ISSUES OF INTEREST

VOLUME NO. 36

Written by John M. Post
June 1990

TABLE OF CONTENTS

Issues Of Interest Vol. 36

Issues Of Interest Vol. 36

PARTICIPANT SURVEILLANCE OF PRIVATE COMMUNICATIONS

REGINA V. DUARTE - 53 C.C.C. (3a) 1. Supreme Court of Canada - January 1990

The police in Ontario rented an apartment for an informer who was working with an undercover officer on a cocaine trafficking investigation. This resulted in Duarte being convicted of trafficking cocaine. He appealed the conviction.

The apartment was equipped with hidden audio-visual recording equipment and over a period of two years crucial evidence had been collected against this accused and others involved in selling cocaine. Needless to say, the communications between the informer and the accused were private and to have the recorded interceptions admitted into evidence the Crown had to overcome the strict exclusionary rule contained in the Invasion of Privacy provisions in the Criminal Code. (s. 189 (1) C.C.) It provides that lawfully intercepted private communications are admissible in evidence against the parties to that communication. It is also admissible if one of those parties has consented to the interception. In this case the informer had consented and all the evidence collected by the hidden equipment was admitted against the accused. This was the cause of the accused's appeal.

It was argued that the constitutionality of the exception to the offence of intercepting a private communication where a party to it consents and the evidence obtained by the interception being admissible, does not arise. It was found that these provisions (s. 184 (2) (a) and s. 189 (1) c.c.) apply equally to police and members of the public. Considering our flirtation with the electronics in all sectors of society numerous accepted practices would turn criminal if consented recording of a communication would be included in the crime of interception. However, a distinction ought to be made between police or the state undertaking such "participant surveillance" (a party consenting) for whatever purpose. The constitution applies "to the Parliament of Canada" and "to the legislature and government of each province" and that supreme law guarantees a right to be secure against unreasonable search and seizure. For this purpose police are joined with the state and thus "participant surveillance" amount to an infringement of the right of the unsuspecting party to that surveillance? If such interception does amount to an infringement are then the enactments permitting police to intercept a private communication with the consent of a party to it, "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"? (s. 1 Charter). If not, the evidence obtained by this unreasonable search and seizure may be excluded under the provision of s. 24(2) of the Charter. This basically was the position of the defence.

The Crown's position appeared to form a continuation of the status quo. A confidant may not have any intentions to keep the information he receives confidential, passing it on and making notes of the conversation. Needless to say notes are only reflections of memory and the author's impression of the communicators message. That we accept in evidence whether from an agent provocateur or anyone. An electronic recording is accurate and

the best evidence of a fact. Why accept a human's fallible memory while an infallible (in terms of accuracy) means to preserve and present this evidence is available. The former we accept, then why suppress the latter? In principle and law they are the same.

Needless to say that the positions of the parties to the criminal dispute sharply oppose one another. However, the Court recognized the anomaly in the law. No one is allowed to intercept a private communication. However, law enforcement agencies can under strict rules and prerequisites obtain a judicial license to do so, or if they have the consent of one of the parties to communications intercept and record to their hearts content for so long as they want. Are we....

> "A society which exposes us at the whim of the police or state, to the risk of having a permanent electronic recording made of our words every time we open our mouths?"
>
> "Such a society is superbly equipped to fight crime, but is one in which privacy no longer has any meaning."

Considering these issues the Court identified the heart of the matter to be....

> "Whether our constitutional right to be secure against unreasonable search and seizure should be seen as imposing on police the obligation to seek prior judicial authorization before engaging in participant surveillance"
> ...."This Court is accordingly called in to decide whether the risk of warrantless surveillance may be imposed on all members of society at the sole discretion of police."

The Court held that nothing in the Invasion of Privacy provision in our Criminal Code protects us from our confidants divulging information we conveyed to them. No law can immunize us from such a risk! The provisions are there to protect us from "the insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words."

Interceptions of private communication other than "participant interceptions" are subject to laws that strike an appropriate balance between public interest and the privacy of our communications. Privacy in this context means self determination when, how, to whom and to what extent a person will divulge information about himself. He should be able to do so on the assumption that the police will not clandestinely intercept or record his communications unless an impartial member of the judiciary authorized police to do so on the basis of reasonable and probable grounds that he is involved in certain criminal activities; that conventional investigative means would fail; and that his private communications may afford evidence of those criminal activities.

The first case[1] involving s. 8 of the Charter, that reached the Supreme Court of Canada caused a quantum change in our approach to search and seizure. A warrantless search is by its very nature un-reasonable unless the Crown shows it is not. Furthermore s. 8 of the Charter does not just protect places and property but people and their privacy. Said the Court:

> "Applying this standard, it is fair to conclude that if the surreptitious recording of private communications is a search and seizure within the meaning of s. 8 of the Charter, it is because the law recognizes that a person's privacy is intruded on in an unreasonable manner whenever the state, without a prior showing of reasonable cause before neutral judicial officer, arrogates to itself the right surreptitiously to record communications that the originator expects will not be intercepted by anyone other than the person intended by its originator to receive them...."

Participant surveillance (intercepting with the consent of a party to the communication) has none of these safeguards and can be employed at the whim of police for as long as they want. Where a person has grounds for believing that his communication is private (see definition above) then surreptitious recording is an intrusion on that reasonable expectation of privacy.

But what is the difference between the impugned practices described above and the tattle-tale risk we run in relation to everything we utter. Anyone can inform on another person and sometimes may well be morally obliged to do so. The person we speak to may well tell. The law has no problem with that and provides for this person to be compellable as a witness (in most cases) or for his information to amount to prerequisite grounds for police to act in some way. What is the distinction between that risk and practice when we are face to face and depend on our memory to record things and when a body pack or telephone is used. The intent of the "state" may well be the same and equally surreptitious.

The Supreme Court of Canada did not necessarily say there was a distinction but "draws a line." It did so with following words:

> "...., the law recognizes that we inherently have to bear the risk of the 'tattle-tale' but draws the line of concluding that we must also bear, as the price of choosing to speak to another human being, the risk of having a permanent electronic recording made of our words."

This line the Court felt reflects an appropriate balance between the right of the state to intercede on the private lives of its citizens and the right of those citizens to be left alone.

---

[1] HUNTER v SOUTHAM INC. Volume 18 page 12 of this publication.

The reaction that exempts "participant surveillance" from the crime of intercepting a private communication is not unconstitutional and does not infringe the right guaranteed by s. 8 of the Charter but...

> "..the interception of private communications by an instrumentality of the state with the consent of the originator or intended recipient thereof, without prior judicial authorization does infringe the rights and freedoms guaranteed by s. 8" (Charter)

The Court held that the investigators had acted in good faith. They had complied, to the letter, with the law as it was at the time of the interception. Although they did, by virtue of these judicial findings, infringe Duarte's right admitting the evidence of the recorded communications would not bring the adminstration of justice into disrepute.

Appeal was dismissed conviction upheld.

Comment:

Even a close study of this judgment may leave one in doubt if the interception with consent or the recording of what is intercepted constitutes the infringement of the s.8 right. For instance, where the Court "draws the line" between public and private rights, it clearly states that it is "the permanent electronic recording made of words." In various other places if seems to indicate that it is the recording that causes the right to be offended. Then in the final part of the judgment the Court refers to "interception" as the cause of the infringement. From a practical as well as a legal point of view if makes sense to only consider the recording to offend the Charter (if there has to be an offending aspect) and leave the interception to the "risk" factor. It seems that some Crown positions were either not advanced or poorly considered. For instance, an agent or under cover personnel carrying a transmitter for their safety, may well be taboo.

Another point the Court seems to assume without any consideration for circumstance in which this participant surveillance may be done for purposes other than to collect evidence. The Court implied strongly all through its judgment that the police and the "state" are synonymous. At best it can be said that in criminal investigation police joins the state in its interest. To see this U.S. approach is regrettable and worrisome. Some who are not in favor of the status of police in Canada may find comfort in this judgment.

SUSPECT ARRESTED FOR ATTEMPTED MURDER - VICTIM SUBSEQUENTLY DIES - RIGHT COUNSEL - INADMISSIBLE STATEMENT LEADS TO MURDER WEAPON - ADMISSIBILITY OF REAL EVIDENCE

BLACK v. THE QUEEN - Supreme Court of Canada [1989] 2 R.C.S. 138 - August 1989.

Based on information two police officers received from witnesses at the scene of a stabbing, they went to a neighbouring apartment and arrested the accused for attempted murder. She was told of the reason for the arrest and was given her right to counsel.

Upon her arrival at the police station at midnight, she immediately insisted on speaking to a lawyer, Mr. B. One of the officers dialed Mr. B.'s home phone number and left the accused alone in the room to speak to her counsel. The call lasted about 40 seconds. The accused was quite intoxicated and had a cut lip. After having spoken to her lawyer, the accused was left alone in the interview room for about 1 1/2 hours. At 1:40 a.m., two other officers (apparently from the detective division) entered the interview room and informed her that the woman she had allegedly stabbed had died. After they calmed her down, the officers read her the warning about anything that had previously been said to her should not influence her to say anything now. She was again made aware of her right to remain silent, but not of her right to counsel. However, upon the warning, she insisted on speaking to Mr. B. again. One of the officers tried B's home several times but got a busy signal. He assumed the receiver was removed from the cradle. He told the accused that he was getting a busy signal (but not of his opinion about the phone being off the hook) and asked if she wanted to speak to another lawyer. The accused was quite adamant that it had to be Mr B. She was then allowed to phone her grandmother who had apparently a quieting affect on her.

After this call, she started to speak of her own volition with one of the officers about her concern for one of her children. She asked if she would get out on bail over the weekend. He told her that she would remain in cells and he then changed the topic to the stabbing event. He asked her where the knife was and if she would tell him what had happened. She said the knife was in her apartment, and she gave a full statement to the officer and signed it. She was then taken to hospital for treatment. A blood sample (that proved a very high blood/alcohol level) was taken, and she was taken to her apartment where she then turned the knife over to the police. The evidence of all of this caused five questions to be put to the Supreme Court of Canada when the accused (who was convicted of manslaughter) appealed the decision of the Nova Scotia Court of Appeal that she must be tried again for murder. These questions were as follows:

1. Did the accused fully exercise her right to counsel when she spoke to Mr. B. at midnight (upon her arrival at the police station)?

2. If not, was the second attempt to reach Mr. B. a reasonable opportunity to consult her lawyer after she was told of the victim's death and before she gave her inculpatory statement to the officer (detective)?

3. Had the accused waived her right to counsel when she gave her statement?

4. If the accused's right to counsel was infringed, should the inculpatory statement be admitted in evidence?

5. If the accused's right to counsel was infringed, should the discovery of the knife (the murder weapon) be excluded from evidence?

In regard to question 1, the Crown argued that there was only one detention involved, all the way through. The officers informed her of the charge and made her aware of her right to counsel which she exercised with the full cooperation of the police. That the charge changed when the victim died was immaterial. There was no new arrest or detention - there was only one arrest in respect to "one occurrence or transaction."

The Supreme Court of Canada disagreed with the Crown's position. The accused made it clear she wanted to consult her lawyer when she was informed of the far more serious charge she was facing from the one for which she was arrested and in relation to which she had spoken to her lawyer. To presume that the legal advice would inevitably have been the same is "sheer conjecture." In the circumstances (including a lack of urgency to interview the accused) the accused was not afforded a reasonable opportunity to consult counsel.

In regard to question number 2 the Court held that the accused's insistence to speak to Mr. B. again and not to any other lawyer was reasonable in the circumstances. Only where such a choice necessitates an unreasonable delay is there an obligation to accept another lawyer. There was no such urgency. The police had sufficient evidence and witnesses to show that the accused had caused the death of the victim. An inculpatory statement and securing the weapon were the only outstanding issues. This could have waited until morning when Mr. B. would have been available. Therefore, police had not fulfilled the duties upon them as established in the Maninen[2] case. The accused clearly stated she wanted to speak to her lawyer, no reasonable opportunity to do so was afforded her, and consequently, absent a waiver by the accused regarding her right to counsel, the officer was not in a legal position to question that accused on the relevant events and the murder weapon.

In regard to question number 3, the Court referred to their decision in the *Clarkson*[3] case. When the accused spoke to the officer, gave her statement and gave them the murder weapon, she was aware of the charge she was facing, of her right to remain silent and her right to

---

[2] Regina v. MANINEN - Volume 28, page 1 of this publication.

[3] CLARKSON v. The Queen - Volume 24, page 38 of this publication.

counsel. However, she, like Mrs. Clarkson, was in an intoxicated condition. Furthermore, the accused was not an intelligent person and only has a grade four education.

She had unattended to injuries of the face, neck and hands. It is true that she initiated the conversation with the officer, but when she inquired about her continuation of custody and expressed concern for one of her children, the officer changed the topic which resulted in the impugned statement and discovery of the knife.

Although she did this with "an operating mind" (her intoxication was not such that she did not know what she was saying) she was not likely aware of the consequences of making the confession. The operating mind test is applied to determine voluntariness and whether the statement can be relied upon in terms of the truth of its content, while the "awareness of consequences" test goes to judicial fairness as a component of the right to counsel. These two tests are far from synonymous. A statement resulting from an operating mind does, consequently, not necessarily mean that the person waived his/her right to counsel. Such a waiver may be inferred from words and conduct. Considering all these circumstances, the accused could not assume to have been aware of the consequences of making the statement. The alcoholic woman simply did not have the intelligence. She had not impliedly waived her right to counsel by speaking to the officer with an operating mind. Hence, police had infringed her right to counsel.

In regard to question number 4, it should be kept in mind that the consideration for suppressing the statement was one under the exclusionary rule under the Charter and not a test of voluntariness. For the answer to this question, the Court referred to its landmark decision on the Canadian exclusionary rule in *Collins*[4] case. The predominant objective of s. 24(2) of the Charter is to protect the reputation of the administration of justice. The Court subdivided the consideration whether to apply the rule into three factors:

1. Those relevant to the fairness of a trial;

2. The seriousness of Charter violations as defined by the conduct of law enforcement authorities; and

3. The possibility that the administration of Justice could be brought into disrepute by excluding evidence despite the fact it was obtained in a manner that infringed the Charter.

The Court held that admitting the inculpatory statement would bring disrepute on the administration of justice as it would infringe the accused's right against self-incrimination. Had her right to counsel not been infringed, this could have been prevented.

---

[4] Regina v. COLLINS - [1987] 1 S.C.R. 265, Volume 27, page 1 of this publication.

The infringement was serious as the officer should not have questioned the accused knowing she wanted to consult counsel. Consequently, not admitting the statement in evidence would not blemish the reputation of the administration of justice.

In regard to question number 5, the Supreme Court of Canada referred to their decision in the *Strachen* case[5]. There it had observed that, in the course of a valid arrest, violations of right to counsel will frequently occur. It questioned the exclusion of real evidence that had a causal connection with the violation in terms of its discovery. The only type of real evidence that may be said to be causally connected to violations of the right to counsel is derivative evidence obtained as a direct result of a statement or other indication made by the accused. The court emphasized that there cannot be a "hard and fast rule" when the infringement of a right or freedom becomes too remote from the discovery of evidence for it to be eligible for exclusion. A temporal link, however, is prominent but not determinative. Each case will have to be weighed on its own merits.

The knife in this case was derivative evidence obtained as a direct result of a statement or other indication by the accused. Hence, the discovery of the knife was causally connected to the violation of the accused's right to counsel. In other words, the infringement caused the statement from which the discovery of the knife was derived. It was a chain of events that sufficiently linked the violation to the discovery.

If the trial would be unfair due to the admission of this impugned evidence, then that admission will bring disrepute on to the administration of justice. That meant that all utterances by the accused to do with the discovery of the knife are inadmissible. But what about the knife itself? It is real and fact and did not exist because anything the accused said or did. There, no doubt, would have been a search made of her apartment with a search warrant with or without her consent. This is an example why the Court held in Collins (supra):

> Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence did exist irrespective of the violation of the Charter and its use does not render the trial unfair.

Consequently, the police officer who received the knife from the accused could testify that the knife had been located in the accused's kitchen and was subsequently examined by a forensic scientist. It was wrong of the trial judge to exclude the knife from evidence. The issue was whether the accused by stabbing the victim intended to cause death. The admission of the knife had little influence on this. Hence, to conduct a new trial would be superfluous.

---

[5] STRACHEN and The Queen - [1988] 2 S.C.R. 980, Volume 34, page 32.

Accused appeal was allowed.
Jury's verdict of manslaughter was restored.

Comment: What is discussed here should not be confused with what some have labelled as the "doctrine of subsequent facts." The leading decision on that was in *Wray*[6] case. Wray was charged with murder and a lengthy interrogation resulted in a confession and Wray taking police to the place where he had discarded the weapon. A ballistics test proved that the rifle was, as Wray claimed, the murder weapon. All Courts involved agreed that Wray confession was inadmissible. Due to involuntariness, it could not be relied upon in terms of the truth of its content. However, in regard to the rifle, there was no need to worry about that. Facts proved Wray to be truthful about the rifle where it was used for and where he got rid of it. The Court held that the rifle, the ballistics test, and that portion of Wray's statement relating to discovering the rifle were admissible. Although this case seems on the surface similar to the Wray case, there is no similarity at all in term of the issue in question. In this Black case, exclusion of the evidence was due to the exclusionary rule under the Charter, while suppressing a statement due to involuntariness is a matter of questionable reliability of the evidence.

[6] The Queen v. WRAY - [1970] 4 C.C.C. 1.

SEXUAL HARASSMENT AND SEXUAL DISCRIMINATION IN THE WORK PLACE

JANZEN AND GOVEREAU v. Platy Enterprises Ltd. - Supreme Court of Canada - May 1989.

The cook in a sizable restaurant took a fancy to two of the waitresses and sexually harassed them by touching and making sexually suggestive comments and propositions. Although he did not directly supervise the waitresses, he did hire and fire personnel and was generally in a position to make life difficult for a waitress. Presumably, because the waitresses rejected the cook's sexual advances, he made life so miserable for them that the one quit and the other one was fired. The manager of the restaurant had not been interested in the women's complaints about the cook's behaviour.

The legal issue was one of civil rights. The question was, if sexual harassment of an employee by another employee amounts to sexual discrimination in the workplace. The Manitoba Courts held that it was not. What happened among the employees was not the responsibility of the employer held the Court and implied that discrimination on the basis of gender in the workplace is where the employer treats all members of one sex differently than those of the opposite gender, while, for instance, they do the same work. The Manitoba Human Rights Act was not applicable to situations as experienced by these waitresses.

The Woman's Legal Education and Action fund appealed that decision to the Supreme Court of Canada (S.C.C.). This Court unanimously disagreed with the Manitoba Court of Appeal and emphasized the detrimental affects of sexual harassment in the workplace. It attacks the sexual dignity and self-esteem of the employee who becomes the target of the unwelcome sexual advances and suggestions by colleagues. It cannot but adversely affect the work environment, thereby limiting the work conditions of the harassed employee(s). It sharply does also affect the employment opportunities of the victims of such behaviour. Consequently, harassment of any employee on account of his/her gender can amount to discrimination on the basis of sex. Said the S.C.C.:

> If a finding of discrimination required that every individual in the affected group be treated identically, the legislation protection against discrimination would be of little or no value.

Therefore, that only two and not all female employees were sexually harassed by the cook was no defence to the allegation of discrimination on the basis of sex. The crucial fact was that only female employees were the cook's target. His sexual preferences only made them the possible victims of his unwelcome advances and the punitive consequences if he was rejected.

Appeal allowed.
Complainants awarded damages and legal costs

Note: This case and its issues seem inconsistent with the usual criminal law topics of these publications. However, the decision by our Supreme Court of Canada is an important and landmark precedent and thought to be of interest to our readers.

AGGRESSIVE POLICE DOG CAUSING IMPROMPTU STATEMENT TO BE INADMISSIBLE

REGINA V. HART - 48 C.C.C. (3d) 516, Alberta Court of Appeal

An industrial building had been broken into and a police dog picked up trail. When spotted and ordered to halt, the accused ran and failed to stop after the officer identified himself. Finally, the dog was released for the exclusive purpose to arrest the accused.

The dog out ran the accused and attacked him, biting him around the arms and legs for a period of approximately 20 seconds. When the officer pulled the dog off, the accused said: "I needed the money."

The attack had caused sufficient punctures so that the accused required medical attention. The marks were still clearly visible at the time of his trial 10 weeks later.

The dog's master testified that his dog had attacked the accused on his command and that the animal's actions had nothing to do with the scent. This, in a way, detached the accused from the break-in scene and police had no other evidence that showed it was the accused who had committed the breakin. Needless to say, the impromptu statement leads one to draw quite an inference of guilt and the admissibility of that statement was the reason for appealing the accused's conviction.

The Alberta Court of Appeal acknowledged that the dog was used exclusively to effect a lawful arrest and not to force a confession from the accused. It also had no argument with the Crown's position that the accused had been angry and frustrated and "blurted" what he said quite spontaneously. However, the Court emphasized and reiterated that to determine if a statement was made voluntarily, the test is a subjective one.

Any statement like this is adduced to prove the truth of its content. If given under any inducement or fear the statement is unreliable for that purpose and must not be allowed in evidence. This is the way it has been ever since 1740. (In those years, an accused person was not even allowed to testify and could not rebut or clarify his statement.) In other words, whether there is fear of threat, or hope of advantage depends on the accused's perception at the time. The Court felt that the accused saw the police dog which just prior to him making the utterance in issue had mauled him, as being anxious to renew his activities and being completely at the whim and command of the arresting officer. The aggressive environment surrounding the making of the statement met all rationale for excluding the statement, held the Court.

Emphasizing that their judgment did not offer any opinions on the propriety of the use of the dog; the lawfulness of the mode of apprehension; admissibility of incriminating statements induced by violence from external causes not sponsored by authorities; or any means of

gathering evidence other than during an arrest or interrogational settings the Alberta Court of Appeal.....

Allowed the accused's appeal and quashed his conviction.

Note: The rules of evidence guiding this issue are exclusively at common law. They are elementary and unarticulated according to McWilliams in "Canadian Criminal Evidence." This seems to give the Courts considerable latitude to weigh each situation on its own merits. However, that the suspect's perceptions determine voluntariness, even when there is no violence, threats or inducements involved, is clearly shown by the Supreme Court of Canada in *HORVATH*[7] v. The Queen. In that case, the psychological superiority of a very experienced police interrogator had caused the young suspect to be so influenced that he, in a consequential mild hypnotic state, had monologues (known as soliloquies) during intermissions in the questioning. The intellectually adroit interrogator was complimented by the Court for his superior abilities and not in any way criticized. Yet the confessions obtained by him were considered unreliable to be admitted for the truth of their content. The soliloquies were inculpatory as were the other statements. However, the intellectual superiority of the officer and the intenseness of the skillful interview had turned the interrogation into a scene akin to the cat maneuvering a mouse. The statements were ruled to be inadmissible.

[7] [1979] 44 C.C.C. (2d) 385. Also Volume 7, page 22 of this publication.

CONSTITUTIONALITY OF "BREAK AND ENTER" PRESUMPTIONS

REGINA V. CAMPBELL - County Court of Prince Rupert, Smithers No. 7286 - June 1989

Campbell did break and enter a home and was charged with doing so with the intent to commit an indictable offence therein. He was also charged with being in a dwelling house without lawful excuse, with the intent to commit an indictable offence therein.

Defence counsel attacked the two presumptions in our Criminal Code the Crown was relying on to convict Campbell. One presumption provides that if it is proven that the accused broke and entered a place, then, in the absence of evidence to the contrary, that is proof of his intent to commit an indictable offence in that place. The other states that if one enters without lawful excuse, the proof of which lies upon him, a dwelling-house, then, that is, in the absence of evidence to the contrary, proof of intent to commit an indictable offence therein.

These provisions violate the presumption of innocence claimed the defence, as it places a burden of proof on the defendant.

If it is proven that one broke into a place, then absence of evidence to the contrary means that it has also been proven that the act was done with the intent to commit an indictable offence in that place. It has now been well established that presumptions that can be rebutted by simply raising a reasonable doubt about the fact that may be presumed do not violate the presumption of innocence. They do not shift the burden of proof from the Crown to the defence. If the presumed fact is rebuttable by adducing "evidence to the contrary," then that is the equivalent to raising a reasonable doubt.

When it comes to being unlawfully in a dwelling house, the excuse that can prevent the presumption that there was an intent to commit an indictable offence, must be proven by the accused on the balance of probabilities. Rebuttal of this presumption is not raising a reasonable doubt, but showing the non-existence of the fact to be presumed.

Both provisions place an evidential burden on an accused person, although the one quite more so than the other. They offend the right to be presumed innocent. Furthermore, the Court found that the presumption in relation to a dwelling-house cannot withstand the rational connection test. In other words, if someone is without lawful excuse in a dwelling-house (the prerequisite fact) it is not a necessary or inexorable inference that his presence was accompanied by an intent to commit an indictable offence therein. Consequently, as implied above, both presumptions offend the Charter right to be presumed innocent.

The Court then had to apply the s. 1. Charter test to determine if the impugned sections are a reasonable limit to the presumption of innocence.

The Court concluded that the portion of the dwelling-house presumption that places the onus on an accused to prove that he had a lawful excuse, to escape application of the presumption that he intended to commit an indictable offence, could not pass the test. That reversed onus the Court found to be inconsistent with the constitution and to be without any force or effect. However, the judge concluded that section 349(1), without the words, "the proof of which lies on him" can pass the s. 1 Charter test. Consequently, he decided at the conclusion of a voir dire on these issues as follows:

1. Subsection 348(2) C.C. is inconsistent with s. 11(d) of the Charter but is justified under section 1 of the Charter. (This is the enactment that provides that breaking into a place is in the absence of evidence to the contrary proof that this was done with the intent to commit an indictable offence therein.)

2. Subsection 349(1) C.C., due to the words, "the proof of which lies on him," offends the presumption of innocence and is due to those words inconsistent with that Charter right. The section cannot pass the s. 1. Charter test and is consequently without force or effect with those words included. (This is the section that provides that a person who enters a dwelling-house without lawful excuse, the proof of which lies upon him, did unless there is evidence to the contrary enter with the intent to commit an indictable offence therein.) The County Court Judge found that without those offending words the section is, despite it still violating the presumption of innocence, justified under s. 1 of the Charter.

As a result, s. 349 C.C. now only provides that entering a dwelling house without lawful excuse is, without any evidence to the contrary, proof that he did so for the purpose of committing an indictable offence therein.

CONSENT TO ASSAULT DURING HOCKEY GAME

REGINA V. CEY - 48 C.C.C. (3d) 480 - Saskatchewan Court of Appeal

During the course of a hockey game, P. was handling the puck. When facing the boards at a distance of about one meter, the accused approached P. from behind at considerable speed with his stick extended in front of him. Without making any jabbing motions, he allowed the stick to collide with the neck area of P. forcing him to collide severely with the board. This resulted in considerable facial wounds, whiplash, and concussion requiring hospitalization for a period of time. Needless to say, the trial revolved around the issue of consent to rebut the allegation of assault causing bodily harm. The trial judge, being of the opinion that there is implied consent on the ice during a hockey game, even if the bodily contact amounts to misconduct under the rules of the game, acquitted the accused. The 5 minute penalty imposed on the accused did not have the probative value to consider the infraction to amount to a crime under the Criminal Code.

The Crown appealed the acquittal to the Saskatchewan Court of Appeal which considered the issue of consent without the benefit of the *Jobidon*[8] decision by the Supreme Court.

This Court of Appeal first observed that the trial judge's perception of the defence of consent had been erroneous. When the assault and apparent lack of consent had been proven, it was then up to the accused to show that he had a sincere belief in his victim having consented to his conduct. Instead, the trial Court and the defence "relied on the Crown's failure to negative consent as required by s. 244(1)."

To assume that implied consent to bodily contact is unlimited during a 'sporting' contest and grants immunity from criminal behavior would recreate coliseum scenes with gladiator mentality. People who want the joy of playing a sport assume certain hazards of the sport but need not accept "malicious, unprovoked or overly violent attacks."

> .....injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent.[9]

Quotes from other reasons for judgment on violence in sports and the limit of the consent one may infer from another person's participation in a game which are indicative of the Canadian approach to this issue are:

---

[8] See Volume 35 of this publication.

[9] Quoted from AGAR v. CANNING (1965) 55 W.W.R. 384. Manitoba Court of Appeal.

> .....the risks of injury he assumes are those which are incidental to the particular game or are those risks which fall within the bounds of fair play... .
>
> .....in the course of a vigorous contest, players cannot be expected to stop and check themselves from committing what would normally be considered assaults in ordinary walks of life.
>
> .....where there is conduct which shows a deliberate purpose to inflict injury, then no immunity is accorded to the offending player.

Normally, the test whether there was consent is a subjective one that examines all circumstances and the state of mind of the parties involved. However, with a team sport, there cannot be as many implied consents as there are players on the field or ice. There simply has to be a scope of implied consent that may vary depending on the kind of game, the rules of the game, the policy of the league, the ages of the players. However, there are limits to what the law allows a person to consent to. In this regard, the victim was asked, if, despite his experience and injuries, he would continue to play hockey, full-well knowing that he could be injured again. He replied: "Yeah." This eloquent and exhaustive response must have contributed to the trial court's conclusion that the Crown should have considered if the actions of the accused considering all circumstances was so dangerous and violent that it was excluded from the scope of implied consent of any hockey player. Also, if the act was so violent that it is one we cannot consent to. Any assault intentionally causing actual bodily harm or injury are unlawful regardless of consent.

Crown's appeal allowed.
New trial ordered.

Y. O. ACT TRANSFER HEARING
RULES OF EVIDENCE

J.J.K. and THE QUEEN - Supreme Court of B. C., January 1990 - Campbell River No. 324

At age 15, the accused youth approached four young children playing on the beach. By playing hide-and-go-seek, he managed to separate two girls, ages four and six, from the group. He left the youngest sitting on a tree trunk while he took the six year old in the bushes and murdered her by strangulation and beating her head. He then sexually assaulted her body. He confessed to police and re-enacted his actions on video tape. He had shown no remorse or emotional response to the killing; there appeared to be no motive. A hearing was conducted in Youth Court, and due to the obvious extended treatment the youth required for correctional purposes and the protection of the public considering his predations, he was ordered to stand trial in open court for murder in the first degree.

The hearing judge had heard all of the evidence and looked at the video tapes. He had commented that he was not convinced that the issue of admissibility of evidence would, at trial, be resolved in favor of the accused.

The transfer was appealed to the B. C. Supreme Court. It was argued that the hearing judge considered evidence that was legally inadmissible. This judge had, under the circumstances, ignored the presumption of innocence and had placed the burden upon the accused to show that he would not be convicted. The Crown had adduced psychiatric and forensic reports which expressed opinion based on the premise that the accused had committed the murder.

The Supreme Court held that the ordinary rules of evidence do not apply to a transfer hearing. The Youth Court is entitled to base its decision on evidence that ultimately may well be inadmissible. The Crown may put forward allegations during a transfer hearing it may not be able to prove at trial. The role of the Youth Court is more administrative than legal in these hearings. The Youth Court does not have to decide on guilt or innocence--not even on probable guilt (as does the Provincial Court by means of a preliminary hearing). The presumption of innocence is consequently not applicable.

The Court also rejected alleged non-compliance with waiver provisions in s. 56 of the Y. O. Act. The section does not apply for hearing purposes.

Appeal dismissed
Order to stand trial in open court was upheld.

REASONABLE GROUNDS - ACTING UPON INFORMATION FROM AN UNKNOWN INFORMER - LAWFULNESS OF ARREST - CHARTER RIGHTS AND ADMISSIBILITY OF EVIDENCE

REGINA V. COOK - B. C. Court of Appeal - Vancouver No. CA 010206 - January 1990

An unknown informer approached police outside a pub. He pointed out the accused to the officer and told him that she was selling pills from an envelope she kept under her blouse. The officer did not doubt the credibility of the informer who was a man of approximately 60 years of age, who said that he just wanted to help with "the tough job" police had to do.

The officer approached the accused in the pub, told her he was a police officer, took her by the wrist and guided her outside. Then he effected an arrest for possession of a narcotic after he told her what information he had received. He then asked the accused to turn the contraband over to him or be searched. She reached under her blouse and retrieved a plastic baggie with 15 Talwin pills. Then before any conversation took place, the officer gave the warning of right to remain silent and right to counsel. The accused was very relaxed about it all; she was sober and cooperative. She admitted that the pills were Talwin and that she was selling them for '10 each.'

The accused appealed her conviction of possession for the purpose of trafficking. The grounds of appeal were simply that the arrest was not lawful and that consequently the search was not justified as incident to such an arrest under the Narcotics Control Act. The arrest was unlawful argued the accused, as the officer did not have the prerequisite reasonable and probable grounds. Furthermore, due to the accused's right to be secure against unreasonable search having been infringed, her voluntary inculpatory statements following the impugned arrest and search should have been excluded from the evidence.

Police did not know the informer nor the accused. In the circumstances, there should have been surveillance to verify the information from an unknown source. All police had was a bold conclusionary statement by a person absolutely unverified as far as credibility is concerned, who himself had been drinking in that pub.

The B. C. Court of Appeal held that a "totality of the circumstances" test must be applied. Firstly, something of considerable significance and weight is that the pub was known as a place where drugs of this kind (Talwin) are sold. "Reasonable grounds" does not mean that the officer was required to have evidence that would make a conviction a certainty. Some of the circumstances which collectively amount to adequate grounds to effect an arrest may well be weak and could by themselves not justify the arrest. However, it is the totality of the circumstances, the aggregate weight of all aspects, that must be considered to determine if there were the requisite reasonable and probable grounds. The Court concluded that the officer in the circumstances had the required reasonable grounds to arrest the accused.

The court also had to decide if any consideration must be given to the exclusion of the voluntary statement the accused gave as to her knowledge that the pills were Talwin and that she was trafficking the pills. The lawfulness of an arrest does not mean that it was not arbitrary, the same as an unlawful arrest is not necessarily arbitrary. These are simply distinct issues. The officer had not acted in a cavalier fashion, had not acted capriciously or maliciously, and, consequently, the detention of the arrest was not arbitrary.

However, there was a Charter flaw in the way the officer had investigated this complaint of trafficking. The right to counsel warning should have preceded the search of the accused (before the accused handed the drugs over upon the promise that there would be a search if she did not do so.)

The Court held that the infringement of the right to counsel was technical in nature and there was no connection between this infringement and the statement the accused made that would justify excluding that evidence.

Appeal dismissed.
Conviction upheld.

OBLIGATION ON DETAINEE TO REASONABLY AND DILIGENTLY EXERCISE RIGHT TO COUNSEL; ADMISSIBILITY OF STATEMENT

REGINA V. SMITH[10] - Supreme Court of Canada - (1989) 2. S.C.R. 368 - September 1989.

The accused was arrested at his home at 7:00 p.m. for a robbery committed five months previously. The trip to the police station took two hours with several stops made at the accused's request. He had been properly made aware of the charge against him and was told of his right to counsel. He was also advised by the arresting officers not to discuss the charge until they arrived at police headquarters. When that happened, the accused made it very clear that he was not going to answer any questions regarding the robbery until his lawyer, Mr. G. B. was present. He was provided with a phone and a telephone book. He declined to make any attempt to contact Mr. G. B. as only his office number was listed. He said he'd phone in the morning and that he would not say anything until then. The accused was then placed in cells for approximately $1^{1}/_{2}$ hours. He was then taken to an interview room and questioned after repeating his refusal to at least make an attempt to phone his lawyer. When the accused repeated that he would not say anything unless his lawyer was present, the officer asked him what he thought his lawyer could do for him. The accused responded that he could at least explain to him what went on. The officer then predicted that what the lawyer would advise him is not to say anything to the police. They (the investigators) then worked on the accused's emotions and mentioned his family to him. The accused cried and then said he would only speak "off the record" and made an inculpatory statement. At trial, the investigating officer said that he encouraged the accused to contact his lawyer and would have assisted him in every way, but frankly admitted that knowing what legal advise the accused would get, his chances of getting a statement were slim. He simply tried to avoid that.

The trial judge admitted the statement in evidence and the accused was convicted of robbery and the B.C. Court of Appeal upheld the conviction by a majority judgment*. The accused then appealed his conviction to the Supreme Court of Canada, which, by a 4 to 3 decision, held that the conviction should be upheld.

The defence relied heavily on the *Maninen*[11] decision by the Supreme Court of Canada, while the Crown relied on that Court's decision in *Regina v. Trembley*[12]. However, Maninen was considered to be distinct from this case in that he had said he wanted to speak to his lawyer and police had not adequately given him an opportunity to do so. In

---

[10] Regina v. SMITH - Volume 32, page 38 of this publication - (1988) 43 C.C.C. (3rd) 379

[11] Regina v. MANINEN - Volume 28, page 1 of this publication.

[12] Regina v. TREMBLEY - Volume 29, page 8 of this publication.

Trembley, the accused had ample of opportunity, but had procrastinated which appeared a ploy to not give a sample of his breath. In another case, a *Mrs. Clarkson*[13] had waived her rights to counsel when questioned about her husband's murder. She was quite intoxicated at the time, although she had waived her right with an operating mind. However, in the circumstances, judicial fairness was affected if her statement was received in evidence. The Crown had been unable to prove an unequivocal waiver. The defence in this Smith case reasoned that there was no waiver at all on the part of the accused. As a matter of fact, there was a firm intent to exercise the right to counsel.

The Supreme Court of Canada reasoned that a detained person must be given the opportunity to exercise his or her right to counsel. When the authorities provide that opportunity, there is an obligation on the detainee to be reasonably diligent in the exercise of the right to counsel. For the accused Smith, refusing to dial the number listed in the phone book (where a recording or answering service may have placed him in touch with his lawyer) simply because he claimed it was useless, was not a reasonably diligent exercise of his right to counsel. The officers had exercised their duty and gave the accused a reasonable opportunity to confer with his lawyer. This gave them justification to question the accused, who could, at any time thereafter, had exercised his Charter right to contact his lawyer. He didn't and the questioning had continued. Moreover, he did not even assert his right until more than two hours after his arrest.

In terms of the voluntariness of the statement, the accused did not claim that his statement was not free and voluntarily given.

Appeal Dismissed.
Conviction Upheld.

[13] CLARKSON v. The Queen - Volume 24, page 38 of this publication.

DOES THE "BUY AND BUST" OPERATION AMOUNT TO ENTRAPMENT?

REGINA V. BARNES - BC Court of Appeal - Vancouver CA 10557. March 1990

Policewoman N. participated in a "buy and bust" operation in an area known for drug activities. Of the 2294 drug charges preferred in the entire City, 506 were committed on that portion of a city street where Cst. N. operated.

She approached the accused, and the man who accompanied him and asked, "Got any weed?" "No." was the reply. The partner of the accused made a comment of encouragement to accommodate the undercover policewoman. There was one more refusal and then the accused sold the officer sixteen dollars worth of hash. This resulted in an arrest and the seizure of a small amount of cannabis resin.

The trial judge had found that the constable had engaged in random virtue testing amounting to entrapment. He applied the precedent set in the Mack case[14] and stayed the proceedings. The Supreme Court of Canada had used the example of deliberately leaving a handbag displayed in a bus station in the hope that someone will walk off with it. That would amount to random virtue testing. In this case the policewoman approached people she did not know. Due to appearance or certain behaviour she thought these people might be in possession of drugs they were willing to sell. The person so approached were selected by "hunch, a feeling ....." while there was no reasonable suspicion that they were involved in crime.

If one reads the Mack case it becomes obvious that the Supreme Court of Canada was careful not to stifle *bona fide* police investigations. Said the Court:

> ".....we do not expect to have contact with the police unless we have done something to trigger their suspicions or, unless we happen to be in the vicinity or reach a *bona fide* investigation of criminal activity."

Even in the example of the purse at the bus station, the Court emphasized that if there was a problem with theft of personal belongings, the placing of the bait would not amount to entrapment but be part of a *bona fide* investigation. Police activities in such an investigation that go beyond providing an opportunity to commit the crime and induces a person to commit it, is entrapment.

---

[14] MACK v. The Queen - Volume 33 page 48 of this publication.

The BC Court of Appeal held that the police were involved in a *bona fide* inquiry. The policewoman was in an area known for drug activities and she simply gave people present there an opportunity to commit related crimes. That is not random virtue testing held the Court. However, whether her persistence amounted to inducing the accused to commit the crime was never determined by the trial judge.

Crown's appeal allowed.
A new trial was ordered to determine if police had induced the crime.

CIRCUMSTANTIAL EVIDENCE OF POSSESSION OF COCAINE
EVIDENCE OF A TRACE OF COCAINE

REGINA AND YOUNG - BC Court of Appeal, CA 008546, Vancouver March 1990

Constable V. spotted the accused driving his car. The two knew each other. The accused was known as being active in the drug market and Constable V. had been told a few weeks previously that the accused carried a firearm for "strong-arming" tactics in his drug transactions. That information had come from another officer who claimed his informer to be reliable.

Constable V. stopped the accused under the authority of the BC Motor Vehicle Act for the purpose of a routine check of the accused's car and its documentation. The accused came out of his car and was very nervous and visibly shaking. The Constable searched the car for drugs and weapons but found nothing. He then spotted a definite bulge in the accused's trouser pocket who declined to be searched. The accused was then placed under arrest for possession of narcotics and asked to move his car off the road. Instead the accused kept on going with the officer in pursuit. The accused stopped and ran between houses to a parallel running street where he was apprehended by another policeman. He was then told of his right to counsel.

The officer searched the trail the accused had run. While he was doing this a couple of children handed him two baggies with white powder they had found in a garbage can near the accused's route of escape. He denied any knowledge of the 60 grams of cocaine the powder turned out to be. All of the evidence lead to a conviction of possession for the purpose of trafficking, which the accused appealed.

The morning after his arrest the accused's clothing was taken away from him and traces of cocaine were found in the pocket that had bulged. Needless to say this was important evidence in this circumstantial case and defence counsel did his level best to have the evidence excluded. The basis for this argument was the breach of the accused's right to counsel. He had not been allowed to phone counsel until his home was searched (with a warrant) and there had not been any further consultation with counsel when his clothing was taken. (The accused had not asked at that stage to consult counsel).

The question put to the BC Court of Appeal were:

1. Was the search by Constable V. lawful and reasonable?
2. If unreasonable and unlawful should the evidence of the cocaine have been excluded?

The Court found that the combination of the provision of the BC Motor Vehicle Act, the Constable's knowledge (derived from a credible source) of the accused carrying a firearm, his nervousness, the bulge in his pocket gave Constable V. reasonable grounds for searching the car

and the accused under S. 101 C.C.

The Court referred to the Supreme Court of Canada decision in the *Debot* case (included in this Volume) where it was held that rarely will a right to counsel violation trigger a search being unreasonable. Hence the search was reasonable.

It also had to be determined if the evidence of the trace of cocaine was relevant and admissible. The minute trace of cocaine found in the pants pocket did not prove present possession, but did it show earlier possession? The Court found it was relevant as part of all the circumstantial evidence that the baggies found by the children had before caused the bulge in the pants pocket.

In regard to exclusion due to the accused not having been given an opportunity to phone his lawyer for an hour and a half after his arrival at the police station, the Court found this did not amount to an infringement of his right to counsel. Police were in the process of obtaining a search warrant for his home. A call to his home would have frustrated the investigation and resulted in a probable disappearance of the evidence. He was not questioned during this period and as soon as police arrived at the accused's home he had been enabled to communicate freely with his lawyer.

From all the evidence the jury had been entitled to draw the inference that the accused was in possession of the cocaine. Furthermore, the quantity was such that they were also entitled to find that the possession was for the purpose of trafficking.

The BC Court of Appeal unanimously....

Dismissed the accused's appeal and upheld the conviction.

VALIDITY OF "FRISK" SEARCH UNDER S. 37 OF THE FOOD AND DRUG ACT.
REASONABLE BELIEF ON THE PART OF THE AUTHORITIES

REGINA V. DEBOT - Supreme Court of Canada - [1989] 2. S.C.R. 1140, December, 1989

Constable G. got information from a reliable informer that a considerable drug transaction would take place. He told his Sergeant who immediately placed the parties to this transaction under surveillance. All were known to police as being active on the drug scene. Everything went as was anticipated; the gathering took place and the accused was seen leaving with others in his car. He was stopped by Constable B. and told that there were grounds to believe that he was in possession of "Speed". Before being told of his right to counsel, the accused was searched and the "Speed" was found on him.

Constable G. did not participate in any of the investigation. The Sergeant had taken charge and directed operations from a command post. The Constables who had done the surveillance and conducted the search testified. The Sergeant did not appear as a witness.

The issues of course, were all Charter related:

1. Was the on-the-spot search of the accused lawful and reasonable?
2. Had the accused's right to counsel been infringed?
3. Should the drugs found on the accused have been excluded from evidence?
4. Was the search incidental to the arrest the officer effected? (He arrested the accused after he found the drugs)

The Sergeant had briefed the officers involved on what Constable G. had told him. From there he had ordered every move the officers made from his command post at headquarters. In other words, the officers did not exercise their own discretion but were following orders. This, held the trial judge, meant they acted arbitrarily. The Crown appealed the acquittal that resulted. The Ontario Court of Appeal ordered a new trial as they disagreed with the trial judge's opinion. They said that the on-the-spot search was analogous to a search of weapons before informing a suspect of his right to counsel. The Supreme Court of Canada disagreed with this and held that a search for weapons is a matter of self-preservation, while the search for drugs is exclusively to gather evidence and seize the contraband. For such purpose it is not justified to delay the right to counsel warning.

The question whether Constable B. had the prerequisite reasonable and probable grounds to search the accused, remained a key question. The Supreme Court of Canada concluded that Constable B. was entitled to rely on the grounds the Sergeant (nothing to do with rank distinctions) had for directing the operation as he did. It was in the circumstances immaterial what knowledge Constable B. had. "It would have made no difference had he known nothing

about the case and had merely been on patrol in the area at the opportune time", concluded the Court. Consequently the Sergeant's knowledge was a key link to the Constable's actions being lawful. The absence of the Sergeant's testimony on this point was considered to be "unsatisfactory". All the Court had was the hearsay evidence of the Constable of what they knew the Sergeant was aware of. The Court, therefore, tried to piece the Sergeant's knowledge together from what they had.

Needless to say what the Constable had related to the trial court by means of his testimony was pure hearsay evidence if it was adduced to prove what the Sergeant knew. However, it is an established rule of evidence that "state of mind" which justifies a certain action may be shown through hearsay testimony[15]. In *Eccles V. Bourke* police had conducted a search of a dwelling house for a wanted man based on information the officers received from colleagues. In *Collins*, the Supreme Court of Canada had been critical of the trial judge and the lawyers involved for not allowing a police officer to testify of what he knew from others, that caused him to search Ms. Collins. Consequently, all the hearsay information the Sergeant and the Constables had was admissible to show there were reasonable and probable grounds to search the accused.

Constable G. had acted on information from his informer before and had found it to be credible. The informer was not being paid and there were no charges outstanding against him or any favours extended to him. The Constable had in the past conducted a search of the accused's home and seized narcotics and paraphernalia used to package and traffic drugs.

Constable G. also knew the other persons who were supposed to be in on the drug deal to be active in the drug community. He had therefore every reason to believe that the transaction would occur as the informer said it would. In other words the "outside" tip was credible. He transferred all this knowledge to the Sergeant who, for lack of a better word, inherited Constable G's knowledge and was justified in having the same beliefs. The surveillance corroborated all this information. The meeting took place. The accused himself was not spotted but his car was there. When that car was driven from the scene he had not been identified, but was found to be a passenger in the car when it was stopped upon command of the Sergeant. The other flaw in the sequence of events the informer said would take place, was that the drug carrier did not arrive or at least, was not spotted. (Defence counsel had made quite an issue of this and urged that this flaw invalidated the prerequisite beliefs the Sergeant was inferred to have.) Said the Court:

> "In my opinion, it should not be necessary for the police to confirm every detail in an informer's tip as long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence.....I am satisfied that the police surveillance yielded sufficient corroborative evidence to warrant the belief that a drug transaction had occurred."

---

[15] ECCLES v. BOURKE - [1975] 2. S.C.R. 739.
Regina v. COLLINS - [1987] 1 S.C.R. 265 - See Volume 27, page 1 of this publication.

The search under scrutiny in this case was a lawful, warrantless search authorized by S. 37 of the Food and Drug Act. But it was, as pointed out above, conducted in the face of a Charter violation. The prerequisite beliefs to search the accused existed, but when he was detained so the lawful search could be carried out, he had not been told of his right to counsel. This raised once again the question whether a lawful search in the face of a Charter violation can be "reasonable" The Supreme Court of Canada reasoned that particularly when the search is warrantless it is carried out at the discretion of police. This makes them hardly independent to advise the suspect on the legality of their actions. Therefore, our Charter provides for a right to challenge the lawfulness of the intrusion or invasion of privacy, or to be informed by their counsel that they must submit to the search. Said the Court:

> "....the question whether a denial of the right to counsel renders a search unreasonable depends on two factors: (1) the source of the authority for the search; and (2) the invasiveness of the search."

(In other cases the Supreme Court of Canada has said the same thing. What makes a search unreasonable is the law that may permit excessive searches and/or the conduct and demeanour of those who carry out the search).

To clear up point (2) above the Court used as examples the most invasive searches like that of body cavities to a search of your car. The more invasive the search the more weighty the absence of right to counsel protocol becomes in rendering the search unreasonable.

In this case the search (a frisk search) had been the least intrusive search of the physical person. Furthermore there was no evidence of mistreatment or any physical force by the officer.

This still left the question if the Charter violation of failing to inform the detained accused of his right to counsel justified to exclude the evidence of "speed" on his person.

The evidence found on the accused was "real" and existed unrelated to the Charter violation. It was not found by conscripting the accused against himself. Admitting the evidence would not render the trial unfair.

Although the violation of the accused's right to counsel was not trivial, the motivation of the constable to conduct the search as he did (so the drugs would not be disposed); the interest of truth and the integrity of the judicial system, caused admission of the evidence to serve the reputation of justice better than excluding it.

Here ended the most analytical reasons for judgement. However, it should be noted that the majority of the Court was shorter and more to the point on the issue of the search.

Firstly, is should be noted that the extensive consideration by the Supreme Court of Canada was mainly due to the search being warrantless. It reiterated its first consideration of S. 8 of the Charter in *Hunter V. Southam Incorporated*[16] where it held that such searches are *ipso facto* unreasonable unless the Crown shows them not to be so. This is so far the only Charter violation where the burden of proving it is not on the party who raises it. A search by warrant upon a proper information has received independent judicial consideration and is consequently distinct.

The Constable was authorized by S. 37 of the Food and Drug Act to conduct the search. However, the Crown had not argued that S. 37 amounted to an overriding limit prescribed by law under S. 1 of the Charter that is demonstrably justified in a free and democratic society. Defence counsel did not challenge the validity of S. 37, and only attacked the standard of reasonable belief in this case. Said the Court:

> "Therefore, this court must proceed from the proposition that S. 37 of the Food and Drug Act is compatible with both S. 8 and 10 (b) of the Charter."

Consequently, the constitutional validity of S. 37 was not dealt with. Separate concurring reasons for judgment by one Justice was synopsized as follows:

> "The police were under no obligation to advise the appellant of his right to counsel before the "frisk" search. Where the obligation to inform a person of his or her right to counsel arises, there is an obligation to afford that person a reasonable opportunity to consult counsel. If the circumstances surrounding a search incidental to an arrest do not lend themselves to the delay inherent in making counsel available, they are equally not conducive to the reading of rights. This Court has recognized that the right to retain and instruct counsel without delay is not absolute. The right to be informed of the right to counsel need not be accorded different treatment."

The above synopsis outlines the clear opinion of the court as it was similarly expressed by other members of the Court.

---

[16] HUNTER v. SOUTHAM INCORPORATED - [1984], 2 S.C.R. 145, Volume 18 page 1 of this publication

Despite the Charter right of detained persons, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel. The only exception to this rule is where the lawfulness of the search is dependent on the detainee's consent.

The majority of the Court felt that only in exceptional circumstances would a right to counsel violation cause a search to be unreasonable.

Debot's appeal was dismissed.

IS A SOLID STATE SPIKED RING A PROHIBITED WEAPON?

REGINA V. M.J. BC YOUTH COURT - 52 C.C.C. (3d) 284.

> "Any finger ring that has one or more blades or sharp objects that are capable of being projected from the surface of the ring, is a prohibited weapon." According to the Criminal Code of Canada.

M.J. wore a spiked solid state ring with the spikes protruding approximately 1 1/2 centimetres from the surface of this so-called "death ring". There was no mechanism of any kind that would deploy any blade, point or projectile from the ring's surface. The issue in this case was if the ring was included in the above quoted definition.

In 1987[17] two BC Provincial Court Judges found that "sharp objects", were the key words in the definition. So did another colleague in 1989[18]. Presumably these judges found that a snoot-full of mechanized spikes is as painful as that from stationary ones.

This Provincial Court Judge held the crucial part of definition in the French language translates: "Any ring furnished with concealable disappearing or retractable blades or points.....". That, he found was unambiguous. Consequently, he held that a solid state ring is incapable of being included in the definition.

M.J. was acquitted

---

[17] Regina v. BUCHAN - June 11, 1987, Victoria, BC
Regina v. MARCHUK - June 8, 1987, Richmond, BC

[18] Regina v. KLASSEN - October 20, 1989, Vancouver, BC

BREAKING IN THROUGH ROOF..."OOPS, WRONG STORE." DOES INTENT TO BREAK-IN TO PLACE OTHER THAN THE ONE ATTEMPTED TO ENTER, NEGATE INTENT REQUIRED FOR CONVICTION?

REGINA V. WOOD - County Court of Westminster, June 1989, X019827

The accused was found on top of a roof over a drug store and a bank. He was quite high on drugs and had made some attempts to gain entry to the building. If successful, the accused would have found himself inside the bank while he obviously wanted to gain access to the drug store. He was charged with attempting to break and enter both business premises. The question before the court was whether the accused by meaning to break and enter the drug store but mistakenly removed panels that gives him access to the bank, was guilty of attempting to break and enter his true target; is guilty of attempting to break and enter the premises he was physically trying to gain access to; or is he guilty of attempting to burglarize both?

Considering the statutory provisions that if one breaks and enters a place it may be presumed that he intends to commit an indicatable offence therein, the Crown had a problem. The accused tried to gain access to the bank but intended to steal from the drugstore. If the intent is transferrable the accused could be convicted. In many cases such transferability exists as statute or common law.

Our criminal intent is usually paramount in situations like these. For instance, where A. for a specific reason means to take the life of B. but due to mistaken identity kills C., he could argue that he killed without intent and consequently had not committed murder. Even in jest one could say this was an ....oops, sorry...didn't mean to.....accidental death. If due to error the culprit's actions are inconsistent with his criminal intent, the law usually does not allow this as an excuse for the crime he committed. One can imagine the defence possibilities if this were so. The "wrong address defences" would be to the criminal element what the computer is to technology.

The only case the defence found to support its argument was decided by the BC Court of Appeal in 1987[19]. The Crown alleged conspiracy to import heroin. Saunders and his co-conspirators did import heroin while the Crown proved that the conspiracy was one of importing cocaine. The trial judge in this Wood case held that the issue in the conspiracy case was not one of transferred intent, but the Crown alleging a crime that did not occur. Conspiracy, in terms of transferring intent, is distinct from a substantive offence. Conspiracy is an agreement and plan intended to be carried out. What the allegation and the evidence had in common was importing only. This of course, is not to be confused with

---

[19] Regina v. SAUNDERS - unreported.

allegations of trafficking or actually importing of one prohibited or restricted substance and the evidence showing that the restricted or prohibited substance actually imported or trafficked was different from what is alleged. Then the intent is transferrable[20].

In conspiracy, "the whole offence is the intention" and ....."the correct intention must be alleged."

Accused was convicted of attempting to break into the drugstore and acquitted of that offence in relation to the bank.

[20] Regina v. KUNDEUS - [1975] 24 C.C.C. (2d) 276

ADMISSIBILITY OF STATEMENTS AND OF EVIDENCE SEIZED WITH INVALID SEARCH-WARRANT
PROPRIETY OF IMMEDIATE ARREST AT COMMENCEMENT OF SEARCH

REGINA V. ROGER VANDEN MEERSSCHE also known as MICHAEL GRANT HENDERSON - County Court of Vancouver, No. CC851877

A police officer received information from an informer who he (due to accuracy of previous information) considered to be a reliable source, that at a certain address a party by the name of "Roger" was selling cocaine and marihuana. The officer passed the information on to the drug squad.

A brief investigation revealed that the real identity of Roger was a mystery. The name of the woman he married some years back was Mrs. Vanden Meerssche. Other names also surfaced and police even searched the garbage that was put out for collection to shed some light on this. The accused was in fact an illegal immigrant who went under various names. This became apparent before "Roger's" house was searched.

A couple of days after the information was received from the informer, a member of the drug squad swore to have reasonable and probable grounds that there was cocaine and marihuana in the house. The officer attested that his reasons for so believing were:

> "Information received from a reliable informant whom I believe who has seen marihuana and cocaine in the above mentioned residence recently."

Knowing that "Roger", his wife and three young children were in the house, a female officer was among those who executed the warrant. Two officers asked the accused upon entering the house, if he was "Roger". There was no response but the accused was arrested for possession of narcotics. The police woman did likewise with the woman of the house though she personally had not been briefed. All she knew was that there was to be a house-search for narcotics and that she had to take charge of a woman. The arrest she effected was for trafficking in cocaine and marihuana.

Apparently to protect his wife, the accused said that whatever "You guys find, joints or anything, it is mine and my responsibility." The accused was searched and nothing was found. A second and more thorough search resulted in finding a plastic bag containing a white powder. When asked to identify the substance the accused said he did not know and reminded the officers that he did not have to say anything.

The accused was placed in one room, his wife in another and the children had been taken away by a child care worker. The officer guarding the accused had some conversation with him. He

knew the accused had been told of his right to counsel but he implied in his testimony that unless the accused specifically asked for the use of a telephone directory and phone he would do nothing to accommodate consultation with counsel. He had not told

the accused he had a right to remain silent and the question he had put to him was for the purpose of gathering evidence. He told the court that he rarely gave that warning as it was not a necessary ingredient to prove the voluntariness of a statement.

The accused had been attempting to make contact with his wife by shouting. He wanted her to contact a lawyer. The policewoman assisted the wife with the directory and phone, but for naught as the phone was out of order. However, the woman was not to worry as no questioning would take place until arrival at the police station where the phones were presumed to be in working order. Ten minutes later the wife was questioned about a certain location of the house and was asked to provide a key.

The search resulted in the finding of significant quantities of money, narcotics and paraphernalia indicating that it was kept for the purpose of trafficking. Police also found numerous documents (passports, birth certificates, social insurance cards and drivers licences) the accused could use to assume various identities.

Police conceded in Court the warrant was for narcotics but that they seized the documents to support charges in relation to passport and immigration offences. Also to investigate possible frauds in which the documents were used. No additional warrants to seize these documents were applied for despite the fact that the Narcotics Control Act does not authorize the seizing of anything in addition, like the search warrant provisions in the criminal code (compare s. 10 N.C.A. to s. 445 C.C.C.)

The trial arising from the falsified documents charges preceded the trial in relation to the charges under the Narcotic Control Act. The Crown apparently did not do too well in having the documents admitted in evidence in the first trial. Both trials were in the County Court before different judges.

Despite the fact that the warrant did not give police the authority to search for and seize the documents, it is presumed that to determine the reasonableness of search, the warrant was relevant. The first trial judge found that the affiant (the officer who swore the information to the warrant) omitted facts in relation to <u>his</u> grounds for the prerequisite beliefs. He had not received information from the reliable informer. Another officer did. Furthermore the aggregate of the application's content was insufficient to satisfy a Justice of the Peace that there are the necessary reasonable and probable grounds to issue a search warrant. Although this decision did not stop the judge who tried the accused for the narcotic charges to find differently, he didn't. He agreed with his brother and considered the warrant invalid.

This and other matters opened the floodgates for Charter arguments to suppress the evidence, and disallow all statements. The defence alleged that the search and seizure were unreasonable,

that the arrest of the accused and his wife were, (when effected) arbitrary and without grounds, and that the right to counsel had been infringed.

The first County Court trial judge had found that the "immediate" arrests were simply to accommodate the investigation and obtain admissions of guilt. Also, that police out of "convenient expediency" had prevented the Justice of the Peace from judicially deciding if a warrant should be issued. This conduct would shock the community he thought and therefore bring disrepute on the administration of justice. Also that opinion was not binding on the second trial judge as these decisions were all made during *voir dires*[21]. The trial judge agreed with his brother that the search warrant was due to inadequacies, invalid. He also found that the arrest of the accused's wife was without grounds and unlawful. However, the first trial judge was dealing with spin-off evidence (the documents) from the warrant to search for narcotics. The second judge had to decide on admissibility of the substances mentioned in the (invalid) warrant. Also since the first trial there have been judgements by more superior courts that have shed some light on the issues that arose in both trials. Then, considering the courts were equal in terms of level, the second trial judge had to address these issues anew, except in relation to the validity of the warrant. He agreed that it was invalid and consequently the search was warrantless.

On the admissibility of the inculpatory statements the accused made during the search, admitting that whatever would be found, he possessed, defence counsel argued that these were made under inducement. Police searched, apprehended his children and arrested his wife without cause. To protect his family he had no alternative but to assume responsibility. The trial judge ruled quite contrary to his colleague and held that the accused's, "I don't have to say anything" upon the white powder being found on his person, indicated that he was very much aware of his right. Furthermore, his motivation for speaking (exonerating his wife) may have been a response to a circumstance unfortunate for the accused but not a response to a fear of prejudice or hope for advantage. "Deploring" the practice of the constable not to inform people of their right to silence and conceding that it is not an essential to prove voluntariness, the statements were admitted in evidence.

Although the judge found that the "immediate" arrest of the accused's wife was unlawful and unreasonable, and that there never arose during the search or subsequent investigation any grounds to legally effect an arrest of her, the "immediate" arrest of the accused was lawful. Two sources of reliable information had described to police the "Roger" who resided at this address and was trafficking cocaine and marihuana. The accused did fit that description. Quoting a longstanding interpretation of reasonable and probable grounds, the judge held that police had "reasonable grounds for suspicion of guilt". This did not only justify the arrest but also rebutted any suggestion that the detention that followed for the duration of the search (1 hour and 40 minutes) was not arbitrary. It also caused the two physical searches of the accused to be lawful and reasonable.

---

[21] Supreme Court of Canada, DUHAMUL V. The Queen - See volume 20 page 1 of this publication.

The County Court trial judge also found that the accused's right to counsel had not been infringed. There was no doubt of his awareness of that right. Although police are to provide reasonable opportunity for a detainee to exercise that right that obligation only comes after a request for it has been made. The Court held that careful consideration of all the evidence leads one to conclude that when the accused shouted for his wife to contact a lawyer he advised her to get a lawyer for herself. There was nothing to indicate that he intended her to get a lawyer on his behalf.

This left the reasonableness of the search to be decided. It, as well as any of the other Charter infringements alleged by the defence, is capable of having all of the evidence suppressed. Despite the fact that the Court felt that there had not been any deliberate deception on the part of police when the warrant was applied for, it was nonetheless incompetence on their part. As regrettable as that may be, the officers who conducted the search did so in faith of the warrants validity. The question was if this was capable of rendering an unlawful search a reasonable one. The answer depends on the reasons for the warrant being invalid. If the reason is minor or technical such conversion is possible, however where the flaw in regard to the warrant is substantial such conversion is excessive and disharmonizes with the Charter's tenor. In this case an officer swore that he had information received from a source. That in fact was not so and a blatant inaccuracy. That is not minor or technical. In addition to that police went ahead and seized items that were not in the scope of the warrant had it been valid. The search was unreasonable!

Would admitting the evidence bring the administration of justice into disrepute? The evidence police found was real evidence; the narcotics found were physical evidence that the information police received, and believed to be reliable was accurate; police did rely on a warrant they sincerely believed to be valid; the accused could not hide behind the trauma of a large-scale search so he chose to maintain his stock of contraband in the same place he shared with his wife and children, etc.

Admitting all the narcotics and paraphernalia as part of his unlawful business, would not render the trial unfair or bring disrepute on the administration of justice.

All evidence admitted.

USING STATEMENTS MADE DURING INTERCEPTED COMMUNICATION TO IMPEACH CREDIBILITY OF WITNESS APPLICATION OF INVASION OF PRIVACY PROVISIONS

NYGAARD and SCHIMMENS V. THE QUEEN - Supreme Court of Canada 51 C.C.C. (3d) 417, November 1989.

The accused were tried for murder, committed while collecting a $100.00 debt from the victim. Schimmens called two witnesses, Ms. J., who testified that she saw him at the race track at the time of the murder and a Mr. S. who said he was with him at the track at that time.

The telephone line of Ms. J. had been tapped and the Crown had recordings of her conversation with a Mr. W. as well as Schimmens. The statements Ms. J. made during the telephone conversation were contradictory to her testimony. To discredit her the Crown submitted transcripts of that conversation and cross-examined her on the basis of that contradiction. Needless to say that this was over objections by defence counsel whose position was that the Crown was obligated to show that the interception was lawfully made. The Crown had not even lead any evidence of an authorization or consent by either of the parties to the communications. The Crown took the position that he was not introducing the content of Ms. J.'s statements to prove the truth of its content, but used the contradiction only to discredit Ms. J's testimony about Schimmens being at the race track at the time of the murder. How those statements were obtained was irrelevant. Ms. J. admitted to have made them and that is all the Crown needed to cross-examine her under the provisions of S. 11 of the Canada Evidence Act. At trial, the defence counsel lost his arguments on this as well as the strict exclusionary rule under the privacy provision of the Criminal Code. The Court reminded counsel that the evidence was not against Ms. J., Mr. W. or even the accused. The jury had been instructed that the evidence could only be used to determine Ms. J's credibility.

Schimmens and Nygaard (the co-accused) used this issue as a main cause for appealing their convictions of first degree murder. They were unsuccessful in the Alberta Court of Appeal and then further appealed to the Supreme Court of Canada which by a 5 to 4 decision granted them a new trial.

The Crown again argued that the evidence of the statements made during the telephone conversations between the accused Schimmens and Ms. J. were not used against Schimmens but exclusively to impeach Ms. J's credibility. However, one can imagine that the very evidence of concoction of an alibi being brought before a jury in this manner, is devastating to the defence of alibi, despite the fact that it does not prove guilt. In other words, the Crown came in the back door so to speak. The specific questions put to Ms. J. had an effect far beyond shaking her credibility. In reality the evidence adduced through cross-examination was against Schimmens and consequently it was subject to the exclusionary

provisions in the "Invasion of Privacy" in the Criminal Code. The trial judge should have conducted a *voir dire* and the Crown should have proved the lawfulness of the interception.

Appeal was allowed
A new trial was ordered

OBJECTIVITY VIS A VIS SUBJECTIVITY CRIMINAL LIABILITY DEPENDING ON "KNOWLEDGE" OR "WHAT SHOULD HAVE BEEN KNOWN"

REGINA V. HARRIS - Ontario Court of Appeal

Speaking for myself, it seems that the concept of objectivity and subjectivity in criminal law are a mystery. I have struggled to comprehend but when I think it is finally understood another complexity arises and causes another sense of inferiority. However, this *Harris* decision by the Ontario Court of Appeal is a psychological break- through for me. Maybe those who were assumed to have a flawless grasp of this "thing" are also struggling. Furthermore, I even think it is now possible that the Justices of the Ontario Court of Appeal got so involved in the theories surrounding these concepts that they overlooked the obvious and wrote reasons for judgments that seem absurd in terms of logical conclusions.

Harris, the accused, was in the company of a party by the name of Woods who had a burning desire to travel. Lack of funds was the only thing that stood in his way. To solve this problem Woods unfolded an uncomplicated plan to the accused. They would take a taxi and the accused was to give a large bill to the driver at the end of the ride. While the driver would be pre-occupied with making change Woods would kill him with a knife. To carry out the wicked plot they went to a store where Woods purchased a hunting knife for $114.00. All through this, the accused told Woods, "You are crazy, you know that?" He repeated words to this effect several times but none-the-less continued to go along with Woods with the admitted knowledge that Woods would carry out the plan. A cab was hired and when it arrived at the instructed destination the only thing that did not go according to plan is that Woods presented the bill to the driver in payment instead of the accused. While the accused was alighting from the cab he heard a thud. Then Woods came out and said, "I stabbed him, let's run." They split up and the accused ran straight for a telephone and alerted the police to save the driver's life. He also identified himself on the phone. He had done this as, "I got scared because the whole situation was out of proportion."

The accused met police and made a complete statement. He had gone along with Woods, "Because I had nothing better to do this evening." He commented that he, "Should have stayed home with his wife." To put his comments to Woods, about him being crazy, into perspective in terms of his knowledge that Woods intended to carry out his plan, police asked the accused if he knew that Woods was going to kill the cab driver. He had answered, "From what he said, I understood that he was going to knife the cab driver." and, "Yes, I knew. After it happened I felt sorry and guilty and that is why I called."

A jury convicted the accused of murder, after it was instructed on the provisions contained in Section 21 of the Criminal Code which stipulates who is a party to an offence and in essence provides in subsection (2), that if one has an intention in common with another person to carry out an unlawful act, then if he knew or ought to have known that the commission of an offence would be a consequence, he is a party to that offence. The jury was told that it must find that the accused "knew or ought to have known" that Woods would kill the taxi driver.

The Ontario Court of Appeal held that the Crown relied on a subjective test to determine the prerequisite knowledge on the part of the accused to be a party to the murder Woods committed. It found that the required test is an objective one. In other words, the accused should have had an objective foreseeability that Woods was going to commit the murder. As this was not included in the jury's instructions, a new trial was granted.

Synopsizing the explanations learned persons have given of the meaning of subjectivity and objectivity in criminal law, one concludes the following:

> A subjective standard is met by considering what the person to whom it applies, believes on the basis of his/her circumstances at the time. What did that person know, believe, understand or intend at the time in question.

An example is a statement to a person in authority in an under-cover situation. Whether or not, for the purpose of voluntariness, that person was a person in authority depends on what the accused believes that person to be at the time he/she made the statement. The typical example is the agent-provocateur sharing a cell with a suspect, who in an air of confidence, grandeur or remorse tells the person he believes is no more than a cell mate, a version of relevant events.

Whenever the law specifically requires a certain state of mind, then the standard required whether that state existed is subjective. When the law requires knowledge, or intent, then these issues must also be determined by means of a subjective test.

An objective standard is usually a lesser threshold than the subjective one. That of course can vary with the issue. For instance, the Supreme Court of Canada decided that to determine entrapment an objective test is to be applied which makes the criminal propensities of the entrapped person irrelevant. There, of course, the subjective standard would favour the Crown. Generally, when the objective test applies we compare the actions of an accused with those of an average, reasonable person in our society. Considering the circumstances in this case would the average, reasonable person have foreseen that murder would result from the unlawful act the twosome intended in common. Particularly where the law stipulates that the party "ought to have known", then the average and reasonable man is the bench mark. Remarkably enough, sub-section (2) of Section 21 seems to provide that either test can be applied where persons form an intention in common to carry out an unlawful act. Then, if a consequential offence other than the one they intended in common occurs, all are a party to the offence if they "knew" (subjective standard) or "ought to have known" (objective standard) that the consequential offence was "probable" considering all the circumstances.

The Ontario Court of Appeal had the appeal before them of a man convicted of murder because he had an intent in common with Woods to commit robbery with a 5.5 inch blade hunting knife, especially purchased for that purpose. Woods admittedly tells him that he is going to kill the taxi driver upon which Harris replies, "You are crazy, you know that?" This he said (found the Court) not because he thought Woods to be facetious or joshing, but because he believed Woods to be capable and serious about committing not only the robbery but also the murder. While Harris fully believed all of this, and not having anything better to do that evening anyway, he went along and was prepared to do his part (presenting the bill that would require change). When questioned, the accused said in a voluntary, admissible statement, "From what he said I understood he was going to knife the cab driver, I went with him because I had nothing better to do this evening." He also said about the stage of the robbery at which the stabbing was to take place, "I got out of the car, I knew what was going to happen." He did not get out of the cab to disassociate himself from Woods' actions but the ride had come to an end. To the specific question, "Did you know he was going to kill the cab driver before you got into the cab?" Harris replied that he did know and had felt guilt and remorse when it happened and had phoned the police to save the driver's life in the event the stabbing had not been fatal in the first instance.

The Ontario Court of Appeal considered the standard of intent for constructive murder (the construction of law section 21 (2) as established in the *Vaillancourt*[22] decision by the Supreme Court of Canada). *Vaillancourt* also was a party to an armed robbery and the Crown had relied on the then valid Criminal Code provision that if in such involvement a death resulted you were guilty of murder. The Supreme Court of Canada declared that provision without force or effect due to it not providing as a minimum requirement "subjective foreseeability" on the part of the person who was involved in the robbery, but was not the one who caused the death. In other words the Court said that the law should have provided for a standard where the party to the offence must know that the death of a person is a probable consequence.

In this Harris case the Crown did not and, of course, could not rely on that invalidated Criminal Code provision. It relied on S. 21 (2) C.C, which, as explained above, provides that if you and someone else join in the commission of an unlawful act, you are criminally liable for the consequences of that act provided you know or ought to have known the probability of the consequences. The Supreme Court of Canada had in *Vaillancourt*, declined to deal with the applicability of S. 21 (2) C.C. and only dealt with the provision the Crown solely relied on.

The trial judge in this Harris case explained to the jury what the "ought to have known" means and included its use in his instructions to them. In view of the fact that murder requires a specific, rather than a mere general intent (which was a kernel issue in

---

[22] VAILLANCOURT and The Queen - Volume 30, page 1 of this publication.

Vaillancourt) the Ontario Court of Appeal held that "ought to have known" (the objective standard) was inadequate to determine whether or not there had been specific intent on the part of Harris.

Conviction set aside
New trial ordered

Comment:

It is very difficult to understand why the Ontario Court of Appeal interfered with the conviction. The only issue was determining knowledge by means of the subjective test (knew) or the objective test (ought to have known).

It seems reasonable to say that if someone knows that his partner in a robbery is going to murder the victim, then it seems totally superfluous to instruct the jury to consider whether he "ought to have known". In this case one can go as far as to say that he knew the consequence and not just the probable consequence, of the robbery. Harris' statements were admitted in evidence as proof of the truth of their content. No one can have any doubt that the subjective standard to determine the knowledge on the part of Harris had been met. When it has been proved what the accused did know, it is difficult to envision the significances what he ought to have known.

In many situations the subjective test to prove knowledge or intent is an idealistic standard which may well prove to be a legal luxury we cannot afford. We must not forget that it blocks the most reasonable and sensible conclusion that the accused in the circumstances must have known the probable consequences unless he is such an idiot that we must question his fitness to stand trial. Can subjective foreseeability only be proved by direct evidence? If we have to determine what was in a person's mind at a certain point in time, and we are not to use any objective standard, a confession of knowledge seems the only means. Even the most blatant and obvious case of wilful blindness would be inadequate to meet that burden of proof. One wonders if knowledge (in view of these recent cases) can be proved because the evidence is consistent with the accused having had that knowledge and is inconsistent with any other rational conclusion. It seems that drowning an irresistible inference from evidence requires (even where we take the mentality of the person in consideration) an objective standard.

Section 21 is an essential part of our criminal law. Without it that law could be impotent to deal with the sophisticated criminal. Assuming that two persons had and admit to have had an intent in common to commit unlawful acts. However, both claim (or simply

don't confess to having knowledge of the ultimate intent) not to have had any knowledge of the probability of a consequence beyond their admitted intent. Then following the *Vailloncourt* and *Harris* cases, both would possibly only stand convicted of the unlawful act they admittedly intended and escape any criminal liability for the far more serious crime they really intended and did perpetrate.

The recent decisions, regardless of the high standard they set to prevent the over-reach of law in creating criminal liabilities and excessive vulnerability, will open the door to the most absurd defenses. In our Charter we have confessed such a desire to establish and maintain the highest reputation and respect for our administration of justice. Although the Courts cannot cater to the opinions of the "Archie Bunkers" in our midst, or those with cursory views, it must realize that pursuit to attain infallibility by unrealistic applications of principles is a formidable means of the public considering our Courts to be ineffective and losing confidence in what already appears to many as "Alice's trip through legal Wonderland".

RECENT POSSESSION OF STOLEN PROPERTY

REGINA V. WISEMAN - 52 C.C.C. (3a) 160, Nova Scotia Court of Appeal

Mrs. P. arrived home with a friend shortly after her apartment was broken into. A T.V. set and stereo equipment were stolen. Both looked out of the window and the neighbour, the accused Wiseman, and a Mr. White, were seen carrying the stolen goods. Shortly after, police were knocking on the accused's door and he gave the officers permission to search the house. The T.V. set was found among discarded material in the basement and the stereo equipment had, considering the tracks from the accused's house in fresh snow, very recently been dumped in adjacent property.

At trial neither accused testified but they called other neighbours who claimed they had seen persons carrying things in plastic bags out of P.'s apartment. These persons were not the accused. The credibility of P. and her friend was brought into question by means of witnesses who repeated contradictory statements P. and friend had made about the incident.

The accused was convicted of breaking, entering and theft. "Recent possession" coupled with the absence of an explanation was what the Crown relied upon to convict the accused. He appealed his conviction. (White had been acquitted.) Wiseman reasoned that if the jury acquitted White they could not possibly believe Mrs. P. and her friend. Consequently the sole reliance of the Crown was on the unexplained possession of property recently obtained by the commission of an indictable offence. The defence also claimed that although the accused had not given a statement, testified or given an explanation directly, he had done so indirectly by adducing evidence of these other men who were seen carrying goods from the apartment. Hence the jury were not entitled to draw the inference (not presumption) of guilt.

The address to the jury had been flawed by the trail judge not having followed the precedence set by the Supreme Court of Canada in *Kowlyk v. The Queen*[23] Now the "doctrine of recent possession" is "the unexplained possession of recently stolen goods which give rise to the inference that the person knew the property was stolen or that he was the thief". This was done inadequately. The trial judge told the jury that if they rejected the evidence of Mrs. P. and her friend then "recent possession" only applied to Wiseman and not to White. If they rejected the evidence of the neighbours who saw "persons" other than Wiseman and White carry things away, then that would be a reasonable explanation that would negate "recent possession" for Wiseman (it would then not at all apply to White). This had possibly confused the jury held the Nova Scotia Court of Appeal and amounted to an erroneous instruction. The trial judge should also have told the jury that if they felt that the explanation the neighbours evidence amounted to, might reasonably be true (even

---

[23] Volume 33 page 5 of this publication - (1988) 43 C.C.C. (3a).

though they are not satisfied that as to the truth of the neighbour's testimony) then "recent possession" does not apply. Being satisfied that a proper instruction to the jury should have resulted in a different verdict the Court held by majority that:

> The conviction must be set aside and a new trial must be held.

MALE STRIPPER ASSAULTING FEMALE MEMBER OF AUDIENCE - ACCUSED CONSENT

REGINA V. KINDELLAN - also known as McLEOD - County Court of Vancouver No. CC880321, August 1988.

The accused put on his act as a male stripper for the purpose of entertaining his predominantly female audience and provide sexual titillation for them. Part of his act was to involve a female member of the audience and simulate certain sex acts with her. On the occasion that gave rise to this allegation of sexual assault the accused had selected a female person who was a member of the band that played at the same club and had taken a rest period while the accused went through his routine. The complainant clearly protested to be the accused's partner in the act. In spite of this, the accused continued and found himself convicted of sexual assault. He appealed the conviction to the County Court.

The grounds for appeal were that the assault (if any) was not sexual as the act was not to gratify himself or any one in the audience. This was totally rejected as the assault had affronted the sexual integrity and dignity of the complainant.[24]

Conviction upheld.

---

[24] "The meaning of "Sexual Assault" Regina v. CHASE - Supreme Court of Canada. Volume 2a page 35 of this publication.

INSTALLING A VIDEO CAMERA UNDER THE AUTHORITY OF A SEARCH WARRANT - ADMISSIBILITY OF CONTENT OF TAPES - REASONABLENESS OF SEARCH

REGINA V. HILTON ET AL - County Court of Cariboo, Prince George CCR 15673, October 1989.

Mr. James Hilton and 11 others were charged in relation to a substantial cocaine business. Police had been investigating this group and James Hilton in particular for some time. Their efforts resulted in locating his cut house (a place where cocaine is prepared and packaged for distribution). An authorization for a listening device to be planted in this apartment (cut house) was obtained and police gained surreptitiously access[25] to the apartment to install the device. While in the apartment technicians attempted to install a video camera but ran into technical difficulties. They searched for a spot to mount the camera and found while doing so, material commonly used for packaging cocaine. The following day a search warrant was obtained and during the so-called search the video camera was installed. This resulted in five soundless video tapes of the accused packaging cocaine and counting large amounts of money. During their trial the Crown adduced the video tapes in evidence and a *voir dire* was held to determine their admissibility.

The four main questions arising were:

1. Can a search warrant be used to obtain the intangible evidence captured by the video camera?

2. Does soundless video surveillance amount to a search?

3. If it was a search, was it reasonable and did it infringe the rights of the persons captured by it?

4. If it is an infringement of the rights of the accused will admitting the tapes in evidence bring the administration of justice into disrepute?

The officers were in a position to present the best possible evidence to the Courts. There was no doubt that an illegal activity was perpetrated - a crime of considerable gravity. The means the police used (in the latter part of 1987) was not one for which the law (either statute or common law) provided any procedures or guidance. The police decision was based on conscience and law, although very little of the latter at that time. It was decided that public

---

[25] Supreme Court of Canada 1984 - Volume 20 page 13 of this publication.

interest outweighed the right to privacy. A search warrant did issue for the intangible evidence of the activities in the alleged cut house.

In October of 1987, when police went ahead with visual monitoring of Hilton's apartment, a place where he did not reside, there was at least one case decided by the District Court of Ontario. A private homosexual event regularly took place in a public washroom facility. Innocent people had been caught with their pants down, but so did the two accused. The Court held that visual monitoring does constitute a search where the person(s) observed by camera cannot have a reasonable expectation of privacy because of circumstances and including the place where they are monitored.

Subsequent to police visually monitoring *Lofthouse et al*[26] in his cut house by means of a video camera, the Ontario Court of Appeal decided on a case where police visually monitored a hotel suite where a *Mr. Wong*[27] provided for many of his invited friends a gambling den. In other words, a public event in a private place. In view of the event by law, being public Mr. Wong was not entitled to have an expectation of privacy and consequently the video surveillance was not a search and the evidence obtained by it was admissible in evidence.

Another case, is one decided by the Quebec Court of Appeal in 1987. *Mr. Asencios*[28] used a private garage to store narcotics he was distributing. Police, without warrant, installed video equipment and collected considerable evidence against the accused. In the circumstances, Asencios was entitled to an expectation of privacy despite his activities of a criminal nature.

In terms of using a search warrant for video surveillance in a place other than a public place the police had a 1985 precedent[29] that was not in their favor. It was clearly established that search warrants cannot be issued for intangible objects. This meant that the search warrant issued for Hilton's apartment did not cover the installation of the video camera or the evidence obtained by that equipment.

The Court also held that neither precedent of the public event in a private place and the private event in the public place, did apply. Hilton had a reasonable expectation of privacy and the video surveillance was therefore a search subject to s. 8 of the Charter (reasonable search).

The cases clearly indicate that an unlawful search is not automatically unreasonable or, a lawful search in not always reasonable. If the law providing for the search is unreasonable any search

---

[26] R. v. LOFTHOUSE and R. v. LE BEAU 27 C.C.C. (3a) 553 - Volume 26, page 18 of this publication. This decision was upheld by the Ontario Court of Appeal - 41 C.C.C. (3a) 16B.

[27] R. v. WONG *et al* - 34 C.C.C. (3a) 51 - Volume 2a, page 43 of this publication.

[28] R. v. ASENCIOS - 34 C.C.C. (3a) 168 - Volume 2a, page 43 of this publication.

[29] LE BANQUE ROYALE DU CANADA AND THE QUEEN - (1985) 18 C.C.C. (3a) page 8.

in compliance with that law is unreasonable and only good faith may salvage that situation. Demeanour and behavior of authorities are capable of causing a perfectly lawful search to be unreasonable. Said the B.C. Supreme Court about the search of Hilton's cut house:

> "In the absence of trespass I am unable to see where the search was contrary to any statutory or common law."

When they installed the video equipment the officers were lawfully in the apartment under the authority of a search warrant. A search was carried out at that time which produced tangible incriminating evidence (drugs and equipment for packaging). Said the Court:

> "The concern here is not whether the search by means of the video camera was unreasonable under s. 8 because it was unlawful, but whether it was unlawful, because it was unreasonable under s. 8 as an unjustified invasion of privacy."

The Court found as facts that Hilton, nor anyone else, used the apartment as a dwelling. "He primarily, if not solely, used it as a fortress to keep police away from his criminal activities". The camera was aimed at the table where the packaging was done. No other part of the apartment was captured by the lens. Hence the intrusion into privacy was very limited.

The Court concluded that the police nor a jury should be deprived of the benefit of direct evidence that can be reasonably obtained. The video surveillance was not unreasonable and did not infringe any rights under the Charter.

Should I be wrong, said the Supreme Court Justice, admitting the video evidence will not bring disrepute on the administration of justice.

Video tapes were admissible in evidence.

- VOIR DIRE RULING IN MURDER TRIAL -
- WHO CAN BE THE BENEFICIARY OF 'REMEDY' OR EXCLUSION OF EVIDENCE UNDER S. 24 OF THE CHARTER
IRREGULARITIES IN RECRUITING A CROWN WITNESS -

REGINA V. P. AND B. - Supreme Court of B.C. - No. X019630
New Westminster Register - Voir Dire Ruling

Eric and Michael P., 17 and 15 years old respectively, lived with their father in a B.C. town. Tyrone B., a 16 year old foster child also made his home with the P. family.

The P. brothers and Tyrone axed the father, his wife and their 9 and 11 year old children to death and made their way in the family car to a northern B.C. community where the mother of the P. brothers lived. On January 19, the three boys were arrested there for theft and possession of the family car.

Eric and Tyrone were charged with four counts of murder in the first degree and Eric was slated to testify for the Crown. The defence claimed that the police had behaved "reprehensibly" during the investigation of the boys. The irregularities in regard to arrest, detention and interrogations had been such that it cried out for a "remedy" under s. 24(1) of the Charter. The remedy the defence petitioned for was a prohibition for the Crown to prosecute the boys for murder in the first degree or a prohibition for the Crown to call Michael as a witness.

After a lengthly *voir dire* the Supreme Court Justice decided that despite some irregularities the two accused had not been prejudiced, nor did any of it result in evidence against them. Hence no remedy or exclusion of evidence was called for in regard to any infringements of their rights.

This left the Court to consider how the Crown witness Michael fared in respect to his Charter rights when he was at first a suspect and subsequently "recruited" to be a witness.

On January 19 police were looking for three boys in that northern community. Police contacted the mother of the P. brothers and she attended the police station prior to the arrests which were effected later in the evening of that day. Michael was told of his rights and taken to a telephone several times during the evening but he simply "hung his head" and failed to use it. He claimed: "There is no one to call." His brother Eric did phone his mother and made her aware of the arrests.

Police did contact the Justice of Peace and notified her of the arrests and told her about the murder investigation. They asked her to remand the youths on the theft and possession charges, until the following morning for a court appearance. She complied. However, no appearance was made on January 20. Police "cancelled" the appearance to "facilitate" the

murder investigation. Although this seems the ultimate of impropriety one can appreciate the incredible dilemma. Police had no evidence to support charges of murder at that time. To say that the boys were prime suspects is an understatement. But were there grounds requisite to hold them or justify an application to the Court for a further remand in custody?

Consequent to the notification of the arrests to the mother of the P. brothers, a legal aid lawyer advised Eric and Michael of their rights in the morning of January 20 and a lawyer retained to represent them, spoke with his clients in the afternoon. Subsequent to this Michael was interviewed by police that day in the presence of his mother. He made it very clear that he did not want to say anything as per the advice he received from his lawyer. This caused the interview to end abruptly.

Due to the magical (but often misunderstood) 24 hours of custody fastly approaching the officers arranged for a hearing before the local Justice of the Peace which was held at 9:30 p.m. on January 20. The officers confided in the Justice and informed her of their impasse between the relevant law and the investigation of these crimes involving considerable brutality. They asked for, and were granted a further remand in custody, for a period of 3 days. The lawyers who represented the youths were not present at the hearing and neither was the mother of the P. brothers. When all this was questioned during the trial, police said it was customary to brief the Justice of Peace before hearings of this kind.

The Justice of the Peace said she gave the boys an opportunity to have their lawyer present by pausing after reading the charges of theft and possession of the family car to them.

Police agreed, that in view of not getting anywhere with interviewing the boys, Michael was the weak link, the one most likely to talk and provide them with information.

While Michael lived in the northern community he was friendly with the sons of a police constable; he had been the officer's paper boy and had lived in the same neighbourhood as the officer. To get the necessary details of the killings and to secure Michael as a Crown witness it was decided that this officer should interview Michael and that he should be informed that he would not be charged with murder.

Right after the appearance before the Justice of the Peace on January 20th, the constable interviewed Michael. Upon again being told of his rights Michael indicated that he had nothing to say. The officer then eased into the real purpose of the interview and said that he wanted to speak to him as a friend, a neighbour and a police officer. Michael apparently agreed to talk upon the following agreed to conditions:

1. The conversation had to remain confidential, "just between you and me."

2. No part of his statement was to be used during any legal proceedings.

3. Nothing was to be "written down".

About the January 20th interview, the officer said he had disregarded the requirement of the Young Offenders Act in term of the presence of parent or counsel as "we were investigating a murder and the other two had said nothing."

Late afternoon, January 21, Michael was again interviewed by the father of his old neighbourhood buddies. This interview was taped without Michael's knowledge. Michael said he wanted to talk to his mother. He was talked out of this by it being implied that as he was not to be charged and that there really was no need for him to make that call.

When this interview took place there had been no changes to the conditions Michael had set; and the Police had by then decided that Michael would not be charged and that he would be released in the custody of his mother on January 22, the day he was to appear in Court. On the morning of January 22, before being released, another interview of Michael took place.

The Court found that numerous violations occurred in dealing with Michael e.g. Young Offenders Act; Bail Reform Act; Charter of Rights and Freedoms etc. Examples were the judicial hearings being improper and police cancelling a judicial order; the right to have parent present at interviews and hearings; the right to counsel; continued questioning despite his clear indication that he wanted to adhere to the advice he received from his lawyer. If evidence against Michael had been obtained by these means, its admissibility would be unlikely.

Besides all of this police had practised deceit in vouching that Michael's utterances would be "between you and me" only, while all the while police were securing evidence Michael could be forced to give during proceedings against his brother and B. To be fair to the investigators and to put things into perspective the court said:

> "In fairness it should be noted that the police were not obtaining evidence from Michael but were obtaining a statement which could not be used against him in any event. Moreover, it cannot be forgotten that the police were in the midst of investigating crimes of immeasurable brutality."

In relation to the statements given by Michael the Court recognized their purpose:

> "At most the Crown secured statements from the witness Michael. Of course, these statements would not be evidence in the trial. At most, the statements only provided the Crown with ammunition with which to impeach their own witness, should the occasion arise."[30]

---

[30] Needless to say, the Court referred here to the adverse and hostile witness trial procedures by which it may gain the opportunity to cross-examine its own witness.

Now the interesting question had to be dealt with. Can an accused person claim any remedy or have evidence against him excluded if the right or freedom violated was that of another person? The Supreme Court of Canada touched on this issue in the Collins case[31] "exclusionary rule" trendsetter but could not rule on it as that very issue was not before them. However in 1987 The Supreme Court of Canada[32] held that only the person who's rights were infringed could apply for a remedy under the Charter. The defence claimed that the accused persons were entitled as a principle of fundamental justice, to a police investigation free of legal and constitutional improprieties. Furthermore, to accept evidence from this deceived and trapped witness would undoubtedly bring disrepute on the Courts.

The Supreme Court Justice ruled that the two accused had no standing to apply for a remedy or exclusion of evidence. Their rights had not be violated. The wording of s. 24 Charter is clear, only the person whose rights and freedoms were violated can apply for relief. Concluded the Justice:

> "One appreciates the immense difficulty which the police face in securing evidence in difficult cases while attempting to maintain the integrity of the system of justice. However, I do not think that the Charter intended to confer remedies upon persons whose rights are not directly breached by the authorities. For these reasons the applications are dismissed."

Note: P. and B. were convicted of four counts of first degree murder.

Comment: The practice of the Justice of the Peace being the confidant of police investigators seems not uncommon. Many do not see that person as a member of the judiciary who must be impartial without prejudice, or to put it succinctly, must act judicially. He or she is seen more as an administrator not just by police but also by Crown counsel. It has been experienced many times that the Justice of the Peace will not only refuse to exercise his judicial discretion on whether to issue process but will not even entertain an information unless Crown Counsel has approved the process to take place. Recent challenges of impartiality on the part of Justices of the Peace in Ontario remind us of entitlement of judicial excellence regardless of the level of the judiciary.

---

[31] Volume 27 page 1 of this publication.

[32] FAHEY v. R. (1987) 33 C.C.C. (3a) 289.

Also note that quoting the Alberta Court of Appeal[33], the B.C. Supreme Court Justice seemed of the view that there may be cases where it is appropriate to make an order under s. 24(1) of the Charter, exclusively to deter law enforcement agencies from similar breaches.

> "...perhaps an award in damages against police would be an appropriate remedy so as to deter future similar conduct."

It must not be forgotten that the accused persons were the applicants in this case. Assume that Michael, quite separate from this criminal trial had petitioned the Supreme Court (the Court of residual powers) for a remedy in the form of damages. One can expect that he has standing and the extend of "remedy" is still an unknown quantity.

---

[33] R. v. CARDINAL (1985) 21 C.C.C. (3a) 254.

INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE BY GIVING MONEY TO A POLICE OFFICER FOR CONFIDENTIAL INFORMATION

Regina v. KWIATKOWSKI AND COOKE - Supreme Court of BC, Vancouver CC 890099, November, 1989

Mr. K., a drug dealer, was also a reliable informer and had provided police with information that had lead to convictions. Consequently when K. told a member of the Coordinated Law Enforcement Unit that the accused had corrupted police member(s) of that Unit and had gained access to secret information, the information was taken seriously. If true, the leak had the potential of jeopardizing the lives of informers and the success of ongoing investigations.

To check the validity of the information, police placed some fictitious information on the CPIC and provided names and details to K. for him to request the then unsuspecting accused to get details for him from his C.L.E.U. contact. Mr. K. came back to his police handlers with CPIC print outs on the fictitious name and entries with the accused's fingerprints on the paper. The next stop, of course, was to discover who leaked the information to the accused. Mr. K. was to play an important role in that part of the investigation.

Mr. K., however, was in the meantime arrested for possession of a large quantity of cocaine and a loaded restricted weapon. All of this had happened in the wake of a shooting incident for which K. and another party, were allegedly responsible. C.L.E.U. personnel made a deal with K. and got him out on bail so he could continue to work with police to discover the corrupted person(s).

K. was supplied with a "body pack" and met the accused on several occasions. From the conversations it was inferred that the accused's police source was suspicious that his activities had become subject to an investigation. Possibly, certain steps taken by investigators of the shooting incident, had justified such suspicion. Hence the leak dried up.

The accused quite determined to receive inside police information recruited his brother Henry, an ex-RCMP member to approach a Cpl. M., a person Henry had served with at, at least two detachments and had socialized with, to see if he could be corrupted to provide such information.

The accused and Henry paid Cpl. M. one visit, apparently to test the waters, and then Henry met M. alone. He promised the corporal, "Big dollars" and as an example of good faith he gave M. a little over one thousand dollars in cash. Unknown to Henry or the accused the Corporal gave all the information and the cash to his supervisors.

The accused told the informer K. of Cpl. M. having been approached to replace the dried up source in C.L.E.U. This caused the original police investigators to devise a new strategy. They had K. tell the accused of a big cocaine deal and offer him a good slice of the profits. The accused was to clear the way for this deal by finding out from his police source if they (K. and/or the accused) were subject to any ongoing police investigation. The accused then embarked on getting that information from Cpl. M. Needless to say, his attempt was in vain and he found himself convicted by a jury of having interfered with the administration of justice by giving Cpl. M. a sum of money for him to obtain confidential police information.

At this stage of the trial the accused moved that the Court enter a stay of proceedings and not register a conviction[34]. The accused claimed that he was entrapped by police. He said he feared K., the police informer, who had threatened him. He had, out of fear, complied with K.'s instructions.

The Court responded that police action had been in pursuit of a *bona fide* inquiry upon reasonable suspicion that the accused was involved in crime, and had no more than provided the accused with an opportunity to commit a crime. He had not been induced. In the circumstances police had to be commended and not to be condemned. This was in answer to the defence condemning police for allowing K. to continue to commit his crime. K. had testified and frankly admitted that he acted as an informer to "build goodwill in the event of his being arrested" in regard to his criminal activities.

Corrupting police personnel is serious, in terms of the security within the police service and is a crime of considerable gravity on the part of those who corrupt them. Said the Court:

> "In my opinion given the particular facts and circumstances of this case the police were warranted in proceeding as they did, not withstanding their knowledge of K.'s activities."

Entrapment was rejected,
Convictions were recorded.

---

[34] **MACK v. The Queen** - Volume 33, page 48 of this publication.

LEGAL TID BITS

RIGHT TO COUNSEL - ADMISSIBILITY OF STATEMENTS

Mr. Cuff was detained on a charge of first-degree murder. His father retained counsel for him. Police would not allow the lawyer to see his client, as Cuff had not asked for a lawyer. Needless to say, that this was wrong as the accused should have been given the opportunity to personally reject the opportunity and, indeed, his right to counsel. Within a short time, the error was corrected; the accused spoke to his lawyer who told him, as well as the police officers, that "silence" was to prevail. This advice was ignored and police continued to question the accused who was obviously willing to speak as statements resulted. The admissibility of those statements were in issue when Cuff appealed his murder conviction to the Newfoundland Court of Appeal. What was also in issue was the admissibility of statements made to an officer who, under cover, shared a cell with Cuff. In regard to the statements made as a result of police ignoring defence counsel's instructions, the Court held that the instructions did not prevent police from continuing their questioning. The accused received his advice and obviously waived his right to silence. There was no infringement of right to counsel in these circumstances. If the accused had said (like *Maninen* did[35]) that he would not say anything unless he first retained counsel, then continued questioning is improper. In regard to the agent provocateur in cells, the defence claimed that Cuff's right to remain silent had by trickery been deprived from him. The Court concluded that the trickery did not procure or induce Cuff to make the statements he did make, in a manner that is contrary to the principles of fundamental justice. These, and other grounds of appeal, were dismissed and the conviction was upheld.

Regina v. CUFF - 49 C.C.C. (3d) 65.

Note: There is no direct precedent on these issues from the Supreme Court of Canada. It should also be noted that the agent provocateur had a body pack. It is rumoured that very recently, the Supreme Court has held that the use of body pack amounts to an unlawful interception of private communication. (See *Regina v. Duarte* of this volume).

---

[35] **Regina v. MANINEN** - Volume 28, page 1 of this publication.

OBSTRUCTING TWO POLICE OFFICERS SEPARATELY - ONE COUNT ALLEGED NAMING BOTH OFFICERS - INFORMATION MULTIFARIOUS

The accused was arrested for possession of a stolen van. He told the arresting officer his given names were Donald Philip. He told the booking officer (in the absence of the arresting officer) that his given names were Douglas Philip. Later he told the arresting officer his true given names are Jeffery Michael. He did give his surname (Moran) on each occasion. He was convicted of one count of obstructing peace officer to wit...the arresting and the booking officer, in the execution of their duty. He appealed this conviction to the Vancouver County Court claiming that the information was multifarious. Assuming that a team of two officers had effected the arrest and were given, as a team, a fictitious name by the accused, then, if such an act amounts to obstruction both officers were simultaneously obstructed and there would be only one act of obstruction. The Crown argued that there had been a "single continuing transaction" amounting to obstructions. The County Court held that information was multifarious and substituted an acquittal for the conviction.

Vancouver C.C. 891650, January 1990.

* * * * *

USE OF A FIREARM IN A ROBBERY - MEANING OF "USE"

The accused gave the bank teller a note demanding money and telling her he had a gun. He never displayed the gun and it was not seen by anyone during the robbery. However, it was not a bluff as he had a pellet pistol in his pocket. He contested the allegation that he had "used" a firearm while committing an indictable offence as he had not brandished or shown the gun. The Ontario District Court held that "using" means employing the weapon. Reliance on the presence of the pistol and being prepared to use it, is not "using" it as intended in Section 85 C.C.C. said the Court. He was convicted of robbery only and acquitted of using the firearm.

Regina v. BREWER - September 1988, "Decisis", Issue 114, page 16.

THE MEANING OF "SELL" UNDER THE FOOD AND DRUG ACT

The definition of "sell" in the Food and Drug Act now states that it includes "offer for sale, expose for sale, have in possession for sale and distribute, whether the distribution is made for consideration." Consequently there seems to be a general belief that "possession for the purpose of sale" must be accompanied by evidence of distribution. In the old definition of sell, there were two distinct acts that constituted "sell", "possession for sale" and "distribute". Are these now one act? The BC Supreme Court reviewed the findings of a Provincial Court judge and held that "possession for sale and distribute" is two species of sale that can be quite distinct from one another. The one is commercial and the other non-commercial. For a conviction of "possession for sale" there need not to be any evidence of distribution.

The Attorney General of Canada and Judge W.W. Klinger and Edward Bilert. Supreme Court of BC. Vancouver No. C.C 890073 - October 1989.

* * * * *

DOES AN INFORMANT HAVE TO BE BILINGUAL TO SWEAR A BILINGUAL INFORMATION?

Since July 28, 1988, S. 841 of the Criminal Code provides that all pre-printed forms set out in Part XXVII of the Code, shall be in both official languages. Any bilingual person will tell you that the English and French versions of the law are not literal translations of one another. The same is the case with the pre-printed forms. A peace officer swore a bilingual form, charging Mr. Perry with impaired driving and refusing to blow. Mr. Perry called the officer-informant and established that he did not understand the French version of the charges he swore he believed on reasonable and probable grounds Mr. Perry committed. He then sought a prohibition order against the Crown to proceed with a trial on basis of that information (form). All details of the charge were in English only and Mr. Perry is English speaking. He had not been mislead by the information and should there have been flaws, they can be corrected by amendments. There is no requirement for the informant to know both languages to swear to the bilingual form as long as he understands one of the languages and the filled-in details of the charge. That enables him to swear to the substance of the charge and that is what the officer did. The application for an order of prohibition was dismissed.

PERRY and The Queen - Supreme Court of BC, Vancouver No. C.C. 891337, August 1989.

"TRANSITORY" POSSESSION OF A FIREARM

During a police chase of a car occupied by the accused and two other young men, the accused threw a sawed-off rifle out of the window. When eventually stopped, the accused was found to have one round of ammunition in his pocket of the calibre required for the discarded rifle. During his trial for possession of the rifle police evidence revealed that the accused had explained that he only learned of the presence of the rifle after he got in the car. He had been told by one of his companions to throw the rifle out of the car. Consequently his possession was merely "transitory" argued his lawyer. Nonetheless the conviction resulted in a six month gaol sentence. The BC Court of Appeal declined to reduce the sentence or to find anything erroneous about such transitory possession to be included in the offence of possessing the firearms in these circumstances.

Regina v. DOBSON - BC Court of Appeal, January 1990, Vancouver CA 011478

* * * * *

ARE POLICE OBLIGATED TO ENSURE THAT REQUEST FOR PHONE CALL IS TO REACH COUNSEL

Waltz was arrested for the attempted murder of his robbery victims. On the way to police headquarters he asked the officers for an opportunity to phone his mother. At the station he asked again and it was promised that it would be arranged A.S.A.P. He was asked if the call was urgent. He said, "No." and indicated that it could wait. He was then interviewed and gave an inculpatory statement. At trial Waltz claimed that he had told police that the purpose of the call to his mother was for him to obtain legal counsel. Police evidence was that he had not given any indication at all what the purpose of the call was. Defence Counsel argued unsuccessfully that if the Court believed the police witnesses and rejected Waltz's claim, the officers should have inquired from him why he wanted to make the call to ensure they were not infringing Waltz's right to counsel. The Ontario Court of Appeal held that the trial judge had not erred in holding that in the circumstances Waltz's right to counsel had not been violated and that his confession was admissible in evidence.

Regina v. ADAMS and WALTZ - 49 C.C.C. (3d) 100.

COUNSEL OF CHOICE WHEN UNDER DEMAND TO GIVE BREATH SAMPLES

The accused was under demand to give samples of his breath and made several attempts to contact the lawyer of his choice. His attempts being futile he told police of his failure and was then asked if he wished to speak to another lawyer. He replied to only want the lawyer of his choice. The demand was then repeated and resulted in a refusal and a conviction for doing so. He appealed to the Alberta Court of Appeal which held that the taking of breath samples is a matter of urgency from a factual as well as a legal point of view. This overrides the right to counsel to be the one of choice. The legal urgency was the provision that the samples must be taken as soon as practicable while the practical urgency is the loss of evidence through absorption of alcohol from the bloodstream. Furthermore, cases like these must be decided on the basis of what the police knew, not the hidden facts an accused fails to disclose to police. If these hidden facts require police to wait taking tests they cannot function to show impropriety on the part of police unless an accused conveyed those facts to the police. As he had not included in the information he gave police about reaching the counsel of his choice, the details he raised during his trial which would have justified a delay, his appeal was dismissed.

Regina v. TOP - 49 C.C.C. (3d) 493.

* * * * *

REASONABLE EXCUSE - MUST SUSPECT TELL HIS REASON FOR FAILING TO BLOW

The accused tried twice to contact his lawyer while under demand to give samples of his breath. After the first attempt he said, "I refuse". The officer inquired if he had spoken to his lawyer. When he discovered that the accused had not been successful he was again taken to the phone and further calls were made. Again the accused said, "I refuse". He gave no explanation to the officer but testified that he had been assured by the answering service that he would get a call from his lawyer in 5 to 10 minutes. The trial judge accepted the accused's testimony but held that it fell short of showing a reasonable excuse for refusing in that he had not explained this to the officer. Upon appeal the County Court reversed the accused's conviction and held that he owed no explanation to the police. Raising his excuse in the Court and not before was his right to do. In a split decision the BC Court of Appeal held that the accused in the circumstances should have told police of his dilemma to avail himself of the reasonable excuse he had. Concoctions are otherwise legion. If he were allowed to conceal his reasons for refusing, he could deprive police of a chance to cure his grounds for refusal. Short of having to reveal the content of legal advice, he should give police logistical reasons. The dissenting justice of the BC Court of Appeal felt that the problem was for Parliament to solve and not the judiciary.

Crown's appeal allowed, conviction restored

Regina v. PERRON - BC Court of Appeal, Vancouver No. C.A. 009873, July 1989.

* * * * *

MEANING OF: "IF YOU WANT TO CONTACT A LAWYER NOW IS THE TIME TO DO IT" -RIGHT TO COUNSEL -

A demand for breath samples had been made and while awaiting the arrival of the breathalyzer operator the investigating officer said, "If you want to contact a lawyer now is the time to do it." Needless to say one can infer from these words that now is opportune, while we are waiting anyway or it is now or never. Defence of course pushed for the latter and was successful. The Court held that the words had caused the detained suspect's right to counsel to have been infringed. The Ontario Court of Appeal added a third interpretation and held the words also conveyed "contact a lawyer because now you are in the most need of legal advice". In other words, do it before it is too late. It held that the infringement was not likely to bring disrepute on the administration of justice and that the evidence of the blood/alcohol level should not have been excluded. Crown's appeal was allowed, conviction recorded.

Regina v. MASHALL - Ontario Court of Appeal, 52 C.C.C. (3d) 130.

* * * * *

DRUNKEN HUSBAND TAKING REFUGE IN THE FAMILY CAR

Mr. Kang, whose blood-alcohol level was 310 milligrams, wanted to get away from his wife's protests regarding his excessive drinking. With the ignition keys in his pocket, he took refuge in his car which was parked in his driveway. The wife phoned police and a "care and control over 80 milligrams" conviction resulted. Mr. Kang appealed to the County Court claiming that his lack of intent to drive rendered him innocent. The *Ford and Toews* cases[36] were centre stage in the legal arguments of this case. The trial judge had found that Kang lacked the requisite intent but could easily have changed his mind. This is the danger from which the public is entitled to be protected. The County Court judge held that the possibility of changing his mind was not an issue and was not included in the "unintentional risk" when a person occupies the driver's seat and has within reach all the car's fixtures and fittings. This made "unintentionally setting the vehicle in motion" the only issue. As this had been left unexplored the County Court had no alternative but to set aside the conviction and acquit Mr. Kang.

KANG and The Queen - The County Court of Westminster, No. X019875, New Westminster Registry - June 1989.

---

[36] **FORD v. The Queen** - 65 C.C.C. (2d) 392 - Volume 5, page 23 of this publication.
Regina v. TOEWS - 21 C.C.C. (3d) 24 , Volume 11, page 29 and Volume 22, page 24 of this publication.

- CARELESS DRIVING -
IS DRIVING WITHOUT DUE CARE AND ATTENTION A SEPARATE OFFENCE FROM DRIVING WITHOUT REASONABLE CONSIDERATION FOR OTHERS USING THE HIGHWAY?

The accused was involved in an accident driving a car that should not have been on the road due to its poor mechanical condition. However, the condition of the vehicle had nothing to do with the cause of the accident. He was convicted of driving "without due care and attention". He appealed this conviction claiming if he was at all guilty of an offence under the careless driving section of the BC Motor Vehicle Act, it was driving without reasonable consideration. The County Court judge decided that a person could be convicted of this latter offence if he knowingly drove a car that was dangerously road unworthy without any bad driving. He also decided that the two offences created under the section are different from one another. Driving without due care and attention requires inadvertent negligence in the driving itself. Driving without reasonable consideration does not necessarily require any fault in the actual driving. Consequently the accused was not guilty of driving without due care and attention. This appeal was allowed, the conviction set aside and acquittal substituted.

Regina v. VANDALE - County Court of Westminster, Chilliwack 20738, November, 1989

* * * * *

WARRANTLESS SEARCH - GROUNDS FROM UNKNOWN INFORMER

A police officer phoned a Sgt. H. in another community to tell him that the accused staying at a particular motel in the latter's jurisdiction was about to drive to a certain destination to transport a quantity of marihuana. Sgt. H. asked if the information was reliable and upon confirmation that it was, the less than one minute telephone conversation ended. A surveillance team arrived at the motel just in time to see the accused drive off. Sgt. H. was notified and he was present when the accused was stopped and a warrantless search was conducted. The information proved reliable and a seizure was made under the Narcotics Control Act. At trial for possession for the purpose of trafficking the Court suppressed the evidence of the marihuana due to the search being unreasonable. The Crown appealed the acquittal that followed claiming that the contraband should have been admitted in evidence. The Saskatchewan Court of Appeal disagreed with the Crown and dismissed the appeal. The Crown had failed to produce the "phoning" officer as a witness to tell (or persuade) the Court of the reliability of his informer. Hence the Crown had failed to establish that the officers who conducted the search had the prerequisite reasonable and probable grounds to do so. Also the accuracy of part of the information received that the accused was indeed registered at this motel was insufficient to amount to the necessary grounds for the search. The surveillance could have continued to verify the accuracy of all, instead of some, of the information the search was based on. This rendered the search unreasonable and the additional considerations were resolved in favour of the defence. The acquittal was upheld.

Regina v. CHEEHAM - 51 C.C.C. (3) 498, October 1989.

Comment: The Saskatchewan Court of Appeal held that "The ruling on admissibility is essentially a discretionary one and we find no abuse of that discretion". This was in relation to whether in the circumstances the admission would bring disrepute on the administration of justice. In *R. v. Collins*[37] the Supreme Court of Canada seemed to clearly say that the exclusionary rule [S. 24 (2) Charter] does not confer a discretion on the Canadian judiciary. However, the words used in the judgment could be interpreted to mean that there is no arbitrary exclusion but a duty to consider admission or exclusion based on proven relevant facts. There are also indications in the reasons for judgment that the Courts were critical of Sgt. H's deliberately passing up opportunities to ascertain facts that would have helped to render the information received reliable, prior to conducting the warrantless search. The Court found, "It was he who knew that the information could not support the requisite belief and therefore the violation of the accused's right as guaranteed by S. 8 of the Charter is directly attributable to Sgt. H."

---

[37] Volume 27, pages of this publication - (1987) 33 C.C.C. (3d) 1.

CAN THERE BE A CONVICTION FOR USING A FIREARM IN THE COMMISSION OF AN INDICTABLE OFFENCE WITHOUT THERE BEING A CONVICTION FOR THAT INDICTABLE OFFENCE?

The accused pointed a loaded shotgun at the man he suspected of having an affair with his wife. He was convicted of using a firearm in the commission of an indictable offence. The trial judge found as a fact that the accused's actions had amounted to the indictable offence of assault although he was not charged with assault neither was assault identified or in any way included in the wording of the indictment alleging the use of the firearm. The propriety of all this reached the Supreme Court of Canada. It held that as the law clearly indicated that Parliament intruded to provide for "Additional Punishment" for an offence aggravated by the use of a firearm, it provided "for a sentence that will be tacked on to a previous one". Needless to say that this can only be achieved by a sentence for the "underlying" offence, that is, the indictable offence he committed or attempted to commit. That means, that there has to be a conviction for that underlying offence which must be alleged separately or be included in the count that alleges the use of the firearm. "That it would be clear to the accused that he is in jeopardy of being found guilty of two offences." In other words the count can be duplicitous. However, simply identifying the underlying offence in the count and then finding as a fact that had the accused been charged with that offence he would have been convicted in the circumstances is not meeting the prerequisite Parliament intended for a conviction of using a firearm in the commission of an indictable offence.

Regina v. PRINGLE[38] - Supreme Court of Canada, June 1989 [1989] 1. S.C.R. 1645

[38] See volume 35, page 9 on constitutionality of this offence re: double jeopardy.