHT TO COUNSEL - IMPAIRED DRIVING AND REFUSAL BY PERSON VERY FAMILIAR WITH PROCESS

Regina v. LAYNE - County Court of Vancouver - CC870406 - Vancouver Registry - March 1988.

Police officers had followed a car that had emerged from a pub parking lot. It had a near collision and did some "drifting". Just as enough had been enough and the equipment to stop the driver was to be activated, the car stopped near a store and the driver went into the building. He was then recognized by the officers as a defence lawyer regularly seen in the courts.

The accused was showing definite symptoms of impairment. He demanded to examine the officers' notes and tried to advise them what to include in them. The accused was arrested, given all the warnings and advice he was entitled to and was then read a demand for samples of his breath. At the police station the accused availed himself of a phone and then demanded the use of another phone. With a quarter from the officers he then made a lengthy call in private, but while being observed. After 20 minutes of this the accused was told to "Wrap it up". Ten minutes later the request was repeated to which a simple "no" was the response. The officers then hung up for the accused and escorted him to the breathalyzer where he refused to give any samples until he had spoken to a lawyer.

In his defence the accused called friends to testify that he was not impaired that evening. The person on duty at his answering service testified how the accused had asked her the phone number of a certain lawyer and had been cut off before she could give it to him. The accused claimed that all his other telephone conversation had been with a lawyer who was the accused's employee. For his "drifting" and erratic driving he led evidence of mechanical steering problems.

The trial judge had considered the defence witnesses to be unreliable and had failed to consider evidence of the bumpy road the accused travelled. Furthermore, he had found the police conduct during the investigation appropriate. Consequently the accused was convicted of impaired driving and failure to comply with a demand for breath samples.

The accused appealed and argued that the trial judge had found he was impaired on a balance of probabilities instead of beyond a reasonable doubt. Secondly he argued that the officer who made the demand had done so based on suspicion of impairment rather than the requisite belief based on reasonable and probable grounds. In answer to a question about his opinion of the accused's condition when he made the demand, the officer had responded: "I <u>suspected</u> that he had committed an offence under section....due to the consumption of alcohol and that his ability to operate a motor vehicle was, <u>in fact</u>, impaired by that alcohol". Thirdly the accused claimed that he was not given a reasonable opportunity to retain and instruct counsel. All he had was five minutes with a legal associate and was cut off when he attempted to make

contact with the counsel of his choice.

The County Court judge rejected all of the grounds of appeal. The evidence of the officer (despite the unfortunate referral to a "suspicion" due to the "in fact"), was sufficient to prove that he had the prerequisite grounds to make the demand. The trial judge had given adequate and careful consideration to the defence evidence and he gave reason for not considering the evidence of the friends of the accused to be reliable. In regards to the infringement of right to counsel the County Court judge found that the accused had been given a reasonable opportunity to exercise his right and did speak with a legal associate. Therefore the police interruption after 30 minutes of private conversations and use of a telephone made the Court observe: "In the absence of any enlightenment from Mr. Layne, it appears he had already had a reasonable opportunity to do so".

Appeals were Dismissed.
Conviction for Impaired Driving and
Refusal to Supply a Breath Sample are
Dismissed.

CORRECTION NOTICE

Issues of ~~Interest~~ Volume 31. "RIGHT TO COUNSEL - IMPAIRED DRIVING AND REFUSAL BY PERSON VERY FAMILIAR WITH PROCESS". ***Regina*** **v.** ***LAYNE*** - County Court of Vancouver - CC870406 - Vancouver Registry - March 1988. Page 43.

Please note the following correction:

Appeals were Dismissed.
Convictions for Impaired Driving and
Refusal to Supply a Breath Sample were Upheld.

CONSTITUTIONAL VALIDITY OF B.C.'S 24 HOUR ROADSIDE DRIVER'S LICENSE SUSPENSIONS

The Queen and SENGARA - B.C. Supreme Court - Vancouver CC871899 - May 3, 1988

Based upon good grounds for believing that a Mr. Sengara's ability to drive was affected by the consumption of alcohol, his driver's license was suspended for a period of 24 hours under provisions of s.214 of the B.C. Motor Vehicle Act. Mr. S was served and did sign a notice of the suspension. Within an hour Mr. S was found driving his car. In Provincial Court the Motor Vehicle Act offence of driving in such circumstances was dismissed as the trial judge held that the section of this act violates s.7 of the Charter of Rights and Freedoms. He declared the relevant provisions of the Motor Vehicle Act to be without force or effect due to them violating constitutional rights of motorists. The Crown took this matter by means of "stated case" to the B.C. Supreme Court.

A few years ago* a Mr. Robson took his plight under this section of the B.C. Motor Vehicle Act to the B.C. Court of Appeal. He took issue with the grounds officers had to have to deprive him of his Charter right to drive a motor vehicle, which according to s.7 of the Charter can only be taken away from him by a process based on the principles of fundamental justice. A peace officer who has reason to suspect that a motorist has consumed alcohol (no matter when, or if it had affected him in any way) was hardly such a process reasoned Mr. Robson. The B.C. Court of Appeal agreed and declared the 24 hour suspension laws invalid.

The B.C. Government responded by relegislating the provisions for suspension of drivers' licenses by police of drinking drivers but changed the offending part of it. The new prerequisite in effect when Mr. Sengara was suspended, is that a peace officer must have reasonable and probable grounds to believe that the driver's ability to drive is affected by alcohol. This change was obviously not sufficient in the view of the Provincial Court judge to have remedied the constitutional shortcomings of this 24 hour roadside suspension. Some of the reasons for so finding is that the section does not require the notice to the motorist to include a description of his affected performance behind the wheel, nor is there any independent hearing to determine if the officer's beliefs are justified and appropriately founded. Another interesting objection taken with these suspension provisions is the lack of discretion on the part of the peace officer to limit the period of suspension to the degree of impairment. For instance, a 24 hour suspension for a person who will no longer suffer the affects of alcohol in a couple of hours is excessive. In other words the imposition must be proportionate with the affect the alcohol has had.

Then there was another legal twist the B.C. Supreme Court had to deal with.

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* *R. v. ROBSON* (1985) 19 C.C.C. (3d) 137.

In 1985 the Supreme Court of Canada dealt with an Ontario case regarding police, road checks and drinking drivers.* The events that caused the drinking driving charges against Mr. Dedman in that case occurred in 1980, some two years before the Charter of Rights and Freedoms came into effect. The Supreme Court of Canada held that the right to drive on our highways is not a fundamental liberty, but a licensed activity. When our B.C. Court of Appeal dealt with the constitutionality of s.214 of our Motor Vehicle Act, it dealt with circumstances that had occurred since April 17, 1982. In other words the Charter was in effect as opposed to the situation in Dedman. The B.C. Court of Appeal seems to have been of the opinion that therefore the Dedman decision was not binding on them. They found in Robson that driving is a right that is a fundamental liberty under s.7 of the Charter.

In view of the above the B.C. Supreme Court dealing with this Sengara case held that the Robson precedent is the binding one in B.C. This being so, the suspension provisions of our Motor Vehicle Act are invalid, unless they are in the words of s.1 of the Charter "demonstrably justified in a free and democratic society." In other words the legislation that limits a constitutional right or freedom must be proportionate to the interest of society to protect itself by means of laws. In our fallible society some idealisms are legal luxuries we cannot afford while on this side of the pearly gates.

To show the necessity for this offending law that allows the imposition of suspensions of the fundamental liberty to drive without independent adjudication, the ministry of Attorney General presented evidence of the devastating consequences drinking drivers cause in our society, including the personal suffering of the victims, the medical costs, insurance premiums, the five manhours spent per case by police on each drinking driving case, etc.

It seems that the main hurdle to overcome was the lack of the 24 hours' "relationship to the apprehended degree of intoxication." In other words, is the 24 hour period of suspension excessively weighted on the side of protecting the public? Is the 24 hour period so disproportionate to the sobriety of the motorist that it is outright arbitrary and is an irrational consideration? The B.C. Supreme Court answered no, in the following words:

> "Having considered the nature of the Charter liberty of a right to drive, the pressing and substantial necessity of saving the human and financial costs where accidents are caused by drinking drivers, in my view the safety margin inherent in a 24 our suspension is a reasonable limit which is demonstrably justified in a free and democratic society".

Although the provisions of s.214 of the B.C. Motor Vehicle Act do infringe on or deny rights and freedoms guaranteed by our Charter they are justified in our free and democratic society.

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

Mr. Sengara was Convicted of Driving While Suspended.

Please note that in Thompson and Hufsky (see page 10 of this publication) the Supreme Court of Canada referred to driving as a licensed activity rather than a fundamental freedom.

HEARSAY EVIDENCE
THE CONSPIRATOR'S EXCEPTION TO THE HEARSAY RULE

Regina* v. *SCHIAPPACASSE - Vancouver County Court - No. CC871831 - April 1988.

Conspiracies and wicked plots do not come about without a considerable amount of communication. Needless to say, there is no rule or protocol to such communication. It is spread over the spectrum of the plot, among those who are parties to it and in many instances involve others. When investigators penetrate the plot it is likely that most of the evidence is gained from conversations with a variety of people. These conversations are in many instances not with or in the presence of those charged with conspiring to commit an offence or are alleged to being a party to an offence. Such utterances are in such circumstances clearly hearsay and ought to be inadmissible. Nonetheless the reliable information gained from the communication is essential to prove the allegation. By means of precedents the judiciary created "the conspirator's exception to the hearsay rule". However, in this case no conspiracy was alleged, only that the accused was a party to the substantive offence of drug trafficking by having the criminal intent to do so in common with a principal offender (see s.21(2) C.C.).

C.W., an active trader in illicit drugs, ripped someone off in the system. Fearing severe consequences he went to the police offering information and cooperation in return for protection. In this scheme of things, C.W. introduced an undercover officer to Joanne, his ex-common-law wife. The officer purchased some cocaine from her. This transaction did in no way involve the accused. However, conversations with Joanne and C.W. provided the officer with information that eventually led to the charge of trafficking against the accused. The accused was not present when the conversations took place, and yet the Crown sought to introduce them into evidence, presumably through the officer's testimony. Conceding that the evidence was hearsay, the Crown argued that it should be admitted under the conspirator's exception to the hearsay rule. This despite the fact that there was no conspiracy alleged, but only that the accused had an intent in common with Joanne to traffick drugs. For this the Crown relied on cases decided by courts of superior jurisdiction including the Supreme Court of Canada.* The County Court trial judge agreed that the conspirator's exception to the hearsay rule applies also to allegations of substantive offenses where a person is a party to that offence by having had an intent in common with someone else to commit that offence.

The two charges against the accused arose from the officer doing business with Joanne. On two separate occasions he purchased cocaine from her for an aggregate sum of $50,000.00. These incidents were subsequent to the original

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* *R. v. SOMMERS et al* (1958) 26 W.W.R. 257 (B.C. Supreme Court).
R. v. CARTER 67 C.C.C. (2d) 568 (Supreme Court of Canada).
R. v. BARROW (1987) 25 S.C.R. 694 (Supreme Court of Canada).

purchase when C.W. introduced the officer to Joanne, but at which time the conversations, in issue, took place. For the purpose of completing the transactions the accused rented adjoining hotel rooms. Joanne and the officer were in one room and the accused in the other. For samples, and eventually the quantities of cocaine purchased, Joanne went into the accused's room. At the conclusion of the second purchase police raided the accused's room and found him in possession of cocaine similar in purity to what the officer had purchased.

During the introductory meeting the officer had indicated interest in buying larger quantities of cocaine from Joanne. Referring to her supplier she said, "My man", "My guy". When Joanne spoke subsequently to the officer to make him aware of the arrangements for the larger purchase, she said that "My guy" will pick a hotel and adjacent rooms to complete the deal. When entering the hotel with Joanne the officer asked who all was involved in the transaction. The answer was "Just me and my guy" (or words to that effect). She had also pointed at the room next door and told the officer, "he's in there". This indicated some continuity to prove that the conversations at the introductory and subsequent meeting were all about the accused, thereby implicating him in this scheme to market cocaine.

To admit hearsay evidence of this kind (the conversations) there are some prerequisites the trier of fact must consider (jury and of course the trial judge when sitting alone):

1. There must be no reasonable doubt that the alleged conspiracy existed or that persons had an intent in common to commit a substantive offence;

2. Based on all of the evidence admissible against the accused, it must be found <u>on the balance of probabilities</u> (not necessarily beyond a reasonable doubt) that the accused was a member to the conspiracy or had an intent in common with someone else to commit an offence; <u>and</u>

3. If, the prerequisites in 1 and 2 above have been met, only then may the hearsay evidence be considered in the final step to determine if it is capable, in combination with all other evidence, to show beyond a reasonable doubt that the accused was a conspirator or had a criminal intent in common with someone else.

It should be noted that it is not only the statements of others involved in such plots, but also their acts that are admissible against an accused person.

In this case, the trial judge found that all prerequisites had been met by the Crown and that Joanne's conversations with the officer that implicated the accused in the plot were admissible in evidence.

Accused Convicted on Both Counts of Trafficking in Cocaine.

INTERFERENCE WITH ARREST OF ANOTHER PERSON IS LAWFULNESS OF ARREST AN ISSUE TO DETERMINE IF ARRESTING OFFICER WAS OBSTRUCTED?

Regina* v. *HILLS - B.C. Court of Appeal - Vancouver CA007924 - March 1988

An officer went to the home of Mr. K to investigate a traffic matter. K assaulted the officer who went to her patrol car to call for assistance. The accused then arrived on the scene and his inquiries into what was happening resulted in advice from the officer not to become involved. When assistance arrived K was arrested, presumably for the assault. As one of the officer's laid hands on K, the accused approached the scene. He was warned to stay away and that any interference would result in a charge of obstruction. He did not heed this advice and an altercation ensued between the accused and the officers that in addition to obstruction resulted in charges of two counts of assault causing bodily harm and two counts of common assault.

The jury trial resulted in a conviction on the obstruction charge only. The arguments before the court had been about the lawfulness of the arrest of K. If that arrest was not proven to be lawful, then the officers were not in the lawful performance of their duty reasoned defence counsel. However, the trial judge apparently explained to the jury that had K, the person upon whom the arrest was affected, obstructed the officers then the lawfulness of the arrest would be prerequisite to a conviction of obstruction. He did tell the jury that where a party who interferes in the arrest of another person, the lawfulness of that arrest is irrelevant to charges of obstruction against the interfering party. This is erroneous claimed the accused before the B.C. Court of Appeal when he appealed his conviction. Said the Court of Appeal in response:

> "...whether an unlawful arrest would entitle a person who was being arrested to resist the arrest might be a defence to a charge of assaulting or resisting a peace officer is not a factor upon which a third party could rely when charged with this offence."*

Appeal Dismissed.

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* Also see *R. v. SAUNDERS* (1977) 34 C.C.C. (2d) 243.

LEGAL TID-BITS

UNLAWFUL CUSTODY AND ARBITRARY DETENTION

The accused was arrested at 11:00 p.m. on Friday for beating his wife. He was released at 11:00 a.m. on Sunday. During the 36 hours of custody he did not appear before a Justice of the Peace, and consequently, the custody was not only unlawful (contrary to s. 454 C.C.) but also arbitrary and an infringement to the accused's right under s. 9 of the Charter. Despite this infringement the trial judge convicted the accused, but remedied the Charter violation by reducing the accused's sentence. The accused appealed his conviction to the Saskatchewan Court of Appeal claiming that the infringement of his right should have been remedied by quashing the assault charge. This Court held that every infringement needs to be remedied but not necessarily by means of the most potent means in the court's arsenal. The courts have a discretion or duty to implement the remedy that is adequate and appropriate. To remedy this infringement by reducing the sentence was adequate and appropriate held the Court of Appeal.

R. v. CHARLES, 36 C.C.C. (3d) 286.

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PROHIBITION TO SOLICIT FOR PURPOSE OF PROSTITUTION AND FREEDOM OF SPEECH

The two accused were acquitted in the Alberta Provincial Court for soliciting despite the fact that they had very specifically offered a police officer sexual gratification for money. The trial judge had found that s.195.1(1)(c) C.C. was inconsistent with the Charter and therefore without force or effect. The Crown appealed this decision to the Alberta Court of Appeal. This Court found that the enactment indeed did restrict the freedom of speech for the purpose of earning a livelihood with prostitution. However, this law was the least intrusion to resolve a nuisance and pursue a valid objective--to provide peaceful passage for the public on the public streets.

Crown's Appeal Allowed.
Acquittals Vacated and Convictions Substituted.