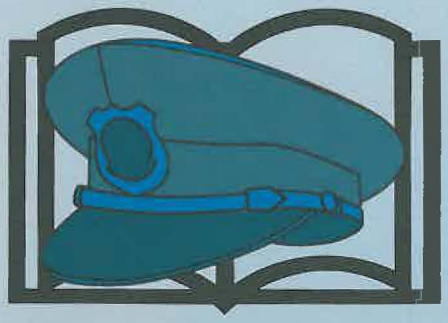

ISSUES OF INTEREST

VOLUME NO. 28

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

ISSUES OF INTEREST

VOLUME NO. 28

Written by John M. Post

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RIGHT TO COUNSEL - POLICE DUTY TO PRESERVE SUSPECT'S RIGHTS

Regina v. *VERMANNING** - Supreme Court of Canada
#18505, June 1987

A couple of days after a store employee was the victim of an armed robbery, the police, acting on a tip, attended at a certain location where the accused arrived a short time later in a car which was reported stolen. Under the seat of the car a handgun was found. The accused was arrested for the robbery, as well as the theft and possession of the car. All his rights were read to him at the time. When asked if he understood, he commented: "It sounds like an American T.V. programme." This caused a second reading of the rights which resulted in the response: "Prove it. I ain't saying anything until I see my lawyer. I want to see my lawyer." This exchange was followed by:

Q. "What's your name?"
A. "Ronald Charles Manninen"
Q. "What's your address?"
A. "Ain't got one"
Q. "Where's the knife that you had along with this (gun) when you ripped off the Mac's Milk on Wilson Street?"
A. "He's lying. When I was in the store I only had the gun. The knife was in the toolbox in the car."

A search of the stolen car resulted in police finding two knives and clothing similar to what the robber wore at the time of the robbery. There was a conversation in respect to these items:

Q. "What are these for?" (showing him the knives)
A. "What the fuck do you think they are for? Are you stupid?"
Q. "You tell me what they are for, and is this (a sweater) yours?"
A. "Of course it's mine. You fuckers are really stupid. Don't bother me anymore. I'm not saying anything until I see my lawyer. Just fuck off. You fuckers have to prove it."

The accused was convicted, but acquitted on appeal. The Crown took the matter to the Supreme Court of Canada on the issue of the admissibility of the above utterances by the accused. The statements had been weighty in the trial judge's consideration and they had been centre-stage in the Ontario Court of Appeal which found that the statements were the direct results of the infringement of the accused's rights to counsel and ought to have been excluded. The arrest and conversation with the accused took place in an office with a telephone at hand. Despite the accused's assertion of "I ain't saying anything until I see my lawyer", the questioning had continued and

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* See Volume 17, page 7 of this publication

resulted in this inculpatory statement. Though the accused may not have been eloquent, there could be no doubt what he intended to convey. He had been arrested at 2:45 p.m. but did not get to speak to his lawyer until "the lawyer phoned him at the police station at 8:35 p.m."

The Supreme Court of Canada held that the Charter and common law imposes two duties on police in addition to having to make a detainee aware of his right to counsel, that is (1) to provide a reasonable opportunity to exercise that right, and (2) to cease questioning or otherwise attempting to solicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel." In respect to the reasonable opportunity in this case scenario, the court found that, where a telephone is available at an earlier occasion, there is no justification to wait until arrival at the police station. This includes that upon the assertion, as in this case, the detainee need not ask for the use of a phone. Police control him and they must provide him with the opportunity to contact counsel.

The Court hastened to add that there may be "circumstances" (see wording of s. 24(2) of the Charter) where urgency dictates to continue an investigation before it is possible to accommodate a detainee in this regard.

Said the Court about the intent of s. 10(b) of the Charter:

> "The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law, but equally, if not more important, to obtain advice as to how to exercise those rights."

The Court dismissed the notion that the accused continuing to answer questions after his explicit assertion had amounted to an implicit waiver of his right to retain and instruct counsel. Two innocuous questions had been followed by a baiting question which resulted in an inculpatory statement. An explicit assertion of a right that is not followed up by police providing a reasonable opportunity to exercise that right (but by further questions) cannot result in an implicit waiver.* Standards of such waivers are very high warned the Court.

The final question to be determined was whether the statement's admission in evidence would bring the administration of justice into disrepute. Firstly, the infringement of the accused's rights was "very serious". He had clearly stated he did wish to remain silent and police officers sworn to protect this right failed to perform their duty in not giving the detainee a reasonable

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* See *Clarkson v. The Queen*, Vol. 24, Page 38 of this publication.

opportunity to contact his lawyer. Furthermore, the evidence was self-incriminatory. It was not real evidence that already existed but was evidence that was the fruit of the officers ignoring the right to counsel. Although the alleged offence was one of considerable gravity, admission of the statement would, due to the seriousness of the rights infringement, bring disrepute on the administration of justice and render the trial unfair.

Crown's appeal dismissed
Order for new trial upheld.

Comment: At a very recent national Criminal Law Conference, attended predominantly by defence counsel with a mixture of judges and Crown attorneys, this decision was quite thoroughly discussed and applauded by the defence side. It was generally agreed that the case sets a precedent for an included right (included in right to counsel) not to be asked questions unless there is an explicit waiver of that right. The only exception to this is when the suspect begins to speak on his own without being prompted or being asked anything that has a causal link to a self-incriminating answer.

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OPENING OF PACKET CONTAINING DOCUMENTS SUPPORTING APPLICATION FOR AUTHORIZATION TO INTERCEPT PRIVATE COMMUNICATIONS

Although it has been quiet at the "open the packet" front for some time, there is recently considerable movement in this area of law. The provisions of s. 178.14 of the Criminal Code are still in effect, but there seems to be overriding considerations arising from the Charter of Rights and Freedom. These considerations cause packets to be opened to determine the admissibility of wire-tap evidence. The packet can be opened for cause if the applicant shows that the applying authorities did mislead or failed to disclose in regard to the affidavit/application. This, of course, creates a dilemma in that the defence has no way of knowing what information was attested to, to obtain the authorization. This, and in some cases, other information contained in the packet are essential to the defence to prepare a proper defence to what is alleged. With the exception of B.C. most judicial jurisdictions in Canada now grant the opening of the packet as of right where the Crown leads direct or indirect evidence of intercepted private communications. That means that the defence needs not show any improprieties in terms of the Crown's disclosures to the authorizing judge at the time of application. This has raised all kinds of complications for the Crown and its duty to protect the identity of informers and undercover personnel primarily, and secondly, police operations. To accommodate the Crown in this duty, editing procedures ex parte in camera and open court processes are being devised by innovative legal minds. In the last few months there have been many cases on this point, and the law in this area is so rapidly developing that writing synopses of these cases is superfluous until the law is settled.

Due to a decision by the B.C. Supreme Court in December of 1986* our province maintains a status quo for now. In other words, in B.C. the packets are not opened as of right--yet. However, it is popularly predicted that this bastion will have to capitulate as soon as this issue reaches the Supreme Court of Canada (again).**

In the meantime, this blurp is merely an "amber light" for B.C. law enforcement authorities, that relying on the confidentiality of the packet may be the equivalent of feeling safe and secure on the Titanic.

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* *A.C. Canada v. Wetmore*, Vancouver Registry C.C. 861795

** *Wilson v. The Queen*, [1983] 9 C.C.C. (3d.) 97

UNEXPLAINED 19 MINUTES DELAY IN TAKING FIRST SAMPLE OF BREATH MEANING OF "AS SOON AS PRACTICABLE"

Regina v. *HEWSON* - County Court of Yale
Kelowna 86/51, April 1987

A demand had been made for samples of the accused's breath. All went in timely succession and without delay until the investigating officer turned the accused over to the breathalyzer operator. According to the evidence before the trial judge the 19 minutes between handing the accused over to the operator and the first sample being taken remained unexplained. The trial judge had applied the precedents in regards to the meaning of the statutory requirement that the samples be taken as soon as practicable before the resulting analyses have any evidentiary value in determining the blood-alcohol level at the time of driving. The Courts have generally held that* as soon as practicable does not mean as soon as possible and that every minute need not be accounted for. Even an unexplained gap of 30 minutes may not necessarily mean that the samples were not taken as expeditedly as statute demands. Consequently, the accused was convicted and became an appellant.

The appellant argued that the latitude applied in the leading cases no longer applies due to a decision by the B.C. Court of Appeal in 1984.** This Court of Appeal, in a wiretap issue, held that statutory requisite conditions must be proven beyond a reasonable doubt. By not explaining the 19 minute gap, the Crown had failed to prove beyond a reasonable doubt that the samples of breath were taken as soon as practicable, argued the appellant. After all, that samples must be taken expeditedly, is a "statutory condition precedent".

The County Court Judge rejected the arguments by defence counsel and held that there was no analogy between the Privacy Act case he relied on and this breathalyzer case. The requisite constitution for intercepting private communication in the case decided by the B.C. Court of Appeal, was whether the accused in that case "resorted" to the place. In other words, defence counsel asked to equate in terms of strictness, the word "resort" and the words "as soon as practicable". The word "resort" demands, in semantics alone, a much broader interpretation and far more interpretive latitude. Furthermore, where the provisions of s. 178.13 C.C. makes proof that a person resorts to a certain place a "statutory condition precedent", the court held that:

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* *R. v. Hay*, Volume 30, Page 6; *R. v. Ulrich* and *R. v. MacEacheron*, Volume 9, Page 10; *R. v. Pearce*, Volume 12, page 25; *R. v. Cambrin*

** *R. v. Miller*, [1984] 12 C.C.C. (3d) 54

> "... the words 'as soon as practicable' in s. 241(1)(c) involves presumptive proof, in absence of the evidence to the contrary."

The Court stressed unexplained delays must not be too long and held that a 19 minute gap was still acceptable. However, it warned that unacceptable gaps in terms of duration, must have a rational foundation and require evidence to be adduced so the Court can judge whether the delay brings the taking of the samples outside the conditions the law sets.

Accused Appeal dismissed
Conviction upheld

CRIMINAL "HIT AND RUN" - INTENT - KNOWLEDGE

Regina v. *HENRY* - County Court of Yale
Vernon Registry 16120, May 1987

The accused struck a pedestrian with her car. The pedestrian had moved very quickly, and according to eyewitnesses, the collision was unavoidable. The accused failed to stop; the pedestrian died from the injuries sustained. The accused was arrested 30 hours after the accident and she gave a statement how she remembers her car had bounced violently, but she had assumed she had ran over a dog. She had made no attempt to discover the cause of the bouncing. The trial Judge found that the Crown must prove that the accused knew she had collided with a person and not merely that she ought to have known, or if a reasonable person would have known in the circumstances that there had been such a collision. Only the actual knowledge of having struck a person obligated the accused to stop and fulfill all the other obligations contained in s. 236 C.C. The Crown had failed to prove such knowledge beyond a reasonable doubt and the accused was acquitted. This verdict was appealed by the Crown, which submitted:

> "... the gist of the offence, in terms of mens rea, is the leaving without stopping when an accident of any sort has occurred, and in this issue, the concern with what or with whom the vehicle contact has been made is irrelevant."

The Crown supported its submission by saying that only when a person, after stopping in such circumstances, discovers the collision is with any one of the things mentioned in s. 236 C.C. is there an obligation to remain and do all of the things the section dictates. In this case, there was a deliberate ignorance on the part of the accused (if she was to be believed) and if the case stands "wilful blindness" would be an escape for any driver in circumstances where not only common sense, but also the law dictates that he/she stops. Furthermore, the Crown had proved the "actus reus" (the wrongful act) as a fact. Due to the rational connection between that fact and the presumption that she failed to stop in order to escape civil or criminal liability, the onus is placed on the accused to disprove that there was the requisite mens rea.

Taking in consideration that it was dark and raining and that, according to an expert, the pedestrian had not collided with the front or side of the car, but with the "underneath" of the vehicle, the appeal court could not hold that the trial judge was wrong in finding that the accused had the requisite knowledge to form mens rea. Despite the fact that the accused assumed she had collided with something, section 236 does not oblige her to stop unless she knows she had collided with "a vehicle, a person or cattle in the charge of a person." Such knowledge only will trigger the presumption that the failure to stop was the escape from liability, the graveman of the offence created by the Hit and Run section.

IS A PISTOL MINUS THE MAGAZINE A FIREARM?

Regina v. Watkins and Graber - B.C. Court of Appeal
CA 005703 and CA 005767, Vancouver - January, 1987

The accused were convicted of robbing a credit union and of using a firearm while committing this crime. The alleged firearm was a 9 mm Browning pistol which takes a magazine with ammunition in the grip. Without the insertion of this magazine the pistol is not functional as the trigger mechanism is immobilized. When the gun was found in the accused's possession, the magazine was missing; there was no ammo found and the hammer was cocked.

The accused appealed the convictions for robbery on several grounds in regards to identification, and also the use of a firearm on the basis that what they had in their possession was not a firearm in accordance with the definition contained in s. 82(1) C.C.

A similar case was decided by the Supreme Court of Canada in 1983* where the robbers had used a CO2 pistol of which seven parts were missing. These parts were each essential to make the pistol functional. The Court recognized that an incomplete firearm, that cannot be made functional at the scene of a crime, is not necessarily a firearm as it was intended by Parliament when it enacted s. 82(1) C.C. It is generally understood that robbers who attack a financial institution during business hours, will make every attempt to minimize the duration of the robbery. To say that an incomplete firearm used during such a crime fits into the firearm definition, would be as absurd as excluding it from that definition if it is used in a crime as, for instance, unlawful confinement that extends over hours or days where a simple adaptation would make that same gun a functional firearm. Hence, the Supreme Court of Canada came up with the following:

> "Therefore, whatever is used on the scene of the crime must, in my view, be proven by the Crown as capable, either at the outset or through adaptation or assembly of being loaded, fired and thereby having the potential of causing serious bodily harm during the commission of the offence, or during the flight after the commission of that main offence, the hold-up" (in this case).

The Court added that if ammunition is the only thing that is missing, the gun is a firearm. In other words, loading the gun is not an adaptation.

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* *The Queen and W. Covin and The Queen and D. Covin*, Volume 15, Page 8 of this publication.

The accused, Watkins and Graber, relied on this Supreme Court of Canada decision when they argued their case before the B.C. Court of Appeal. They, in essence, claimed that if they had used a revolver and all that was missing was the ammunition, the gun would have been a firearm and they would have no grounds for appealing this matter. However, they had a pistol and it was not only the ammunition, but also the clip or magazine that was missing. Inserting this magazine empty into the gun would have functionalized the trigger mechanism, which was immobilized when they used the gun. Therefore, even if a single cartridge had been inserted in the pistol's chamber, without the magazine or clip, the gun could not have been fired and, consequently, it was incapable of causing the serious bodily harm as intended in s. 82(1) C.C. In as much as the CO2 gun of the Covins was not a firearm because of any one of the seven missing essential parts, so was Watkins' and Graber's pistol not a firearm due to the one missing essential part--the ammunition clip.

The B.C. Court of Appeal did not buy the apparent logic on the part of the appellants. Said the Court:

> "It cannot be the intention of Parliament that a gun not be an operable firearm merely because its safety disconnector is engaged (which is the case when the clip is removed from the pistol). If the gun is complete and capable of firing when loaded, then in my opinion, it should be considered a firearm under s. 82(1) of the Criminal Code."

(The underlined portion is not an emphasis but an explanatory comment by the author of this synopsis).

The Court of Appeal expressed the view that neither Parliament nor the Supreme Court of Canada had intended the narrow meaning of firearm as the appellants suggested. After recognizing that the binding precedent established in the Covin decision relaxed the burden of proof on the Crown in that it need not establish possession of ammunition on the part of the perpetrators to show that they possessed a firearm, the B.C. Court of Appeal resolved the issue by holding:

> "... 'ammunition' in this context should be read as including the paraphernalia by which the ammunition is loaded in the gun, in this case the magazine."

The appellants had also been convicted of possessing a restricted weapon without the required permit. In view of the applicable portion of the definition of restricted weapon, the Crown had to prove that the Browning pistol was "designed... to be aimed and fired by the action of one hand." Without the magazine the pistol could be fired by inserting anything into the

cavity for the ammunition clip and depressing the safety disconnector, then one could fire off a single cartridge. It is very questionable if, even using two hands, one could manage to do this, argued defence counsel. He urged the court, therefore, to find that the pistol without the clip (the way the appellants possessed it) was not a restricted weapon. The B.C. Court of Appeal rejected this argument totally and said that what defence counsel was asking the Court to do was to substitute the words "designed to" with "capable of". This would not be interpreting the law but amending it, a function not within any Court's purview.

Despite not winning any arguments in respect to the firearm issues, the Court found fault with the trial judge's consideration of the testimony by defence witnesses. A new trial was ordered.

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THE CONDUCT OF PERSONS IN AUTHORITY IS TO BE JUDGED ON WHAT THEY OUGHT TO HAVE KNOWN IN RESPECT OF CHARTER RIGHTS AT THE TIME THEY ACT. SEARCH AND SEIZURE

Regina* v. *Lacoy - B.C. Court of Appeal -
CA004884 Vancouver, September 1986

Lacoy was under surveillance for importing cocaine. He arrived at the Sea-Tac airport in Washington and made his way by car to the Canadian border. Police alerted the Canadian Customs and when the accused attempted to enter Canada he was placed in an interview room and searched. Three lots of cocaine were found on his person. All of this happened on May 2nd, 1985.

Although nothing in the answers to routine questions justified the search, the order was given to pull him in for further examination and a search. The search took place in an examination room. The inspectors who conducted the search had reasonable and probable grounds for doing so due to the information they received from the police. However, none of this was relayed to the accused, and nothing in terms of arrest, warnings and rights were given until the cocaine was found.

At the time of this incident the legal precedents were quite clear; there was no detention in a situation like this until an arrest was made or such physical control was exercised over a person that detention is the only reasonable inference one could draw from the circumstances. Twenty-one days after this incident, the Supreme Court of Canada did shed a different light on this issue, in the infamous Therens* decision, and more recently, in the Collins** case. Detention received a less stringent definition and, in general, one is, for the purpose of the rights this triggers under the Charter, detained when being stopped by a person in authority and generally in a form of legal jeopardy that calls for or makes it in the person's interest to receive legal advice, whether or not he requests such consultation.

The accused had requested, subsequent to his arrest, to contact his counsel. The customs inspectors told him to wait until police arrived and the police officers would not allow him to call until a search of his home was under way. It was particularly the delay the police officers caused in the accused's access to counsel that caused the trial judge to exclude the cocaine from

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

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

being admitted into evidence. He totally rejected the Crown's submission that, due to the law being what it was on May 2nd, 1985, the police officers had acted in good faith. He was of the view that the police were agents of the State who had acted on a mistake of law. In as much as such a mistake on the part of the accused would not provide him with an excuse (a claim he was mistaken about the law re: bringing narcotics into Canada), it could not justify the actions of police if they were based on their erroneous perceptions of the law. Police are agents of the executive branch of government, the trial judge reasoned, and not independent of political authority. In other words, the issue is not one between the accused and independent officers, but clearly between the State and the accused. He identified the senior level of government in this case to be the Federal government, not because they had enacted the statute under which the accused was charged, but because they employ the R.C.M. Police personnel.

The Crown appealed the accused's acquittal to the B.C. Court of Appeal, which clearly had resolved these issues in two cases recently decided by them.* The Court of Appeal gave a synopsis of what it decided, particularly in the Gladstone decision, as follows:

> "I held that the conduct of the officers is to be judged in relation to what they know or ought to have known in respect of Charter rights at the time the search took place."

The trial judge had "refused" to follow this binding decision, and he was erroneous in law when he rejected the "good faith" submission of the Crown.

However, there were a number of other issues to be considered in this case, one of which is the Customs Officers complying with the Customs Act. Section 143 stipulates that before a person is searched, he must be made aware that when he disputes the reason for it, he must be taken before a Chief Customs Officer or a Justice of the Peace to determine the reasonable cause for the search.

Crown's appeal allowed
New trial ordered.

Comment:

This case could well make history, if it reaches the Supreme Court of Canada, on the issue of good faith and, if some relevance is seen in this, the status of the police. The trial judge Americanized the Canadian relationship between

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* *R. v. Gladstone* and *R. v. Rodenbush and Rodenbush*, Volume 22, Page 20 of this publication.

the executive branch of government and the office of constable - the surrogate citizen. Also, in this regard, the trial judge seemed to have failed to follow the common law. However, the status of police and the doctrine of the separation of powers in respect to their relationship with the executive branch of government may well be found irrelevant to the issues involved in this case. Though the officer is a free agent of his office and not an agent of the executive branch of government, he does join the interest of the State in its criminal dispute and hence its prosecutorial objectives whenever he investigates an apparent criminal incident. The trial judge had placed the constable much closer to the executive branch and we must hope that the unique position of the "constable" be maintained in Canada. Only ignorance of its legal historical development can erase this.

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SEXUAL ASSAULT - HONEST BUT MISTAKEN BELIEF RE: CONSENT
ADMISSIBILITY OF SIMILAR FACT EVIDENCE

The Queen and Robertson **- Supreme Court of Canada -**
June 1987

The accused sexually assaulted one of two female roommates who shared an apartment. He had, with violence, overcome the girl's objections and had sexual intercourse with her. He was a stranger to the complainant and had only learned a few days previous to the encounter from the complainant's roommate about the girl's living arrangements. He had a general conversation with the victim's roommate in a convenience store where she was a sales person, and had promptly asked her if she would go to bed with him. She had declined this generous offer.

At trial, the accused conceded the assault including the intercourse, but claimed that he had a mistaken, though honest, belief that she had consented. This claim was not made by means of testimony on the part of the accused or defence witnesses, but by claiming that the inconsistencies in the complainant's testimony was sufficient for the jury to conclude that there was at least doubt about the issue of consent. The trial judge did not instruct the jury on the 'Papajohn' case* or on s. 244(4) c.c. (consent to sexual conduct) and the accused was convicted.

The trial judge had also admitted into evidence the complainant's roommate's testimony that she had, just a few days before, been propositioned by the accused.

Claiming that the lack of instructions to the jury and the admission of the sexual proposition as "similar fact" evidence were legal flaws that entitled him to a reversal of the jury's verdict, the accused appealed and ended up in the Supreme Court of Canada.

In regard to the issue of consent, the defence counsel argued that proof of the accused's knowledge that he had no consent was an essential ingredient (an element) of the offence and had to be proved by the Crown beyond a reasonable doubt. In other words, the accused need not raise the issue and, if at the conclusion of the Crown's case there is no such proof, there is no case to be met.

The Supreme Court of Canada hardly agreed with this defence theory. Firstly the Court held that s. 244(4) C.C. clearly shows that a "belief of consent on the part of the complainant of assault" is a defence of mistake of fact.

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* ***Papajohn v. The Queen***, [1980] S.C.R. 120

On the question whether "knowledge of lack of consent" is one element of the offence or a defence of mistake of fact, the Court was unanimous:

> "... there must be evidence that gives an air of reality to the accused's argument that he believed the complainant was consenting before the issue goes to the jury.... there are two separate burdens in relation to the issue of honest but mistaken belief - the evidentiary burden and the burden of persuasion. Evidence must be introduced that satisfies the judge that the issue should be put to the jury. Such evidence may be introduced by the Crown or by the defence. The accused bears the evidentiary burden only in the limited sense that, if there is nothing in the Crown's case to indicate that the accused honestly believed in the complainant's consent, then the accused will have to introduce evidence if he wishes the issue to reach the jury. Once the issue is put to the jury the Crown bears the risk of not being able to persuade the jury of the accused's guilt."

The Supreme Court of Canada reiterated this theory when dealing with the Judge's obligation to put defenses to the jury. Before such obligation arises, there must be some evidence upon which the defence can be based. The trial must have revealed some evidentiary basis for the suggested defence. When a Judge is asked to put a specific defence to the jury, then, in the consideration to do so, he must not only consider whether there is evidence relevant to the defence but if the evidence relied on is true and sufficient.

The defence of mistake of fact is merely a denial of mens rea. In the case of sexual assault, an honest belief that there is consent removes the kernel element of the crime, that is the deliberate touching with the knowledge that there is no consent. The lack of such knowledge then does not arise unless there is some evidence (crown or defence) to support it. In addition, where lack of knowledge is the result of recklessness (an indifference whether or not there is consent) that lack of knowledge cannot serve as a defence. Said the Supreme Court of Canada in 1985*, where effect was given by a trial judge to a claim of lack of knowledge that there was no consent:

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* *Sansregret* v. *The Queen*, [1985] 1 S.C.R. 570

> "... the complainant consented out of fear and the appellant was wilfully blind to the existing circumstances, seeing only what he wished to see. Where the accused is deliberately ignorant as a result of blinding himself to reality the law, presumes knowledge..."

As it stands, since s. 244(4) C.C. has come into effect the jury must be instructed that the belief of the accused need not be based on reasonable and probable grounds, but ...

> "... that, when considering all the evidence relating to the question of the honesty of the accused's asserted belief in consent, they must consider the presence or absence of reasonable grounds for that belief."*

All this, of course, relates to the means to the end which is to determine if the accused had an honest belief that there was consent. However, when a jury finds, as a fact, that <u>he did have such belief</u> the requisite ingredient of criminal intent is negated and it must return a verdict of not guilty. The conclusion of honest belief, can result when it is not reasonable for the accused to have such belief.**

In other words, the jury is entitled to consider the matter of reasonable grounds for the belief, but can find that there was such an honest but mistaken belief, despite the unreasonableness that lead the accused to this belief.

The matter of reasonable grounds is simply part of the consideration and deliberation, or in the words of the Supreme Court of Canada**:

> "The reasonableness...of the accused's belief is only evidence for, or against, the view that the belief was actually held..."

Addressing the apparent fear that this judicial law would lead to absurdities the Court said:

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* From Reasons for Judgement in ***Laybourne, Bubmer and Illingworth v. The Queen***, Supreme Court of Canada, 1986

** ***Papajohn v. The Queen***, [1980] 2 S.C.R. 120

> "It will be a rare day when the jury is satisfied as to the existence of an unreasonable belief."

On this issue the Court concluded that the trial judge was, in view of the evidence before him, not in a position to put the defence of a mistaken, but honest belief, to the jury.

The trial judge had allowed in evidence the accused's sexual proposition to the complainant's roommate. Defence counsel argued that this was evidence regarding a separate and unrelated incident that tends to show discreditable conduct on past occasions, introduced solely to demonstrate the accused's bad disposition. The rules of evidence render such prejudicial evidence inadmissible unless it is so probative that it totally outweighs the prejudice it creates. Did this evidence assist to prove what was alleged against the accused? If the evidence was similar fact evidence, it is not admissible to prove propensities or inclinations on the part of the accused, or to allow an inference of "...he did it before so he likely did it again...", but only to show a consistency in the mode of operation. For instance, similar fact evidence has been admitted to show a system of operation, a plan on the part of the accused; a means to provide identity (this is the same person), or to rebut the defence of accident or mistake. When these issues arise, similar fact evidence may be used to show that it was not likely a person other than the accused who committed the crime, or that what he did was not an innocent act in that he used the same strategy before.

The question then is, that if the evidence of the sexual proposition is relevant (everyone agreed it was), is it admissible as similar fact evidence?

In view of the explanation above, one of the first questions to be answered is if the sexual proposition to the roommate amounts to discreditable conduct. It most certainly was not a crime or connected to criminal conduct. The Supreme Court of Canada illustrated by means of an English case where the evidence of a non-criminal, but immoral or discreditable behaviour could be admissible. A Mr. Barrington had been charged with committing indecencies with young girls. To bolster the evidence, the Crown had called three young girls to the stand (not victims of the alleged indecencies), and had adduced evidence how they had been approached by the accused for babysitting services but were instead shown pornographic pictures. He (Mr. Barrington) had not committed any crime or offence in relation to these witnesses, and they did not testify to any activities on the part of Barrington that amounted to an offence. Yet this evidence had been treated as similar fact evidence, because the demeanor and methodology in luring the young girls had been very similar to that of those that were allegedly victimized by acts of indecencies.

Having determined that the accused's sexual proposition to the complainant's roommate could be admissible provided the probative value outweighs the prejudice, if any, the Court examined what the evidence could cause to be inferred or corroborate.

The evidence of the proposition would assist to establish the roommate's credibility; it showed possible motive and intent; the rebuffing of the accused could explain why he turned his attention on the complainant. These possibilities are somewhat remote and the evidence was found to have no great probative value. Secondly, was any prejudice against the accused caused by the sexual proposition? In comparison to Mr. Barrington's activities (showing pornographic pictures to young girls) the accused's request to be allowed to sleep with a woman approximately his own age is particularly, in contemporary society, hardly a discreditable act. Though the evidence does cause prejudice, it was very little. In view of this balance, the Supreme Court of Canada concluded that the evidence had been admitted properly.

Crown's appeal from an order for a new trial was allowed. Accused's conviction upheld.

SCHOOL PRINCIPAL SEARCHING STUDENT FOR DRUGS DOES CHARTER APPLY? IF SO, WAS SEARCH REASONABLE?

Regina v. *J.M.G.* - Ontario Court of Appeal - 29 C.C.C. (3d) 455

The school principal was told that a 14 year old grade 7 student had narcotics hidden in his socks. The principal and the vice-principal brought the youth to their office and informed him how they had come to suspect that he was in possession of drugs and he was asked to take off his socks and shoes. Marijuana cigarettes were found and, consequently, the youth was convicted of possession. There was apparently some interest in this case and the Civil Liberties Association became an intervenor in the appeal process.

There appeared little or no dispute over the procedure followed by the principal. The youth's father was present when the boy, after the search, made some inculpatory comment. No issue was taken with this part, but the appellant youth did argue that the Charter applied to the school system and its personnel and that they (the principal and vice-principal) had violated his Charter right to be secure against unreasonable search and seizure. They simply did not have the requisite grounds for the search and, furthermore, it was not the principal's function to enforce federal laws. He should have alerted police and let them handle the matter.

Without addressing the issue in depth, the Ontario Court of Appeal held that the school and its personnel and management are subject to the Charter. (This made it unnecessary to decide if the Charter also applies to private individuals*). The principal had a discretion to call police, handle it himself or turn his information over to the parents. The offence was very serious in terms of school discipline; as far as a crime is concerned, it was not an offence of great magnitude. The principal exercised his discretion well in the circumstances. His actions were not only justified; they were dictated by his responsibility. The grounds for the search were adequate and justified the "not excessively intrusive search". For the good order and discipline in the school, it was reasonable to confront the student with the information and have him either prove or disprove the allegation.

The next question was whether the youth had been detained and should have been informed of his right to counsel before he was searched. On the surface, one would be inclined to conclude that the youth's right to counsel had been violated. His movements were controlled; a demand was made of him that could have considerable legal consequences for him and he was impeded in having

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* See *Regina* v. *Lerke*, Volume 24, Page 44, and Volume 19, Page 12 of this publication.

access to counsel. He was not even informed of this right. However, the Court found that there was no detention; what happened was all part and parcel of going to school. By the very nature of the school system, reasonable discipline and investigations into breaches of that discipline are part of attendance.

The Court warned that there may be situations where a principal, in deciding to handle an investigation, encounters circumstances whereby his/her actions make him/her an agent of the police. This applies particularly when the actions go beyond the performance of duty in maintaining order and discipline, as required in a school environment. Bringing a student to an office for questioning and searching may well constitute detention, thereby causing a need for the Charter of Rights.

Conviction was found to be proper.

Note:

It seems that the Supreme Court of Canada agrees with the Ontario Court of Appeal, as it denied leave for further appeal.

WHAT INTENT MUST THE CROWN PROVE TO SHOW CRIMINAL NEGLIGENCE IN THE OPERATION OF A MOTOR VEHICLE?

Regina v. Waite - 28 C.C.C. (3d) 326
Ontario Court of Appeal

The church organized a picnic. Three tractors towing wagons with hay and peole were proceeding along a country road; it was dusk and right around the time headlights were required. The accused was part of the hay-ride group and had been following this small convoy in his car for some distance. Some of the young people had jumped off the hay wagons and were walking on the road side of the procession. The accused passed the wagons and drove some distance up ahead. He turned around and, at a high rate of speed with his fog lights on, he drove on the left side of the road heading straight for the lead tractor. He said to his passengers, "Let's see how close we can get." At the last moment he crossed to his own side of the road knocking down five of the walking young hay-riders; four were killed and one was seriously injured. The accused had been drinking since that morning and his blood alcohol level was in excess of 80 mg. Immediately, after pulling over, the accused heaved a cooler of beer into the field. He was charged with four counts of criminal negligence causing death and one causing bodily harm. He was convicted of the included offence of dangerous driving; a verdict the Crown appealed to the Ontario Court of Appeal.

It is reasonable to assume that the accused had no intentions to cause the tragic devastation that resulted from his "chicken" game. It was obvious that his manner of driving was advertent. Is that sufficient to prove the intent requisite to criminal negligence? Is the test to be applied an objective or subjective one? If it is subjective then the Crown most prove that the accused had a specific intent to drive the way he did, but was indifferent to the consequences. If the objective test is applied the Crown needs only to prove the manner of driving. In the absence of that being an involuntary act, it can then be assumed it was done heedfully, advertently, and with intent.

The jury had asked for specific instructions on the distinction between dangerous driving and criminal negligent driving. The trial judge had responded that in dangerous driving the state of mind of the driver is not important. "You look objectively at the manner of driving. You just look at the manner of driving."

For criminal negligence the jury had been instructed to firstly look at the driving and if that was capable of criminal negligence "you also look at the subjective element", at the mind of the driver. The manner of driving must have been deliberate and there must have been indifference to the consequences on the part of the driver.

The Ontario Court of Appeal disagreed with these instructions. It said:

> "Criminal negligence, like many criminal offenses, requires a finding of fault, including mens rea or a guilty mind of the accused. However, that guilty mind can be determined objectively from the actions or conduct of the accused."

In other words, the requisite intent can be inferred from the advertence in regard to the manner of driving.

Crown's Appeal allowed.
New trial ordered.

Notes for the Curious

The reason for the judgement by the Ontario Court of Appeal are interesting for those who are curious about the historical development of criminal negligence. You can nearly detect a tone of facetiousness when the Court remarks that the law of criminal negligence was understood as well as the law of gravity until parliament in 1955 created the current definition of it. It seems implied that the parliament fixed something that wasn't broke, despite the fact that what was then put in statutory form was already established in common law. Furthermore, criminal negligence arose predominantly from the operation of a motor vehicle and often it was a case of motor manslaughter. The question continuously arose as to what degree of negligence was required to support a conviction. What did not assist in the confusion is that dangerous driving was removed from the Criminal Code for five years (1955-1960). It created a vacuum that was more or less filled by criminal negligence and careless driving provisions in the provincial traffic statutes. In 1960, it had to find its place again while it seemed that we were still struggling to discover precisely what criminal negligence meant. (This theory re: the dangerous driving offence was not inferred from the judgement and is the author's view only).

In 1892 the parliament of Canada created, in our first Criminal Code, an offence for the absence of care with anything under a person's control that could cause danger to life. Not taking reasonable care to avoid such danger constituted an offence. Fourteen years later the section was reworded and it became more clear that the lack of precaution and neglect were only punishable when bodily injury was the consequence of such neglect.

In 1921 the Supreme Court of Canada held that due to the wording and application of the section, there was not really any distinction between civil or common negligence and negligence punishable under criminal law. In other words, neglect that would give rise to civil responsibility was not distinct from that calling for a criminal penalty.

This created judicial comments indicating strong disagreement with such equalization. In 1926, in dealing with this issue, the Ontario Court of Appeal clearly stated how this lack of distinction between civil and criminal neglect was inconsistent with the basic principles of law. After stating, in strong terms, that there cannot be a criminal liability unless the negligence amounts to a crime the Court said, quoting from a 1925 English case:

> "In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In a Criminal Court, on the contrary, the amount and degree of negligence are the determining question. There must be mens rea."

(Emphasis added)

In other words, in civil law, if common negligence is determined, which may have been inadvertent, the judgement turns not on the degree of neglect but on the consequence of it. In criminal law, the penalty must be consistent with, and deter the advertence re: wilfulness of the perpetrator rather than with the inadvertent consequences.

In criminal negligence the test to determine the requisite intent became an objective one. That means that the Crown need not specifically prove that an accused intended to be negligent. Advertence may be inferred from the actions. If those actions showed a wanton and reckless disregard (an indifference as to the consequences of the advertent neglect) then it may be assumed that there was intent to be criminally negligent. This was simple and as understandable as the law of gravity.

In 1955 our current definition of criminal negligence was inserted in our Criminal Code. It ought not to have changed things as it was a statutory reiteration of what already existed at common law. (Note that the current section 202 C.C. does not create an offence but simply defines it so we may apply it to the specific offenses where criminal negligence is a kernel ingredient). From 1955 until 1960 nothing did change. Many courts of superior jurisdiction across Canada said, in essence, "There is nothing new under the sun" in response to the 1955 definition of criminal negligence.

In 1960 some innovative defence lawyer defended a person charged with careless driving under a provincial traffic law. He argued that the careless driving section was, ultra vires, the provincial government as the parliament of Canada had occupied the very field of degree of neglect in the operation of a motor vehicle the provincial legislation intended to deter by its careless driving section. He submitted that the way criminal negligence was then interpreted by the Courts no longer made it distinct from careless driving. A dictum known as the "paramountcy doctrine" dictates that where both senior levels of government have powers to legislate, the federal enactments supersede the provincial ones rendering the latter, at least, inoperable where the two laws are occupying the same field with the same objectives. The Supreme Court of Canada ended up responding to this apparently valid argument. This august judicial body found that interpreting the two enactments, and considering the enabling constitutional provisions for the respective senior governments to legislate in this area (the fundamental assigned responsibilities of the federal and the provincial governments), there was a difference between criminal negligent driving and careless driving. "It is a difference in kind and not merely one of degree". At common law (the judicial application of law), there is no criminal liability "for harm caused by inadvertence" (an unintended act - heedlessness). Intent is a prerequisite to criminal liability. Mens rea (criminal mind) consists of two categories, intention (subdividable in specific and general intent), and recklessness. "The difference between recklessness and negligence is the difference between advertence and inadvertence". Recklessness is not a degree of negligence. The former is a real crime particularly if harm results from it while negligence is not a moral epithet. The parliament of Canada had simply included in its criminal law a definition for offenses of advertent negligence if there are consequences, or if it is in the operation of some motor-powered means of transport. "Criminal negligence" is actually a misleading title and should be "advertent negligence". The provincial legislation deals with and may include "inadvertent" negligence in its offenses. Hence, the "advertent (criminal) negligence is distinct from the inadvertent (careless) negligence held the Supreme Court of Canada.

In 1960, this case altered the requisite intent to convict for criminal negligent driving. For instance, advertence means an awareness, a subjective awareness, on the part of the accused. Consequently, it seemed that to salvage the much needed provincial law a greater degree of negligence had to be proved for criminal negligence than before. At least the objective test to determine the intent by inference seemed out.

This decision had caused considerable confusion and many courts differed in the application of that law. In 1972, the Supreme Court of Canada had the opportunity for another kick at the cat. Someone had deliberately used his car to injure a person. When tried for criminal negligent driving the trial judge had told the jury that they had to find, beyond a reasonable doubt, that the accused had deliberately run down his victim and had thereby caused him

injuries. One Justice of the Supreme Court of Canada said that subjective intent (having to prove actual intent, criminal state of mind) was too high an obligation on the Crown. The majority, however, maintained what that Court decided in 1960.

In 1975 the Supreme Court of Canada heard an appeal related to a pilot charged with flying very low over a couple of men with the intent to frighten them. The act was one of comradery rather than one of revenge. Nevertheless, he flew so low that he struck and killed one of them. In that case, the Supreme Court of Canada held that the conduct of the pilot, viewed objectively without anything further, is sufficient to show that he was criminally negligent. In other words, it seemed, on the one hand, that the objective test in respect to intent was restored. However, the alternative interpretation of the judgement is that the Crown was obliged to prove subjective intent to act recklessly on the part of the accused as a necessary ingredient of criminal negligence. What it comes down to is that the Supreme Court of Canada spoke out of both corners of its mouth. Even in the reasons authored by one Justice one can find support for either theory in deciding this "hay ride" disaster. The Court of Appeal of Ontario did find the support for objective testing for intent to be the strongest. Particularly the phrase in the majority judgement by the Supreme Court of Canada: "In most cases, the fact itself proves the intent" convinced the Ontario Court of Appeal to hold as it did. What appeared to comfort this Court of Appeal in its decision was that their counterparts in other provinces had continued to apply the objective test after the 1960 Supreme Court of Canada decision.

Therefore, the Court held that the instructions to the jury that they had to test the intent in respect to the driving objectively and the intent to be reckless subjectively were erroneous. The trial judge should have read the definition of criminal negligence and instructed the jury to apply an objective test as to the intent for the driving which had to amount to a marked and substantial departure from the standard of a reasonable driver.

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VALIDITY OF INVESTIGATIVE AND RECOMMENDATORY COMMISSION INQUIRING INTO POLICE PROCEDURES AND ACTIVITIES

Re: Robinson et al and The Queen - B.C. Supreme Court
28 C.C.C. (3d) 489

A prisoner was booked for being intoxicated in a public place. He complained to have sustained a serious knee injury due to treatment he received from police personnel. Not being satisfied with the decision of the police disciplinary authority that no proceedings would commence under the provincial Police Act, he requested a public inquiry by the police board, the employer of the officers who booked the complainant and were in charge of the jail at the time.

This public inquiry simply failed to identify the officer(s) responsible for the injury to the complainant and, hence, no action could be taken against anyone. The police board, in its written reasons, were critical of: the procedures used to identify the parties responsible; record-keeping; the complainant's release while injured; there not being any explanation how the injury occurred; and that some of the officers had covered up events. They ordered the Chief Constable to review the matter or for the provincial Police Commission to do so.

This caused the provincial Executive Council (the cabinet) to enact an order in Council appointing members of the Police Commission to be commissioners under the Public Inquiry Act to "inquire and report on all matters associated with the alleged injuries sustained..." by the complainant; to do the same on the internal police investigation, the hearings under the Police Act and determine if truthful evidence was adduced at these hearings. The gist of the object of the inquiry by the Police Commission was to determine the above; as well as the time, place and by whom the injuries were inflicted.

The officers on duty while the complainant was booked, detained and released, petitioned the B.C. Supreme Court to quash the order in council as it was outside the jurisdiction of the provincial government.

The arguments advanced are interesting. Our constitution divides the onus to govern between two senior levels of government. Each receives its legislative authority directly from the constitution. This means that their respective powers are original, which is the most fundamental characteristic of a federation - a federal system of government.

Our constitution gave jurisdiction to create criminal laws and all criminal procedures to the central or federal government and the enforcement of those laws to the provinces (the administration of justice). The Courts have the

responsibility to determine if there is criminal or civil liability in any legal disputes. In this case, there is a complaint of a criminal assault, and the provincial government provided, by their order in council, a criminal procedure to attach criminal liability to someone. "This is outside the province's ambit", said the petitioners (the officers on duty in the jail at the time). Furthermore, the provincial government is attempting to short-circuit the system they said. By appointing an investigative commission with power to subpoena the right to remain silent is abridged. It is for police to investigate crime by legal means and sometimes with the assistance of judicial licence (warrants, etc.). This commission does investigate outside the police mandate. In other words, public inquiries are not designed to investigate matters of this kind. The commission's mandate usurps the function of the police and the Court, and applies the awesome powers of a public inquiry commissioner to criminal proceedings.

Furthermore, the inquiry will cause double jeopardy for officers acquitted by the police board (s. 7 Charter), and their appearance before the commission will inevitably breach the right of protection against self-crimination. (s. 13 Charter), submitted counsel for the petitioning police officers.

As convincing as these arguments sound on the surface, they were all rejected by the Supreme Court Justice. In terms of the jurisdiction and legislative competence of the provincial government to enact the Order in Council, the Court held that it was intra vires that government. The Order in Council did not directly or indirectly legislate criminal procedure. Neither was the commission empowered to determine criminal or civil liabilities. The Province may create agencies that can inquire into the health of certain administrative areas for which it is responsible. That these agencies have power to subpoena witnesses and take evidence under oath from persons who may potentially be accused of an offence later is not new or improper so long as the matter inquired into is one of a valid provincial purpose. It is in the provincial ambit and interest that its law enforcement agencies operate properly in pursuit of their lawful objectives, free of corruption and criminal activities. If the inquiry is for recommendatory and not adjudicative purposes, the law enabling the inquiry does not go beyond the legislative competence of the province. The Justice said:

> "... a province can investigate the allegedly illegal or reprehensible behaviour of a police force within its constitutional jurisdiction, as well as the allegedly illegal actions of any peace officer."

None of the Charter and constitutional arguments, as explained above, have any validity as the commission:

- has no judicial powers;
- cannot make any determinations as to liability or criminal guilt or innocence; and
- can only serve a subpoena on persons as witnesses to assist them in their recommendatory objectives as opposed to serving a summons on persons to answer allegations.

Petition Dismissed.

BREATHALYZER TEST

PROCRASTINATION - INERTIA - EXPERIMENTATION VIS-A-VIS "AS SOON AS PRACTICABLE"

Regina v. Emslie - County Court of Yale - Kamloops No. 1316 - April 1987

The accused drew attention to himself by driving the wrong way up a one-way street. He procrastinated in giving a sample of his breath firstly for the Alert test and later for the breathalyzer. He wanted a glass of water, smoke his pipe, relieve himself, etc. He was as innovative in putting off the inevitable as a child is at bedtime. On the other side, the constable had recently completed an "Alert" course and conceded he made the Alert demand strictly to experiment with and practice the handling of the equipment. He candidly testified that he was sure of the accused's impairment, and that had he passed the Alert test, he would still have made a demand for breath samples for breathalyzer analyses. Between the two of them, some forty minutes had been wasted somewhat unnecessarily. If the word "practicable" in the Criminal Code means capability of doing something, one would be inclined to conclude that the breathalyzer test could have been done much earlier. However, the trial judge concluded that the delay had been mainly caused by the accused and some by the experimenting constable. The accused had given a sample of breath for the Alert test (after four attempts), but refused to give samples for the breathalyzer test. He was convicted of "refusing" and appealed that conviction.

The accused's argument was that when he was finally in front of the breathalyzer, it was in terms of time well beyond the statutory "as soon as practicable". He therefore had a reasonable excuse to refuse to give a breath sample.

The law is that a peace officer is entitled to administer an Alert test despite the fact that he is of the opinion the suspect's ability to drive is impaired by alcohol. The delay that such a test causes will not effect the 'as soon as practicable' requirement*, provided, of course, that it is administered with reasonable expediency.

The trial judge had found as a fact that the excessive delay had been caused by the accused. The officer had done what he was entitled to do and he had been prepared to take the breath samples the accused refused to give, within a reasonably prompt time, in the circumstances.

Accused's Appeal Dismissed
Conviction for 'refusing' Upheld

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* *Regina v. Jensen*, [1982] C.C.C. (3d) 11

ARRESTING A PERSON FOR BEING DRUNK IN PUBLIC TO DISCUSS HIS IDENTITY AND LINK HIM TO THE ABANDONED H & R CAR

Regina v. *Gilliland* - County Court of Vancouver - No. C.C. 861762 - May 1987

A cadillac went through a red light on a main thoroughfare and struck a vehicle proceeding on the green light. The cadillac failed to stop and also continued on its way when it crashed into an oncoming car shortly after. Police found a heavily damaged cadillac parked a few streets over, minutes after the accident. Approximately 10 minutes later they found the accused in an apparent intoxicated state, walking a few blocks from the car was found. It was near midnight and the man refused to answer any questions or identify himself. The officers arrested him for intoxication under the Liquor Laws and found, subsequently, that he was the owner of the damaged cadillac. He was then arrested for impaired driving and Hit and Run. He was convicted of refusing to blow and acquitted of impaired driving and hit and run. He appealed this conviction.

Needless to say, everything hinged on the validity of the original arrest under the Liquor Control Act. It, for lack of a better term, got the ball rolling. Secondly, ownership of the cadillac is hardly reasonable and probable grounds for believing the accused drove it. Consequently, the demand for a breath sample was not lawful argued the defence.

The trial judge had indicated some doubt about the humanitarian aspects of the original arrest (drunk in public). The officers had testified that they were concerned for the safety of the accused in that he was unable to look after himself. "I think he was arrested because they were looking for somebody who had possibly been involved in the accident at Fir and Broadway..." concluded the trial judge. However, the motive for arrest was not his to judge he held, and concluded that the demand was lawful and that the accused failed to comply. The appeal court judge felt that this was an error on the trial judge's part. It was for him to determine that the arrest was not an infringement of the accused's Charter right not to be arbitrarily detained. These defence arguments are valid and sustainable and, therefore, the appeal was allowed and a new trial ordered.

Note:

The County Court Judge did not say that the arrest in the circumstances was improper or that the demand was not lawful. He only found that the trial judge had misdirected himself in saying that the validity of the original arrest was not for him to judge.

RIGHT TO PRIVACY WHEN CONSULTING COUNSEL

The Queen and Rusin - County Court of Vancouver - CC 861850 Vancouver, May 1987

The accused appealed his conviction of having refused to give samples of his breath consequent to a demand. One of the key issues in this appeal was his right to counsel.

The police officer had made the demand and immediately made the accused aware of his right to counsel. As soon as they arrived at the police station the accused was given access to a phone. When he had difficulty in reaching his lawyer the officer assisted him. The phone used was in a booth across the hall from the breathalyzer room. There was a door for the booth, but the accused did not close it. The officer conceded that he had been able to hear the accused's side of the conversation and the lawyer had recalled that he had heard the officer's voice in the background. After the call the accused refused and claimed that he had not been driving.

The defence argued that:

1. The accused was entitled to counsel privately whether or not privacy was requested;

2. Consequently, the accused's constitutional right to counsel was infringed; and

3. This infringement warrants the exclusion of the evidence of the refusal.

To avoid this infringement the officer should have told the accused that he could close the door if he wanted to, or he should have closed the booth door himself.

The Crown countered that the accused, by leaving the door open, had waived his right to privacy. However, the cases on this point say that a waiver must be "clear and unequivocal" and made "with full knowledge of the rights...and of the effect the waiver will have on those rights". As an example of this, see the recent decision by the Supreme Court of Canada on the aspect of judicial fairness in respect to a waiver of a right.* It must be made not just with an operating mind, but also with awareness of consequences. In other words, you nearly have to be a sober lawyer to be able to waive a Charter right.

It simply means that police officers cannot infer that detained persons have waived their right to counsel simply because they did not request that right. This, of course, includes the right to consult counsel in private. In this

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* *R. v. Clarkson*, Volume 24, Page 38 of this publication

case, the officer could not infer a waiver regarding privacy simply because the accused left the door of the phone booth open. The B.C. Court of Appeal found that there was an infringement of the right to private consultation.

As you can read in the Supreme Court of Canada decision (Therens)* on this point that the material facts that arise from and after the infringement are, in cases where a person is by law obliged to provide authorities with incriminating evidence, inadmissible in evidence. Due to that obligation, any infringement of a right will cause disrepute on the administration of justice. In other words, exclusion follows automatically in such cases. In Therens the breathalyzer readings were excluded and, argued defence counsel, in this case refusal must be excluded.

The County Court Judge held that all the confusion the Therens' decision caused has now been settled in the very recent Supreme Court of Canada decision in Collins.** It is not if the actions on the part of police could bring disrepute on the administration of justice, but whether the admission of evidence could. (Note: Not "would").

Applying this test, the Court found that the refusal by the accused must be admitted into evidence. Furthermore, the accused should have shown on the balance of probabilities that the admission of the evidence could bring disrepute to the administration of justice. Also, the officer acted in good faith throughout. The accused would have to show that the quality of the advice he received was tempered by counsel's knowledge that the officers were nearby. Finally, there is no apparent connection between the lack of privacy and the refusal to comply with the demand for samples of breath. Afterall, section 24(2) Charter says that the evidence to be excluded must have been obtained "in a manner that infringed or denied any right". This does not call for "cause and effect" test, but means that there must be some reasonable relationship between the obtaining of the evidence and the infringement. Finally, the Court observed: "The appellant could easily have closed the door himself." That would have been a simple remedy to the "technical" infringement that occurred in this case.

Accused's Appeal dismissed
Conviction for refusal upheld.

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* *R. v. Therens*, Volume 21, Page 1 of this publication

** *R. v. Collins*, Volume 27, Page 1 of this publication

RETURN OF SEIZED MONEY TO PERSON CHARGED

Regina v. *Grant* - County Court of Kootenay - Nelson C.C. 27/85 - January 1985.

A large store's daily take was taken from the store's bookkeeper. Consequently, Mr. Grant was charged with robbery and was acquitted. He applied to this Court that the nearly $7000 police took from him upon his arrest would be returned to him.

The police department, in whose jurisdiction the robbery took place, had requested a neighbouring force to go to Mr. Grant's home and arrest him for the robbery. When Grant was placed in the cells of this neighboring force he was told that police wanted the proceeds of the robbery. Grant used a phone and he and the officer went to a certain address where a woman turned over a brown paper bag containing $6765.

The victim had no idea how much money was taken; there were problems in regards to identity, and the Crown had not been able to get the money admitted in evidence. The statements the accused made during his encounter with the police, and when turning the money over to them were found to be involuntary and, hence, inadmissible.

In other words, the Crown had not been able to show that the monies were the proceeds of the robbery. Despite the Crown's submission that Mr. Grant should show the money was lawfully his, his application to have the funds returned to him was granted. The money was in Grant's possession and, in the absence of proof to the contrary, that possession was lawful.

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MEANING OF "FRAUD" IN OBTAINING CONSENT FOR ASSAULT

Regina v. Petrozzi - B.C. Court of Appeal - CA 005025 - May 1987

The accused picked up a prostitute and promised to pay her $100 for two sexual services. At the time he made the offer he had no intentions of paying the $100. As a matter of fact he only had $10, and he did give that money to the girl. Things started to go a little off track in terms of the prostitute's consent. He, according to the complainant, became quite violent when she demanded the money in advance. He forced himself on her, had his sex and gave her $10. When police happened on the scene the prostitute escaped from the accused and she complained to the officers. A charge of sexual assault resulted.

The trial judge had instructed the jury that if they found that the accused had obtained consent by fraud then there was no consent. The accused appealed his conviction saying that this instruction was wrong and that fraud by which consent is obtained must be, as it was in the old rape section, a representation in respect to the quality or nature of the act, or regarding the identity of the perpetration. If what the accused did amounted to fraud, it was in respect to a business transaction. The question is whether the complainant's consent was vitiated by the accused's intention not to pay, and if s. 244(3)(c) C.C. now allows acceptance of a much broader meaning of fraud in respect to obtaining consent, then it used to be under the old rape section. The new section states that "no consent is obtained where the complainant submits or does not resist by reason of fraud".

The B.C. Court of Appeal was quite aware that it was open to them to consider anew the issue of fraud in regard to obtaining consent for assault. However, the old rape section was, in essence, a reiteration of the common law as it then was. Some theorists claim that if law is repealed it revives the common law. On the other hand, did parliament indicate that all falsehood and deceit will vitiate consent for assault? The fraud that used to negate consent was exclusively in regard to false representation as to the quality and nature of the act. For example, a therapist (no pun intended) may erroneously claim that sexual intercourse would enhance the objectives of the treatment and then provide that therapy. Some of the most bizarre and far-fetched things have been told or claimed to obtain consent. There are old cases where men by impersonating a person (someone who would have the women's consent) obtained consent. The Courts held that the sexual intercourse did not amount to rape but assault. Parliament then included in the act consent by impersonation as something that would negate consent. Needless to say, impersonation, in these circumstances, is also fraud. Therefore, fraud in regards to consent has always been restricted to the quality and nature of the act and identity of the perpetrator.

Another Canadian case on this point was finally decided by the Supreme Court of Canada.* A patient had an appointment for a vaginal examination. Dr. Bolduc put a white coat on his musician friend Bird and introduced him as an intern. The patient consented to his presence, but would not have if she knew that Bird's interest in her vagina had nothing to do with the practice of medicine. Despite the fact that Bird did not touch the patient, both the doctor and the phoney intern were convicted of indecent assault as the consent had been obtained by fraud. However, Dr. Buldoc did not misrepresent the quality or nature of the treatment (the assault), neither did he hide the identity of his partner. He simply lied as to the occupation of the spectator. Therefore, the Supreme Court of Canada quashed the convictions.

The B.C. Court of Appeal concluded that although parliament did not include in its new section on consent for assault, the well established restrictions of fraud in obtaining consent, it did not mean to expand "fraud" as it is used in section 244(3) (c) to any act of falsehood that may have a causal connection with consent. Section 37 of the Interpretation Act makes this clear as it states that an amendment to law is not necessarily a declaration that the new law is different from the law as it was. Therefore, the word "fraud", in terms of obtaining consent for assault, is limited to the quality and nature of the act and in respect to the identity of the assailant.

Conviction for sexual assault set aside.
New trial ordered.

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* ***Buldac and Bird v. The Queen***

BEWARE OF ROUTINE OR POLICY WHERE DISCRETION APPLIES

ARBITRARY ARREST

Law enforcement agencies may, by policy or suggested procedure, cause the "office holder" to routinely detain and arrest persons in certain circumstances while the law grants discretion to that officer to do so. Routine may also cause such detention without discretion. If lawful arrest is effected in compliance with policy or routine without any consideration to the purpose of the arrest then it could be argued that the arrest is arbitrary and an infringement of the constitutional right not to be arbitrarily detained (see s.9 Charter). The word "may" in s. 450 C.C., where Parliament speaks directly to the peace officer, directs that discretion be used and that an arrest only be effected when necessary. Needless to say, statute supersedes policy or routine, and arrest without discretionary consideration as to its need may constitute arbitrary detention especially where there was no need to arrest. This is the new defence theory. Particularly where the offence is indictable and one over which the Provincial Court has absolute jurisdiction, is hybrid, or one punishable on summary conviction the law is even more specific. It states that when an officer "may" arrest for any of these offenses he "shall" not do so unless any of certain aspects of public interest are not satisfied (see s. 450 (2) (d) C.C.). In the event an arrest has been effected where there were no grounds for believing that any of the public interest issues were not satisfied, then for all purposes in criminal law, the arrest is nontheless lawful and the officer in the lawful performance of duty. However, Section 450(3) (b) clearly indicates that this is not the case "in any other proceedings".

Where arrests have been made, particularly for offences where the "shall not" applies, a novel defence strategy in criminal cases is now to argue that the detention was arbitrary. This opens the road to suppression of evidence and/or remedy under s. 24 of the Charter. Where an officer would give policy or routine as the reason for the otherwise lawful arrest, the defence objective to show arbitrariness is enhanced. There are several cases on this point now. It is too early to tell whether this new view will catch on.

One case decided on this issue is ***Regina*** **v.** ***Labine*** (County Court of Westminster No. X0 17908, March 11, 1987), Labine was arrested according to policy and/or routine at the scene of an accident for impaired driving. Said the Court:

> "The police, by a policy which transcends the circumstances of the appellant and applies to all persons who have the misfortune to be suspected of impaired driving in one

> of the largest R.C.M.P. municipal Detachments in Canada, have taken it upon themselves, without authority, to arbitrarily abrogate the rights of the accused to be free of arrest without warrant in the absence of certain contingencies permitting them to do so, and to sustain such a policy would be to invite police officers to disregard the right of the accused to be free of arbitrary detention and to do so with an assurance of impunity."

Also, see R. v. Ware, R. v. Koper and R. v. Byers, County Court of Yale, C.C. 1309 - 1312 and 1313 respectively, and a Judgement by the County Court of Vancouver., No. C.C. 861833 in R. v. Pithart (Arrest of a Prostitute).

DEFENDING PROPERTY - ASSAULT

Regina v. Blair - County Court of Vancouver - Vancouver CC 860302, March 1987

Mr. H and Mr. D attended at the accused's home to serve process on him regarding a mortgage foreclosure. The accused arrived home shortly after H and D had arrived, and caught H peeping in the windows. The accused requested these men to leave in language quite inconsistent with our etiquette or protocol for receiving guests. H and D readily agreed to comply with this not so gracious invitation to depart, and as they did, so did the accused. D decided he would get the accused's licence number while H would back their car out of the driveway. However, the accused drove his car in behind the one H intended to back out and alighted with a baseball bat in hand. He first encountered D (who by now should have had a clear view of the accused's licence plate) who he pushed and ordered to leave. D complied and started to walk up the street leaving his buddy H sitting behind the wheel of their blocked car in the accused's driveway. The accused stuck his head and the baseball bat through the open passenger window and swung the bat around while expressing the opinion that H did not adhere too well to his (the accused's) instructions regarding the process-servers' departure. With this, the accused removed his car and allowed H to leave and collect his buddy further down the road.

The accused was convicted of two counts of assault while possessing a weapon. He appealed these convictions.

The accused had relied on s. 41(1) C.C. which authorizes him to use as much force as is necessary to remove trespassers from his property.

As the cases on this point go, the Crown was obliged to prove lack of lawful excuse on the part of the accused to use the force he did.*

The accused had testified that he, on that day, was carrying a large amount of money on him. He operates two car lots and was in the habit of carrying large amounts of money on him. Due to an unrelated incident, the accused had been threatened and he had been apprehensive about H and D prowling around his home.

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* See *R. v. Taylor* [1970] 73 W.W. R. 636 and *Colet v. The Queen* [1981] 57 C.C.C. (2d) 105 or Volume 1, Page 18 of this publication.

The test under s. 41 C.C. is subjective and whether the force used was excessive. The trial judge had not applied these tests and the appeal court judge found that the accused was entitled to demand these men to leave. The events after that request had not received the appropriate tests to determine intent and excessiveness.

Appeal allowed
Convictions set aside.

MUST AN INFORMATION UNDER THE YOUNG OFFENDERS ACT ALLEGE THAT THE PERSON CHARGED IS A "YOUNG PERSON"

DOSANJH and The Queen - B.C. Supreme Court - Vancouver CC 860851 - June 1986

In this case, the information alleging that D had committed an offence failed to say that D was a "young person".

D petitioned the Supreme Court to quash the information claiming that the Youth Court Judge had no jurisdiction to proceed as his or her jurisdiction is only over young persons.

In 1985 the B.C. Court of Appeal* decided that the Crown need not prove the age of a "young person" as an element of the offence. The Crown submitted in this D case that if it is unnecessary to prove age then why allege it? Anything you include in an information you must prove. The Supreme Court held that these were two different issues. In the "R and C" case, the issue was whether age was an element of an offence under the Young Offenders Act as it used to be for a delinquency (only a juvenile could commit a delinquency). Here, the fact that the accused youth is a young person must be included in the body of the information held the Supreme Court Justice, not as a notice to the accused young person, but to give jurisdiction to the Youth Court Judge. Concluded the Justice:

> "In the absence of an averment in the information that the person charged is a 'young person' under the Young Offenders Act, I have concluded that the Youth Court has no basis on which to exercise its exclusive jurisdiction."

NOTE:

The words used to designate the form used for informations under the Young Offenders Act, do not assist in this matter.

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* *Regina v. R. and C.*, CA 002902, November 6, 1985

GOOD FAITH

Regina v. HOSIE - County Court of Vancouver - No. CC 861299, December 1986

A traffic officer pulled over a speeder. He discovered that the occupant of the car was sought by the drug squad, and he ensured that two members of that squad arrived at the scene. One of these officers asked if they could search the car, but this was refused. This officer then thought he saw the butt of a marijuana cigarette (a roach) in the open ash tray. Upon request, the ash-tray was pulled out and handed to the officer who was of the opinion that the cigarette end was marijuana. He arrested the accused and searched the car and the accused. Nothing was found, but the accused threw something into an adjacent field. This turned out to be a quantity of hashish. At his trial for possession of a narcotic, the roach was not tendered in evidence and the trial judge did not believe the officer had spotted the roach by simply looking into the car. This, of course, affected the reasonable and probable grounds for the arrest and search. The officer had not acted in good faith, but neither could it be said there was bad faith. Holding that the defence had not satisfied its onus of proof to show prerequisite grounds for exclusion of the evidence, all the exhibits were admitted and the accused was convicted. He appealed.

For a court to find that an officer acted in good faith, there must be an evidentiary basis for doing so if there is an absence of evidence of good faith. As explained before*, if it has been shown that there was a breach of a Charter right then the burden to show good faith shifts to the Crown. In this case, as in Therens, the Crown failed to do so. The trial judge had not applied this test. He had left the matter right in the middle and admitted the evidence.

Accused's appeal allowed
New trial ordered.

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* See *Therens and Gladstone Cases*, Volume 18 and 22 respectively

Comment:

Some Courts have suggested that, if the officer who encountered Mr. Therens in a drinking/driving situation had testified that his failure to treat Therens as a detained person after a demand for a breath sample was made, was based on his awareness of the pre-Charter definition of detention created by the Supreme Court of Canada in the Chromick case, the officer may have been found to have acted in good faith. They instead held he had "flagrantly" infringed Theren's right to counsel.

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SEARCH AND SEIZURE - RIGHT TO COUNSEL

Regina v. Parsons - B.C. Supreme Court - Vernon 15732, April 1987

A man wearing a balaclava shot two men coming out of a pub from across the street. All this occurred around midnight in the dark. A police car assigned to another district moved to the area in which the shooting took place to assist the officer who was dispatched to the scene. He found that a shotgun was used and obtained a description of the culprit. The police patrol, moving in to assist, spotted the accused walking. The fact that he paid absolutely no attention to the police vehicle (like a deliberate attempt not to be suspicious), the description of the suspect generally fitting that given by the officer at the scene, and that his direction of travel coincided with that in which the culprit had left the scene, the officer decided to check the pedestrian. Even when he pulled up behind the accused, he did not look back or do anything to discover who was stopping behind him. When asked, the accused turned around and came to the officer and gave his name. A large bulge was noticed under his clothing and when asked what caused it, he answered "a shotgun". Upon this response, the accused was treated in such a way that he was "detained". A search of his person resulted in finding all the parts of a shotgun and ammunition. A balaclava and a knife were also found on him. This resulted in an arrest. The Charter right to counsel, and the standard right to remain silent warnings were given.

The accused was charged with six criminal offenses including two counts of attempted murder.

Defence counsel did his level best to have the facts of the shotgun, ammunition and balaclava suppressed. He argued that the search was conducted on a hunch and suspicion; therefore, the search was without any reasonable grounds, and hence, unreasonable. Furthermore, the "right to counsel" information should have been given before the search.

Responded the Supreme Court Justice:

> "In this case, I hold that the particular situation required the officer to do what he did in the way he did. He did not search or lay a hand on the accused until after he had seen the bulge, asked what caused it, and was told that it was a shotgun. Under these circumstances, I do not hold, as the defence would have me hold, that the regular officer should have taken no further steps until he had given

> the Charter rights' warning. That theorization runs contrary, in my view, to common sense and to reasonable and proper law enforcement..." The words 'without delay', as applied to the context of this situation, do not mean immediately or instantaneously, and under prevailing circumstances. I find no violation under s. 10(b) of the Charter."

The Justice found that everything found on the accused and what he said at the time ("A shotgun" - "Anything I have to say will be said by my lawyer") was admissible in evidence.

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CRIMINAL LAW AND CONSTRUCTIVE KNOWLEDGE

Regina v. *TEWARI* - B.C. Court of Appeal - Vancouver CA 003366, June 1987

The accused arrived at the Vancouver airport on a flight from Bombay via Hong Kong. Thirteen million dollars worth (street value) of heroin was found in the walls of his suitcase.

At his trial the accused testified that he owed a person a considerable amount of money, and to repay he was to take a suitcase to Vancouver. If he refused, hiswife and children "would suffer". The accused conceded he knew that he was carrying contraband, but he had no idea what. He had guessed that it was gold or currency.

Generally, the doctrine of "constructive knowledge" (you may not have known specifically what you were in possession of, but in the circumstances you ought to have known) has no application in criminal law unless specifically provided for. Where knowledge is a requisite ingredient to an offence the Crown must prove specific knowledge or adduce evidence from which the irresistible inference of knowledge can be drawn.

The trial judge had told the jury that when the accused accepted the suitcase and knew that there was something wrong about the content, he, for criminal purposes, accepted "the whole thing". He went on to say that if the accused honestly believed he was carrying gold or currency, and that the possibility that he was carrying heroin had never dawned on him, they were to acquit the accused.

The law generally is that where a person knows he is smuggling something into Canada and he is indifferent or is wilfully blind as to what it is, then he is criminally liable for whatever he possesses and imports. In this case, the jury had to find that the accused never believed he was carrying a narcotic or had a reasonable doubt about his knowledge to acquit. They convicted the accused and he appealed.

The B.C. Court of Appeal found no fault with what the jury had been instructed to consider.

Appeal dismissed.
Conviction upheld.

CREATING A DISTURBANCE IN A PUBLIC PLACE "FIGHTING"

Regina v. *Miller* - County Court of Kootenay - Nelson No. 230332, April 1987

Fighting, like ballroom dancing, requires at least two willing partners. In either activity, any unwilling person involved is a victim rather than an offender.

In this case, police found two persons, the accused and another man, fighting on a public street. There was no evidence on how it started or whether one party was simply defending himself from the other's aggression. It seems, from the reasons for judgement that the trail judge found that there was a public disturbance, but the Crown failed to show that the accused caused it, despite the fact that he was one of the two men who appeared engaged in a fight. Due to the lack of evidence that he initiated, consented to, or was even indifferent in respect to the scene police encountered, the accused was acquitted and the Crown appealed.

The defence argued that the Crown not only failed to prove the requisite intent (mens rea), but also the wrongful act (actus reus). When a person is caught in circumstances as the accused was, there are many explanations possible that would render the person innocent of any offence. The accused owed no explanation at the time or at his trial. The burden of proof was exclusively on the Crown and they failed to meet that burden. All the police could say was that there appeared to be a fight and the accused was in it, which is not sufficient to prove the alleged offence of creating a disturbance.

The County Court Judge (Appeal Court) agreed.

Crown's appeal dismissed. Acquittal upheld.

MEANING OF COMMITTING GROSS INDECENCY WITH OTHERS

Regina v. SHEPHERDSON - County Court of Vancouver Island - Nanaimo Registry 3559, March 1987

The accused, a 74 year old man, had shown pornographic movies to six children (3 boys and 3 girls) ranging in age from nine to thirteen years. During the showing the accused had made comments on the anatomy of the women in the movies and had masturbated in full view of the children. Consequently, he was charged with having committed an act of gross indecency with those children despite the fact that there had been no bodily contact or the slightest attempt or encouragement for such contact. The children had attended voluntarily upon invitation.

The Criminal Code only prohibits (s. 157 C.C.) an act of gross indecency if it is with another person. The subsequent section gives the well known exemptions to the offence, one of which is consent. It is obvious that nothing in the section applies to the circumstance as they were in this case.

The cases decided by Courts of Appeal are not consistent. The Manitoba Court of Appeal decided that s. 157 C.C. denotes that another person must participate in the Act. A man had masturbated in front of another adult who was a mere bystander. An acquittal was ordered.*

In the B.C. case, the Court of Appeal decided subsequently on the involvement of another person. In that case, a man had placed his penis near the mouth of a four year old girl. Semen had been found on the girl's dress.

The B.C. Court of Appeal concluded from this:

> "...she was not only in the presence of the accused, but it is a reasonable inference she was near the accused at the time the masturbation occurred..."
> "...the action of masturbation by the accused was directed at this child. That, it seems to me, involved her with him in his commission of the offence and hinges the case within s. 157."**

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* *R. v. Debattista*, [1986] 2 W.W.R. 722

** *R. v. Huntingdon*, June 1986, B.C. Court of Appeal - Unreported

The word "with" also means being in the company or presence of another person. However, the Courts seem to agree that that is too broad a meaning for that word as it is used in s. 157 C.C. However, the word "with" also means "towards, in the direction of or near or close to, alongside or against". It had, therefore, been found in 1982* that a man who had unzipped the sleeping bag of an 11 year old female guest who was sleeping on her tummy on his sundeck, had done up her nighty so the buttocks were exposed and had masturbated semen on the girl's legs (all while the girl was asleep), had committed an act of gross indecency with that girl.

In all the cases where there was masturbation in the presence of others, it had to be directed at those other persons to support a conviction of gross indecency. In this case (Shepherdson), the masturbation was only in the presence of the six children, and to say that this would be doing it "with" these children would be too liberal an interpretation of s. 157.

Accused was "reluctantly" found to be not guilty.

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* *R. v. "G"*, 70 C.C.C. (2d) 24 - Queen's Bench decision.

OBLIGATION TO ANSWER - MISUNDERSTANDING CROSS-EXAMINATION QUESTIONS

The accused stood trial for sexual assault. The evidence revealed that the complainant had voluntarily shared a motel room for the night with the accused. Consequently, the complainant claimed sexual assault and consent became the kernel issue. Defence counsel, who had failed to share his defence strategy with his client, saw an opportunity to use the evidence that French-kissing had been part of the foreplay to support the defence of consent. The accused testified, and in the examination chief Defence Counsel had his client confirm that there had been French-kissing. The prosecutor tried to establish that the French-kissing was all the accused's idea and had no bearing on the issue of consent. The cross-examination went as follows:

Q: "Who started the French-kissing?"
A: "I don't know."
Q: "I remind you that you are under oath and I ask you again, who started the French-kissing?"
A: "I don't know."
JUDGE: "I must instruct you to answer the question. The law compels you answer the question truthfully and to the best of your knowledge."
Q: "Having heard the instruction you just received, I ask you again, who started the French-kissing?"
A: "I honestly don't know for sure sir, but was it perhaps Maria Antoinette or Napoleon?"

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POLICE BEHAVIOUR CAUSE FOR REASONABLE EXCUSE TO REFUSE GIVING SAMPLES OF BREATH UPON DEMAND AND/OR CAUSING INFRINGEMENT OF A RIGHT GUARANTEED BY S. 7 OF THE CHARTER

Regina v. *SHOBE* - County Court of Prince Rupert - Terrace No. 85580, April 1987

When police behaviour makes it reasonable for a person to believe that there is malice and that unfairness will result, that person may well have a reasonable excuse to refuse giving samples of breath upon demand. However, if there is even outrageous actions on the part of police, which would justify a citizen's complaint, it does not follow that there is a "reasonable excuse to refuse" unless there is a connection between that behaviour and the belief of malice and unfairness.

In this case, there was evidence that the accused had been physically mistreated by the officer on the scene. The officers, who dealt with the accused at the station, were different members. There was no evidence that there was any link between the treatment at the scene and that by the officer who operated the breathalyzer. The two scenes were removed from one another in time, and in terms of personnel. This was the opinion of the trial judge and the appeal court judge came to the same conclusion when the accused appealed his conviction for refusing to give samples of breath.

At trial, defence counsel had submitted that the accused's rights to life and liberty of the person had been infringed. The trial judge had not made a finding in regard to this issue. The physical force applied on the accused could range from a justified force necessary to carry out a duty to brutal assault. It simply was not dealt with.

Should the latter be true, one would have to concede that no evidence was obtained from it, thus exclusion or suppression of evidence as a remedy is impossible. However, it should have been determined if a right had been infringed and a remedy should be invoked under s. 24(1) of the Charter.

Appeal allowed
New trial ordered.

SUPPRESSION OF EVIDENCE AS A REMEDY TO CHARTER RIGHTS VIOLATIONS - PROCEDURE

Regina v. *Clauson* - 31 C.C.C. (3d) 286
Alberta Court of Appeal

The accused, charged with "over 80 mlg" requested the trial judge to conduct a voir-dire on the admissibility of breath-test evidence. The trial judge refused as all prerequisites to the admissibility of that evidence seemed in order. Upon appeal by the accused arising from his conviction, it was learned that the object of the request for the voir dire was to suppress the evidence of the analyses, as he alleged that one of his Charter rights had been infringed. A new trial was ordered and the Crown appealed that order to the Alberta Court of Appeal. It observed that all doubt that existed at the time of trial about the procedure defence counsel suggested has since been cleared up by the Supreme Court of Canada.*

The enforcement provisions created by s. 24(2) of the Charter are not defenses but simply stipulate that denial of a Charter right may lead to suppression of evidence thereby obtained. Such determination "is a necessary incident of the trial process". The accused must make clear and particularize which right was infringed and then the trier of the law (the judge) must, in the absence of the jury, hear the issue and determine the remedy. This procedure is not part of the main trial. The Supreme Court of Canada had suggested the pre-trial motions are also permissible and have "administrative advantage".

The trial judge's denial to conduct such a "hearing" (voir dire may be a misleading term, held the Alberta Court of Appeal), rendered the trial incomplete.

Crown's Appeal Dismissed
New Trial Ordered

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* *Mills* v. *The Queen*, 26 C.C.C. (3d) 481

CARE AND CONTROL

Regina v. *Bremner* - County Court of Yale -
No. 15166 Vernon - May 1987

The accused, after having consumed a considerable amount of alcohol, mounted his car and drove for a distance before realizing that he had drunk too much to be driving. He then "abandoned his intention of driving" and parked on the side of the road and went to sleep behind the wheel. Approximately two hours later a police officer finds the accused and, consequently, he was convicted of having care and control with a blood/alcohol content in excess of .80 mlg. The accused appealed the conviction. The Appeal Court (the County Court of Yale) agreed with the accused that due to him having abandoned his intentions to drive and there being no evidence that he did anything that involved some use of the car's fittings that caused a risk of putting it in motion, there was no care and control.

Appeal Allowed
Acquittal Ordered

Comment: Based on the decisions by the Supreme Court of Canada in 1983* and 1985**, it seems that the conclusion reached by the Appeal Court Judge may be inconsistent with these binding precedents. In the Ford case the Supreme Court emphasized that the definition of "care and control" in s. 237 C.C. is not exhaustive. In other words, there are other means by which care and control may be found. Furthermore, held the highest Court, the section had not been enacted to import an intention to drive as a requisite to "care and control". Ford also sat behind the wheel of his car without any intention to drive. A physical position which creates the danger of unintentionally causing the vehicle to move does suffice to show care and control held the court. In the Toews' case the Supreme Court reiterated what they held in the Ford case. Toews had not occupied the driver's seat, however, and was in a sleeping bag well away from the fittings of the car. The vehicle was, in essence, a bedroom without any actions of the accused or his position making accidental motion of the vehicle a likely possibility.

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* *Ford* v. *The Queen*, Volume 11, Page 29 of this publication.

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

"CROWN PROVING ALTERNATIVE MEANS BY WHICH A MURDER WAS COMMITTED"

Thatcher v. *The Queen* - Supreme Court of Canada - December 1986

The accused and his ex-wife went through a venomous divorce dispute. The ex-wife was beaten and shot, and consequently died. The accused was charged with murder. The Crown adduced evidence to support that either the accused committed the murder himself or he had someone do the killing for him. The trial judge went over the evidence in his address to the jury and he observed that the Crown's evidence was consistent with either version of the accused's involvement in the murder. He instructed the jury that if they found beyond a reasonable doubt that the accused had either committed the murder himself or had aided and abetted the murderer, either mode is equally culpable. The jury, despite the defence of alibi, did convict the accused and he appealed, eventually to the Supreme Court of Canada. One of his grounds for appeal was that he should have been charged specifically with one of the means by which a person can be a party to the offence alleged as stipulated in s. 21 C.C. The Supreme Court of Canada held that the Crown was not obliged to specify in the indictment which of the statutory means it was relying on to show the accused committed murder. It proved, beyond a doubt, that the accused was a party to the offence of murder by two alternative theories, either of which made the accused a party to the offence.

Conviction Upheld

Note: Similar rulings exist where the definition of an offence creates various means in which the offence can be committed. Theft is a prime example of this. (see s. 283 C.C.). Where a person is charged with theft the Crown need not specify which means included in the definition it relies on. If, at the end of the day, it proves one, and now it may well be alternative means by which an accused enriched himself from someone elses property, he can be convicted. Each means creates a culpable offence.