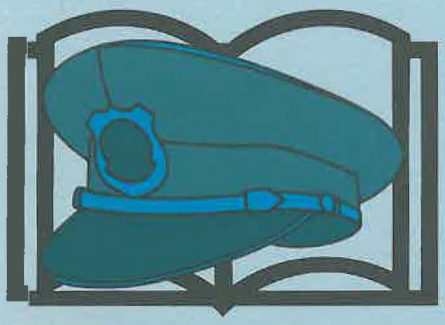

ISSUES OF INTEREST

VOLUME NO. 29

PLEASE CIRCULATE

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

ISSUES OF INTEREST

VOLUME NO. 29

Written by John M. Post

December 1987

TABLE OF CONTENTS

Page

Page

ROADSIDE SOBRIETY TEST - DETENTION - CHARTER RIGHTS

Regina v. BONOGOFSKI - B.C. Court of Appeal - CA 007055, November 18, 1987

The accused used three lanes of traffic to drive in one direction and, when turning left, he drove over top of a cement divider. From that driving, and the results of the breath tests, it seems safe to say that the accused was quite intoxicated. However, an infringement of the accused's right to counsel superseded and suppressed this fact when the conviction of impaired driving was appealed.

The officer, who witnessed the above described driving, decided, despite the atrocious driving and the accused's stumbling when alighting from his car (along with all other typical symptoms of intoxication), that some sobriety tests were in order. Upon completion of those tests, the officer seemed not to have effected an arrest, but made the demand. He gave the accused his Charter goodies and took him in for the breath tests.

Defence counsel argued that the accused was detained from the moment he was stopped and the officer saw his condition. However, the officer had not made the accused aware of his rights until he had collected more incriminating evidence. He admitted on the stand to be fully aware of the weightiness of sobriety test results in impaired driving case. As a matter of fact, the defence claimed that without the evidence of the test, the conviction for impaired driving would not likely have resulted.

The B.C. Court of Appeal agreed that the accused was detained from the moment he was stopped and that he should have been informed of his right to counsel at that point. Waiting until after the sobriety test was an infringement of the accused's Charter right. The question if all of the evidence should be excluded hinged on whether the officer had acted in good faith. After all, the B.C. Court of Appeal has emphasized (especially in the Gladstone case*) that good faith on the part of the police is an important, if not a decisive factor. Also, that when police comply with the law as it was at the time, they acted in good faith despite precedents that since may have made their actions contrary to the law. Nevertheless the B.C. Court of Appeal decided unanimously:

> "... but, in this case, I think that the finding of a good faith should not be the determining factor. Cst. M. believed, erroneously, that prior to the physical tests he was not detaining Bonogofski. In view of Cst. M's knowledge of the importance of the

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* Issues of Interest, Volume 22, page 22

> physical tests in deciding whether to make a demand on Bonogofski, I think that he should have given him the warning under s. 10(C) of the Charter."

The evidence was consequently held to be inadmissible.

Accused's appeal granted
Conviction set aside
Acquittal substituted

Note: The B.C. Court of Appeal made some comments that may be of interest. The Court said that not every driver who stops for police should be considered to be detained. For instance, stopping a person to make him/her aware of a dangerous road condition does not constitute detention. That is where the Court's comment stopped and it did not address the question of detention, when a person is stopped for any kind of infraction of the law. Traffic violations come to mind. It seems important to remember that so far there has been no suggestion, in any cases, that detention only occurs when the officer in the circumstances, has the power to effect an arrest. Yet, this is a popular belief in the law enforcement community. Detention is included in arrest, but the cases say that there can be detention without arrest and do not <u>seem</u> to say that power to arrest in the circumstances is a prerequisite to detention.

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DISCLOSURE AND DISCOVERY - ACCUSED ENTITLED TO AMPOULE OF ALCOHOL SOLUTION - S. 7 OF THE CHARTER

R. v. HOLM, County Court of Kootenay - Fernie No. 430059, August 1987

Three months prior to the accused's trial for "over 80 mg" and impaired driving, defence counsel wrote to the prosecutor and demanded, "...I require a sample of the breath test solution that was identified in the Certificate. I need that for testing by my own expert." Two months later, the prosecutor responded, "I am not prepared to give you a sample of the breath solution - nor the alcohol solution identified in the certificate - as there can be no use in having it tested. It would not be the one employed on the occasion, so any inaccuracy (even if there were one) would only be speculative." When the Crown appealed the accused's acquittal for "over 80 mg." defence counsel submitted (as he did at trail) that the prosecutor's refusal to give him the required samples, amounted to an infringement of the accused's right under s. 7 of the charter,* and had appropriately caused the certificate evidence to be excluded at trial.

The County Court Judge, who heard the appeal, agreed with the defence and ruled that refusal to supply a representative ampoule of the alcohol standard solution had infringed the accused's constitutional right. He quoted from other precedent setting judgements about the meaning of s.7 of the Charter. It is incredibly broad and includes pre-trial disclosures and discovery rights. In this case, the accused had the right to a sample ampoule to test its suitability.

This left the question if that infringement should and could result in suppressing the certificate evidence. Section 24(2) of the Charter is quite specific and only refers to evidence "obtained in a manner that infringed or denied any rights or freedoms..." Here, the infringement played no part in obtaining any evidence. The Court found no merit in that submission and the appeal judge applied what is known as "the poisonous tree principle" to this issue by saying:

> "In my opinion, the violation being a denial of fundamental justice, the whole process is affected and not merely the impugned evidence."

He further observed that if violations of s. 7 of the Charter, occurring after evidence was obtained, was incapable of triggering consideration for exclusion, then s. 24(2) would be meaningless insofar as a denial of

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* *BOURGET v. The Queen* - Saskatchewan Queen's Bench - July 1986 (unreported)

fundamental justice is concerned. Hence, section 24(2) of the Charter applied. However, would admission of the certificate bring the administration of justice into disrepute. Considering the accused was obliged by law to provide incriminating evidence, strictness of the application of Charter provisions does follow as was recently indicated by the Supreme Court of Canada.*

Crown's Appeal was dismissed.

Note: In view of the "frivolous" and "remarkable" response by Crown Counsel to defence counsel's request, the accused applied to be compensated for his costs. There are now some precedents for such awards if the prosecution or appeal are frivolous or for oblique reasons. However, as the County Court Judge could not see anything unusual or different in substance from other appeals, he did not think this was an appropriate case to set a precedent.

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

MUST THE PERSON WHO REFUSES TO BLOW BE INFORMED AS OF RIGHT OF THE OFFENCE HE COMMITS?

Regina v. JOHNSTON - Vancouver County Court - CC 861023

The accused was given four opportunities to provide the breathsamples demanded of him. His failure to provide a suitable sample amounted to refusal and he was convicted accordingly. He appealed to the County Court submitting that failure on the part of the police officers to tell him that he was committing an offence when he failed to provide a suitable sample was an infringement of the accused's Charter right. Defence counsel relied heavily on a decision by the Saskatchewan Court of Appeal* which held that a refusal is not irrevocable and that a suspected impaired driver in circumstances, as in this Johnston case, should be advised that non-compliance with the demand constitutes a criminal offence. This is particularly so, as the offence is unique in that a person on demand of authorities is obliged to provide evidence against himself; a practice contrary to the most basic principles of law.

The County Court Judge did not buy the argument and found an Alberta case** more in line with the law. Consistent with that case he found the criminal code does not provide for a person under demand to be informed as defence counsel suggested and that such a warning is unnecessary. There may well be a general policy or courtesy to do so, but Mr. Johnston is presumed to know the law "and if he chooses not to comply with the demand he cannot expect legal advice from the police, particularly as he has been advised and offered the opportunity of contacting legal counsel and seek advice."

Accused's appeal dismissed
Conviction upheld

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* ***JACKIE v. Regina***, 26 Saskatchewan Reports, 295 Saskatchewan Q.B.

** ***R. v. MIRANDO*** 9 m.v.r. (ALTA Q.B.)

CRIME STOPPERS - SEARCH WARRANT ISSUED
UPON ANONYMOUS INFORMATION - ADMISSIBILITY OF EVIDENCE

Regina v. KYRYLUK and KYRYLUK - County Court of Vancouver
No. CC 860710 - October 1986

Via anonymous Crime Stopper sources, police were told that marijuana was hydroponically grown at a certain address and was being sold from that place. Observation of the premises did not reveal activities that supported trafficking. However, the hydro bill was excessive and had trippled within the last year. Upon the information of the anonymous tip and the trippled hydro bill, a Justice of the Peace issued a search warrant. What police did not tell the Justice of the Peace was that their surveillance had failed to produce any evidence of trafficking or any other relevant evidence. This should have been included to make full disclosure, argued defence counsel. Furthermore, the details contained in the information were inadequate to satisfy the Justice of the Peace to issue the warrant added the defence.

Although the reasons for judgement do not say so, it seems that police found when they executed the search warrant that their anonymous information was accurate. The whole judgement is on Charter related issues regarding the search being reasonable in the circumstances and whether the evidence found, by means of the flawed warrant, should be admitted.

The County Court Judge opened his judgment by outlining the quantum changes the Charter had brought to issues of this kind. He acknowledged that, prior to the Charter, the issue of legal propriety regarding the warrant was collateral, a distant issue that received no consideration at a criminal trial. The validity of a search warrant had no bearing on the admissibility of what was found by means of the warrant. Hence, an exploration of the warrant's validity at trial, used to be a superfluous exercise that would only frustrate the trial judge as he had no power to remedy any flaws or shortcomings in regards to the warrant. Even having a warrant quashed by way of prerogative writ may not have caused the evidence to be inadmissible.

The Charter, particularly s. 8, has drastically changed all of this. The matter of the warrant's validity is no longer collateral, but a kernel issue to determine if the search was reasonable. If the Charter right under s. 8 may have been infringed the evidence is subject to suppression if the circumstances don't warrant otherwise and where the administration of justice would be brought into disrepute if it were admitted.

The Court seemed somewhat dubious about Crime Stopper programs. The information received via that system ought to be the beginning and not the end of an investigation. Furthermore, the results of investigations must be revealed to the Justice of the Peace, "whether this assists in the granting of a warrant or not". In any event, an anonymous tip and a trippled hydro bill may raise justified suspicion, but is inadequate to say that the Justice of the Peace was satisfied that the officers had reasonable and probable grounds

to believe that marijuana was being cultivated in that house. The Judge concluded that Crime Stoppers needed to be watched closely by the judiciary; that the warrant was defective; and that the evidence found must consequently be suppressed. Charges were dismissed.

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OBNOXIOUS DETAINEE WHO PROCRASTINATES IN CONSULTING COUNSEL - CHARTER OF RIGHTS AND FREEDOMS

TREMBLAY and The Queen - Supreme Court of Canada - October 1987

The accused was pulled over and a demand for breath samples was made of him. He was "violent, vulgar and obnoxious", and obstructed investigation in various ways. He procrastinated and delayed things as much as he could. When he was given a phone to contact a lawyer he phoned his wife instead. Although it is not too clear, it seems he may have asked his wife to contact a lawyer for him. At least he submitted that such was the case and that he was asked to blow immediately upon having phoned his wife. No time was allowed to see if a lawyer was going to phone for him. The trial Judge had found that the accused's right to counsel had not been infringed and he was convicted of "over 80 mg." The County Court reversed that conviction and found there was an infringement that called for the exclusion of evidence. Then the Ontario Court of Appeal agreed with the trial Judge and restored the conviction. The accused took his plight to the Supreme Court of Canada.

Our highest Court held that the accused's rights had been infringed, but for such understandable and provoked reasons that admitting the evidence would not bring the administration of justice into disrepute. Said the Supreme Court of Canada:

> "Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set out in this Court's decision in R v. Manninen* imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath."

That was not quite the case with the accused. However, his conduct had been misleading in terms of retaining and consulting counsel. Such conduct is relevant when considering exclusion of the evidence.

Accused's appeal dismissed
Conviction was restored.

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* See Volume 28 of the publication, page 1

ADMISSIBILITY OF POLYGRAPH - EVIDENCE

The Queen and BELAND and PHILLIPS
Supreme Court of Canada, October 1987

Five men allegedly conspired to rob an armoured truck. One of the conspirators went to police and told all. Consequently, no robbery took place. The 'drop-out's testimony was the kernel evidence of the Crown's case to show the conspiracy it alleged against the accused. The accused also testified and they denied everything the Crown had adduced. As a matter of fact, they offered to take polygraph tests and submit the results in evidence. A motion was made to allow the tests.

The motion had been denied as the evidence of polygraph tests is inadmissible. The accused had this ruling reversed by the Court of Appeal and the Crown appealed this reversal to the Supreme Court of Canada.

Our highest Court, dealt in 1978 with admissibility of a polygraph test result* in a case where the accused had selected not to testify and attempted to put his story to the jury by means of the test. In other words, in that case, the results of the polygraph test were to substitute for the accused's testimony whereas in this Beland, Phillips case it was asked to be accepted to corroborate their own testimony. In that way, the cases were distinct from one another.

In 1962, three men were charged with raping a mentally retarded sixteen year old girl. The Crown, being concerned that this girl would not be believed for fear of fabrication, called a psychiatrist who said that her low mental age lacked the imagination to concoct anything. This was called "oath helping".** No evidence is allowed to boost or establish the credibility of witnesses. They have to carry the day by themselves in examination-in-chief and cross-examination. If this sort of evidence was allowed the Courts would become a circus with reams of witnesses boosting each other's credibility or to make their opponents out as liars. Every witness must assume to be of normal moral character. Only when a witness' credibility is impeached "becomes it worthwhile to deny that his character is bad". In other words, evidence of good character is only allowed to rebut evidence of bad character.

Beland and Phillips had testified and the requested polygraph evidence was solely to bolster their credibility by means of a fallible machine. That would fly in the face of the well established rule regarding oath helping. This rule is quite consistent with the rule against past consistent statements. That is also a form of oath helping. This means calling a a person to testify that the witness has made a statement to them consistent

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* ***PHILLION v. The Queen*** [1978] 1 S.C.R. 18

** *R. v. **KYSELKA*** (1962) 133 C.C.C. 103

with his/her evidence to bolster the credibility of what is attested to. This rule has two applications:

1. It precludes an accused person from calling a witness to relate a statement he (the accused) made and that is self serving.

2. No witness (an accused or not) may call another witness to relate a statement he previously made; neither may he testify as to the statements he previously made regarding the matter before the Court.

Allowing that sort of evidence simply means coming in through the back door in that it flies in the face of the hearsay rule. After all, the "oath-aider" cannot vouch for the truth of the content of the statement. Furthermore, it amounts to an accused person in directly testifying without taking the stand and thereby avoiding cross-examination.

The Supreme Court of Canada saw no difference between what the two accused proposed to do and the oath-help rule, or the consistent statement rule.

> "Polygraph evidence when tendered would be entirely self-serving and would shed no light on the real issues before the court."

The court emphasized how the process would become a chaotic "one-up-manship" if this was allowed. The only exception to these rules is where there is an allegation of recent fabrication, or to demonstrate a person's physical, emotional or mental condition at a certain time.

Recognizing that polygraph evidence should not be rejected because it is not perfect, the Supreme Court ruled that it would not possibly serve any purpose. It will only -

> "... disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists."

Furthermore, the trial complexities that would result are enormous. Through the mouth of a polygraph operator, the trier of fact gets to hear that the witness was probably truthful. Such evidence, of course, will only be adduced when the accused can find an operator who is willing to so testify. Absence of polygraph evidence would eventually lead to witnesses not having credibility unless there is someone or something, who or which, is willing to attest to their veracity.

Crown's Appeal allowed
Conviction confirmed

CONVICTION ON FINGERPRINT ALONE - OBTAINING PRINT BY MEANS OF SUBSEQUENT ARREST - UNREASONABLE SEARCH - UNLAWFUL ARREST

Regina* v. *SCHWAB - Vancouver County Court - No. CC 870443 - September 1987

A silent alarm took police in early morning hours to a warehouse where about $15,000 worth of electronic equipment was stolen during a break-in. A fingerprint was found at the point of entry. It could not be matched with any prints on file.

Approximately eight months later, acting on information that gave the officers reasonable and probable grounds, they attended at the accused's home and arrested him. His fingerprints, taken upon arrest, matched those found at the scene of the break-in.

All police had was a name given to them by an informer. That does not satisfy the prerequisite to a lawful arrest, argued defence counsel. Therefore, the taking of the accused's prints was an unreasonable search under the Charter. The defence implied that the arrest had been a concoction to obtain his fingerprints.

The Court held that the officer had testified that he had reasonable and probable grounds to effect the arrest. This was left unchallenged in cross-examination (perhaps defence counsel feared the answers he would get), and, therefore, the unfounded submission of unlawful arrest and unreasonable search could not have any weight to rebut the officer's testimony.

The accused was convicted.

Note: The reasons for judgement do not reveal what the information was about or what the arrest was for. It may well have been for an unrelated offence. Regarding validity of Identification of Criminals Act and the taking of prints prior to conviction, see bottom of page 42 on Supreme Court of Canada decision on Dec 17, 1987.

THE CLAIM OF INNOCENCE!

Regina* v. *MOK and LEUNG - County Court of Vancouver - CC 870383 - September, 1987

An excited man directed by shouts and gestures, two police officers in a patrol car to an oriental restaurant. All this took place in early morning hours. When the officers arrived three men came out of the restaurant. Two ran and were pursued by one officer who apprehended one of the twosome, and the third man was chased on foot by the other officer. The latter fugitive turned and raised a handgun at the officer who had the presence of mind to grab the arm and push it upwards. He overpowered the armed man and arrested him. The three men were charged with the armed robbery that had taken place just before the police officers arrived.

There was incredible contrast between the evidence adduced by the defence and the Crown. The threesome attempted to persuade the Court that they did not know each other, and happened to leave the restaurant at the same time. One of them even took credit for attempting to apprehend the culprit who had come out of the restaurant carrying a handgun. He had seen two men wearing masks and carrying a knife. Although he had no idea what was happening, he had called out "don't move" to those men. This had startled them and one of them had stumbled and fell. A gun had been dropped by this individual in the process. He, the accused, had picked up the gun the very moment police arrived. He had then called out to the police "catch them", waving in the direction of two fleeing men. When the officer came up to him he had stood there innocently with the gun he had just picked up, in hand. It was all a terrible misunderstanding and misinterpretation of circumstances, implied the accused.

In terms of the three accused not knowing each other, the Crown rebutted this evidence by calling police officers who knew the three and who testified that they were in each other's company a short time before the robbery.

The circumstantial evidence was overwhelming and the two apprehended at the scene were convicted.

The case sets no precedent of any kind, and is only related for the remarkable conflict in evidence by the parties to the proceedings.

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LAWFUL AND ARBITRARY ARREST

Regina v. FAULKNER - County Court of Vancouver Island - Victoria No. 42725, July 1987

A peace officer may arrest a person if he, on reasonable and probable grounds, believes that that person has committed an indictable offence. To arrest a person under the Criminal Code for the commission of a summary conviction offence, he must find that person committing the offence. In this case, the officer arrested the accused for impaired driving at the scene of an accident. Hence, he arrested on reasonable and probable grounds. The Crown selected to proceed by way of summary conviction. This, argued defence counsel, caused the arrest for the hybrid offence of impaired driving to be unlawful. Only if the Crown had proceeded by indictment would the arrest have been lawful. The trial Judge, as well as the County Court Judge upon appeal, had to make defence counsel aware of s. 27 of the Interpretation Act which simply stipulates (and has done for decades) that any offence that may be prosecuted by indictment is an indictable offence. Due to being a hybrid offence, impaired driving may be prosecuted by indictment. In other words, regardless how it is prosecuted, it remains an indictable offence. This theory also validates the photographing and printing of impaired drivers under the Identification of Criminals Act.

Defence counsel also went after the new popular "arbitrary detention" infringement due to arrest despite s. 450(2) C.C. The County Court Judge had this to say:

> "Time, in obtaining of such evidence (breath analyses) is crucial to its weight in subsequent proceedings; and to let a suspected impaired driver go free on an appearance notice where he is caught virtually red-handed would be a strange proceeding indeed on the part of a policeman, a dereliction of his duty in my opinion..."

The facts in this case (each must be weighted on the merits of the circumstances) distinguished it from the ones where the arrests were clearly no more than what is now known as "policy arrests". There was a lawful arrest in this case and there was no breach of the Charter.

Accused's Appeal was dismissed
Conviction for impaired driving upheld

Comments:

Although the officer could in cross-examination not give defence counsel chapter and verse as to his authority to arrest the accused, he was quite articulate in relating his reasons for doing so. He did concede that he always arrests for impaired driving; he felt that an arrest leaves no doubt in the suspect's mind that he/she is to accompany him to give breath samples; that it accommodates the giving of the "rights" warnings better. He had taken the accused from the scene in a downtown area where a crowd gathered that was pretty angry over the accident that had jeopardized the safety of the public and had caused considerable property damage. Some of these reasons would not rebut arbitrary arrest, but some do; particularly the latter was convincing. However, the County Court Judge seemed to say that the collecting of the evidence (included in the public interest issues summed up in s. 450(2) C.C.) is sufficient to justify the arrest.

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PROSTITUTION LAWS
ARE THE SECTIONS AMBIGUOUS?

Regina v. ***HEAD*** - B.C. Court of Appeal -
CA 007153 - Vancouver, June 1987

A policeman was acting as the purchaser of sexual services and arrested the accused who looked in his car, and when he stopped offered him sexual services for $40.

The applicable enactment in the Criminal Code is s. 195.1(1), which reads as follows:

> "Every person who in a public place or in any place open to public view
> (a) stops or attempts to stop any motor vehicle,
> (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
>
> for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction."

The accused was charged under s. 195.1(1)(c) C.C. which the trial Judge held was so drafted that, for a conviction, the crown would have to prove something in s.s. (a), (b) , and the first half of (c) in addition to a communication for the purpose of selling a sexual service. This was all on account of the "or's" in the section. Simply because it says "or" in enactment does not mean that it refers to an alternative. Often it has a conjunctive meaning. Interpreting the section as the trial Judge did would, indeed, lead to absurdities.

Reading the section, one may conclude that communication is essential to all the means the section prohibits for offering sexual services. Furthermore, does the section outline three or four means by which soliciting can take place? The "or" in s.s. (c) seems to create two distinct means of soliciting within that subsection.

The Crown appealed the acquittal to the B.C. Court of Appeal. It could not see too many problems with s. 195.1 (1) C.C. Using the liberal interpretation approach the Interpretation Act calls for, there was no need to replace any "or" in the section with "and". Although the drafter of the section might have done better by adding a s.s. (d) to deal with the communication aspect separately, the Court of Appeal found that there was nothing ambiguous about the section.

Crown's appeal allowed.

RIGHTS AND LANGUAGE

Regina* v. *AUJLA - County Court of Westminster
No. X018157, July 1987

The accused was acquitted of impaired driving as he could not understand the English language and had, therefore, not understood the 'right to counsel' information police had tried to make him aware of. The Crown appealed.

The trial Judge had found that the accused's ability to drive was indeed impaired by alcohol at the pertinent time. The acquittal was exclusively as a result of the Charter defence of not having understood the right-to-counsel awareness information.

The Crown took the position that where the charge is refusing to give samples of breath this Charter defence might be valid. The impairment of the accused was blatantly obvious. Therefore, the evidence the trial Judge excluded had not at all, in any way, resulted from an infringement of the accused's rights. In other words, there was no causal connection, while the exclusionary rule (s. 24(2) Charter) states that evidence subject to suppression is that which "was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter".

The County Court Judge concluded that the Crown's position was correct, and that there was no connection between the infringement and the evidence and, hence, there could not possibly be any disrepute on the administration of justice by admitting the evidence of impairment.

Crown's Appeal allowed
Evidence to be admitted.

Comments:

The appeal judge took the disrepute on the administration of Justice into consideration. That seems unnecessary as the lack of the connection between the Charter breach and the evidence precludes any consideration for suppression of evidence under s. 24(2) of the Charter. It seems that incredibly absurd situations could arise if that was not so.

It is also surprising that a similar case by another B.C. County Court Judge* was relied on by the defence and was given considerable consideration by this County Court Judge. In that similar case, the language barrier had also caused the Charter infringement. The evidence of refusal to blow was

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* ***R. v. Leotherdale*** - unreported - County Court of Westminster - January 1985

suppressed as was that of the impairment. That Judge had held that it was repugnant to exclude the evidence to support one count in an indictment and accept it for another count in the same indictment. This, the County Court Judge, in this Aujla case, agreed was decided wrongly.

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ARBITRARY DETENTION UPON ACCUSED
REFUSING TO SIGN APPEARANCE NOTICE

Regina v. *GAGNON* - County Court of Westminster - New Westminster Registry X018317, October 1987

The accused drove erratically and was, apparently, impaired. He was processed and, upon completion, was issued an appearance notice in lieu of an arrest. The accused refused to sign the appearance notice and he was then handcuffed and his "detention" was continued for about 30 minutes until his wife came to collect him. This extended detention was spent on a chair in the police office.

The trial Judge found that the accused's right not to be arbitrarily detained had been "flagrantly' violated and to remedy this, he stayed the proceedings. The Crown appealed.

The kernel issue in this case is whether the refusal to sign the appearance notice justified the continuation of the detention. The officer was satisfied that all public interest issues were satisfied and it was clear that the refusal to sign the notice did not change this. It was concluded from the officer's testimony that he had a personal policy to continue detention or custody if a person fails to sign an appearance notice. He felt that, in such case (despite the provision in s. 453.2(4) C.C., that an unsigned notice is as binding on the person to whom it applies as a signed notice) that either the officer-in-charge or the Justice of the Peace should do the releasing.

The County Court Judge who heard the appeal, held that technically the trial Judge was correct. He observed, however, that that Judge's solution "was the most sweeping and drastic remedy in the arsenal of remedies". Said the appeal Judge:

> "...a Charter breach does not in itself justify turning the system on its head, and while there might be a remedy for every Charter breach, it does not follow that every breach must lead to some remedy being granted at trial. The purpose of the trial is, as it was before the Charter, to decide whether the accused is guilty."

He further observed that the accused must show that it is more probable than not, that the admission of evidence would bring the administration of Justice into disrepute. He had not done so. Furthermore, it is not a judicial function to discipline police or to remedy police misconduct. Concluded the County Court Judge:

"It is more likely that given the horrors consequent upon impaired driving, the community would be more inclined to accept that the use of s. 24* on these facts would bring the administration of justice into disrepute."

Crown's appeal allowed
New trial ordered.

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* Enforcement section of Charter; Remedies to infringements and exclusionary rule.

ARBITRARY ARREST AND LAWFUL ARREST

Regina v. CHRISTIENSEN - Vancouver County Court
CC 870559, September 1987

The accused was involved in an accident at 1:30 a.m. and was arrested for impaired driving despite the fact that none of the "public interest" requisites listed in s. 450 (2) C.C. were apparent. The accused was held in cells until 9:00 a.m. He appealed his conviction of "over 80 mg" to the County Court.

One of the grounds of appeal was that the breathalyzer readings should not have been allowed in evidence as the accused's right not to be arbitrarily arrested or detained had been infringed.

When the arresting officer was cross-examined on the arrest he said that, due to the injuries the accused's wife sustained, the accused had been "uptight" and "hyper". The officer also gave as a reason that he had to complete his investigation as to the cause of the accident which had not been a collision, but a mysterious exiting on the part of the accused's wife while he vehicle was being driven along the road. She was "seriously injured".

When questioned on his "routine" handling of suspected impaired drivers, the officer indicated that he always arrested them. He further said, "...I feel the fellow is impaired and he should be arrested for impaired driving."

Section 450(3) C.C. stipulates that if a peace officer effects an arrest under subsection (1) of s. 450 C.C., but should not have done so due to the "public interest" provisions in s. 450(2) C.C., he is deemed to be acting "lawfully". This County Court Judge held that there is no link between the concepts of "lawfully" as used in the Criminal Code, and "arbitrary" as used in the Charter. Therefore, a lawful arrest under the Code can still be arbitrary under the Charter. He found that the accused's right had been violated and that, therefore, the breathalyzer readings should not have been admitted in evidence as an "appropriate and just remedy" under s. 24(2) of the Charter.

Accused's appeal allowed
Conviction set aside and acquittal substituted

Comment:

The trial judge who had convicted the accused Christiensen, had relied on a 1973 decision by the B.C. Court of Appeal* to hold that the officer had acted

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* *R. v. McKibbon* - 12 C.C.C (2d) .66

lawfully. She had consequently concluded that lawful conduct could hardly be contrary to the Charter. As stated above, the appeal court judge disagreed with this conclusion and observed that in 1973 the Charter was not in effect, and that the B.C. Court of Appeal had not been in a position to consider the issue in question in this case.

Both the trial Court and the Appeal Court (County Court) failed to refer to the binding precedent set by the B.C. Court of Appeal in September of 1984.* In that case, Mr. McIntosh, the suspected impaired driver, had been arrested despite his cooperative attitude and the fact that his wife was standing by to drive him home. Furthermore, Mr. McIntosh was kept in cells some hours after he reached sobriety again, according to an expert. Upon appeal, a County Court Judge reasoned similarly to the County Court Judge in this Christianson case. However, the B.C. Court of Appeal overturned the County Court's decision. The only distinctions in the two cases are that in the McIntosh case the County Court acquitted as a remedy under subsection (1) of s. 24 of the Charter, while, in this Christianson case, the certificate was excluded under subsection (2) of that section, and that in the McIntosh case the officer has been very articulate in stating his reasons for arresting and continuing the custody of Mr. McIntosh. He had testified it was likely that impaired persons would return to their cars and drive again; ...a person needs to be sober to understand the documents by means of which he is released;..."I don't know what he would have done. I would not take that chance."...These reasons, the County Court Judge held, were "mere speculation". The B.C. Court of Appeal disagreed totally, and said that the County Court had erred in law. Experience with impaired drivers, who drive again, does amount to grounds for believing the public interest is not satisfied. Whether, in statistical terms, the risk is small, is of no consequence in showing that there were no grounds for the arrest and custody. "The serious consequences which might have ensued" were of prime public concern and interest.

In regards to the Charter argument, and whether or not the officer was justified in what he did, the B.C. Court of Appeal said:

> "The Constable was carrying out his clear duty in insuring that such disaster could not occur. The Charter, in protecting individual rights, does not require that public interest be neglected."

Admittedly, the officer in the 1984 case was far more explicit in articulating why he arrested impaired drivers. Secondly, the car of his suspect was available while the Christiensen vehicle was impounded for investigative purposes to discover, one supposes, how his wife got to exit the car while it was in motion. This could have given rise to argue that the cases were

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* *Regina v. McIntosh* - B.C.A.A. 002074, Vancouver 1984
Volume 18, Page 19 of this publication

factually distinct. However, it seems the County Court Judge, in this Christiensen case, had the 1984 decision as a threshold. It was relevant and similar. Seemingly, he, nor the trial judge, were aware of the precedent which was binding on them.

Another matter that needs to be considered is whether it was the constable's statement, "I always arrest suspected impaired drivers" that made the Christiensen arrest arbitrary in the view of the County Court Judge, or did the Judge say that any lawful arrest, effected inconsistently with s. 450(2) C.C., constitutes an arbitrary arrest. The reasons for judgment do not, in my view, indicate this clearly, though the latter is implied. If that is so, the section may be paralyzed in respect to its object. The section is obviously protective in nature. If a peace officer is obstructed or assaulted by the person he arrests, or a third party, then, whether or not the arrest was in compliance with s. 450(2), the officer was in the lawful performance of his/her duty for the purposes of "any proceedings under this or any other Act of Parliament". If any inconsistency with s. 450(2) C.C. creates arbitrary arrest, then the exclusionary rule effectively paralyzes this subsection. Furthermore, if the County Court Judge is correct he, in essence, considers the subsection to be without force or effect, except for one still undetermined issue. To have your rights and freedoms infringed can, particularly in criminal matters, be a windfall benefit. Whether these benefits are transferable, has not yet been decided. For instance, if an arrest is effected, and a third party obstructs the officer, could that third party benefit from the fact that the arrest was lawful, but contrary to the Charter? If the answer is "No", then s. 450(2) C.C. still may meet its object in those circumstances.

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Since writing the above, the B.C. Court of Appeal decided again on a near identical case and obviously had not changed its views since 1984.* In October of this year the B.C. Court of Appeal rendered judgement on an appeal by Mr. Kearns, who was stopped for speeding and promptly arrested for impaired driving when the officer observed the relevant symptoms. At the police station, Mr. Kearns inquired if it was policy to keep suspected impaired drivers who fail to give samples of their breath, overnight. This was confirmed. Mr. Kearns is a personal friend of an officer who was stationed at the detachment and in consultation with him, this policy was confirmed. Mr. Kearns then gave samples of his breath and was released on an appearance notice. He was convicted of "over 80 mlg" and had failed to persuade the

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* ***Regina v. Kearns*** - CA 006880 - Vancouver, October 1987

trial judge and a County Court Judge on appeal, that the certificate of analysis should be excluded as his rights had been infringed due to arbitrary detention. He also argued that, due to the threat of continued custody, he had given the breath samples involuntarily. The latter ground for appeal was quickly disposed of. Voluntariness is not an issue after a demand has been made.

On the issue of arbitrary detention; whether or not the arrest had been contrary to s. 450(2) C.C.; and the connection between the two, as well as police behaviour in this case, the B.C. Court of Appeal had the following to say:

> "Even if these had been found to be a threatened arbitrary detention, that did not remove the appellant's liberty under s. 7 of the Charter."

The Court of Appeal did not interfere with the findings of the "Courts below" that the arrest was not arbitrary; held that police had acted honourable and reasonably; that any causal connection between any Charter infringement (threat of continued detention that would be arbitrary), and the obtaining of the evidence (the breath samples) was "tenuous and unsubstantial". Whether the cumulative effect of the arrest and the threat of continued custody amount to arbitrary detention, the B.C. Court of Appeal said:

> "In my view, in the circumstances which I have related, this is a tenuous argument and, in my opinion, devoid of reality."
>
> "The arguments submitted to us are theoretical in nature and mere conjecture in the face of irreversible findings of facts. They must be rejected in their entirety."

Needless to say, Kearns appeal was dismissed.

Whether this view would withstand the Supreme Court of Canada's trend on these issues is a matter of nail-biting suspense. In any event, in the meantime, the views of the County Court Judge in the Christianson case do not seem to reflect the binding precedents in B.C.

A case that is distinct in circumstances from the Christiensen case, but is interesting in terms of lawful arrest and arbitrary detention, is ***The Queen and Lee***, Supreme Court of British Columbia, Vancouver No. 51-56-07100, July 1987.

In this case, a constable who had reasonable and probable grounds that the registered owner of a motor vehicle (which had sheared off a powerpole and later been driven into the bushes) had been driving while his ability to do so was impaired by alcohol, had gone to the owner's home and found him laying on his bed suffering from substantial facial lacerations. He arrested the man (the accused) for driving while impaired, but did not tell him of his right to counsel. The officer's primary concern seemed to have been to get medical treatment for the accused. When that treatment had been rendered at the local hospital, the officer made a demand for breath samples, and then told the accused of his right to counsel.

At trial, much was made of the arrest. It came out that the officer knew the accused for some time as a person who was residing in the community the officer policed. It seems reasonable to say that the defence established that the officer had no grounds to believe that the accused could not be located, would not respond to a document compelling his appearance in Court, or would commit an offence. In terms of gathering the available evidence, the demand without the arrest would have sufficed. Hence, it was concluded that the arrest was lawful, albeit contrary to section 450 C.C. which dictates that in the absence of such belief, a peace officer shall not arrest.

It should be noted that the defence did show absence of the requisite beliefs the officer should have had to make the warrantless arrest in compliance with s. 450 C.C. However, it did not question why the arrest was effected. To make the arrest arbitrary, it may have assisted the defence if the arrest was made routinely, or in compliance with policy. This left the Court with the question, if any arrest made contrary to that special provision in s. 450 C.C. (or any unlawful arrest for that matter) constitutes an arbitrary detention or imprisonment as mentioned in s. 9 of the Charter.

The trial judge had answered the question in the affirmative, and had remedied this infringement of the accused's right not to be so detained by staying the proceedings against him. The Crown appealed this decision to the Supreme Court of B.C.

The defence, in this case, had not pursued all issues of public interest listed in s. 450 C.C. The important question, however, is, if in the case of warrantless arrest, the burden of proof is on the Crown to show compliance with s. 450 C.C. (Generally, the burden of proof to show an infringement of a right of freedom is on the party to the proceedings who alleges such infringement).

With seeming reluctance, the Supreme Court Justice found that the burden to prove that the warrantless arrest was in compliance with s. 450(2) C.C. is upon the Crown. Despite the inadequate pursuit of this issue at trial he held that "as a matter of law" he could not find that the trial judge had erred in finding a "non-observance" of s. 450 on the part of the arresting officer. This brought the Justice to the kernel question whether all warrantless arrests, which "shall" not be effected where no reasonable grounds for believing that they are necessary in view of "public interest" are <u>ipso facto</u> an infringement of the arrested person's right not to be arbitrarily detained.

The Justice found that "arbitrary detention" is "something more than arrest not within the strict requirements of s. 450". If the framers of the Charter had wanted to include all arrests not legally justified, in detentions that infringe a Charter right or freedom, it would have said so. Consequently, he found that not all unjustified arrests are arbitrary or an infringement of a Charter right.

In the Justice's opinion, the lawful, but unjustified arrest made in this case was not "despotic or capricious". It seemed to have been made predominantly to get the accused the medical attention he so obviously needed. He had refused to attend hospital, and the arrest at least got him there. This may not have justified the arrest from a strict legal viewpoint, but it seems that if this was the decent and humanitary reason for the arrest, it may not amount to an infringement of a right. Even if it did amount to such an infringement it may not require any remedy under s. 24 of the Charter. In other words, the stay of proceedings would be overkill.

As all of this had not been considered and decided upon, the Supreme Court Justice allowed the Crown's appeal, and held that as there was an absence of any malice or mistreatment of the accused, or of his right to make a full answer and defence, the further prosecution of the accused would not place the administration of justice in an unfavourable light.

Continuance of Trial was Ordered.

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MANNERISM OF SEARCHING PERSON WITHOUT ARREST - NARCOTICS CONTROL ACT

Regina* v. *O'Reilly - County Court of Prince Rupert - No. 9954 T, July 1987

A police officer received information that a young man was smoking marijuana in a parking lot. As the officer approached the group of youths, he could smell the marijuana smoke and he saw a container protruding from the accused's pocket. Believing that all this gave him reasonable and probable grounds to search, the officer went through the accused's pockets and found the container to hold the suspected contraband. The Provincial Court trial judge considered the search, in the circumstances, unreasonable, and due to the consequential exclusion of the evidence, he acquitted the accused of the charge of possessing marijuana. The Crown appealed this decision.

It should be noted that the legitimacy of the search exclusively depended on the information the officer had, and the smell that assisted to confirm the accuracy of that information. There was no arrest, and the search was not based on the provisions of the Judges' Golden Rules which, at common law, justify a search for evidence or anything with which the accused may harm anyone, including himself, or may make good his escape. The trial judge had held that, in the circumstances, the authority to search had been derived from the detention imposed on the accused by the manner in which the search was conducted (hands in the air and the constable padding and emptying pockets). The trial judge implied that, had the constable told the accused of his grounds, and had asked him to empty his pockets, that would have been reasonable, and such a search would have been under s. 10 of the Narcotic Control Act. Despite the fact that the officer did not effect an arrest, and issued an appearance notice (in lieu of an arrest), the trial judge had held that the manner of searching had, technically, amounted to an arrest. The manner of search conducted would only have been necessary had the accused been uncooperative.

The County Court Judge disagreed quite sharply with the trial judge. He held that there is no law, and there ought to be no precedent to say that a search is only reasonable after a person has been given an opportunity to surrender the contraband to be searched for voluntarily. Secondly, the binding precedents for B.C. are that, as long as there is a nexus or connection between the place where the search is conducted, the person searched and the narcotic, a person's search without arrest under s. 10 N.C.A. is lawful. This was to defeat the argument that the section gave such broad authorization that, if one person in a stadium where thousands were gathered for an event had narcotics in his/her possession, any or all of those gathered could be searched. The "nexus or connection" requirement effectively prevents any arbitrary exercise of police power.

Crown's Appeal Allowed - New Trial ordered.

CONSTITUTIONALITY OF GUILT IN CARNAL KNOWLEDGE OF A FEMALE PERSON UNDER FOURTEEN YEARS, DESPITE SINCERE BELIEF OF AGE (s. 146(1) C.C.)

Regina v. Ferguson - B.C. Court of Appeal - Vancouver CA 003488, September 1987

The 17 year old accused had sexual intercourse with an eleven year old girl. The accused "honestly, but mistakenly believed" the girl was sixteen years of age. Despite this belief, he was convicted of having sexual intercourse with a female person under the age of fourteen. He appealed, arguing that an honest, but mistaken belief that the girl was older than fourteen years effectively erased mens rea as an element of this outright criminal offence. It is a principle of fundamental justice that intent is an element of a criminal act. Therefore, section 146(1) C.C. is unconstitutional, and its provision that an honest belief is no defence is not "demonstrably justified in a free and democratic society". (Sections 7 and 1 of the Charter respectively).

The B.C. Court of Appeal gave an interesting overview of the history of the offence which goes back to 1275 and was then known as "ravishing a maiden". In the middle ages a death penalty was provided by statute, but even for that period, history does not record that the honest belief of being above statutable age was ever raised until 1875* when such "connection" with a girl under the age of sixteen was a crime contrary to the "Offenses Against the Person Act" of 1861. The British Courts held that, when a man "connected" with a child, relying on her consent, he did so "at his peril", if she happened to be under age. The British Parliament included this provision in their statute in 1885, and so did Canada in 1892. It has been there ever since by means of various wordings. Currently, New Zealand and Australia, as well as most of the U.S. states, have this provision in their criminal law. Overhauls of the sex crimes were brought about due to pressure groups and a realization that some of those laws were indeed inconsistent with the ways of contemporary society. In Canada, there were quantum changes in 1978, and again in 1983. However, s. 246(1) C.C. remained unamended despite the strong recommendations by the Law Reform Committee in 1978 to neuter the section and to make due diligence to discover the girl's age a defence. Obviously, Parliament wished the provision to remain unaltered. However, Parliamentary supremacy is, since 1982, (inclusion of the Charter of Rights and Freedoms in the Constitution Act) considerably less potent where legislation by our elected representatives infringes a guaranteed right or freedom. In other words, if the provision that effectively removes mens rea from the offence created by s. 146(1) is inconsistent with the provision in s. 7 of the Charter (we cannot be deprived of our liberty except in accordance with the principles of fundamental justice) and, if that portion of the section that offends the Charter cannot withstand the test, described in s. 1 of the Charter (if the provision is demonstrably justified), then the Courts must declare that part of the section to be without force or effect (s. 52(1) Charter).

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* *R. v. Prince* - L.R. 2C.C.R. 154

The Supreme Court of Canada interpreted the meaning of s.1 of the Charter in 1986*. A simplified version of their decision is that the Courts must be guided by the values and principles of our free and democratic society. If restrictions on the rights or freedoms guaranteed in the Charter are essential, or even reasonably necessary to preserve those values, then they are justified. Reviewing the devastating consequences (exploitation, prostitution, abortions, psychological, economic and family consequences) of men having sexual intercourse with a female child, the B.C. Court of Appeal, in essence, said that the evil of the infringement of a constitutional right in s. 146(1) C.C., is justified by the greater evil flowing from the unscrupulous ones among us who will take advantage of and/or outright exploit female children at their most vulnerable age. Not being blind to the fact that some young females do initiate the sexual acts, and can be very persuasive and seductive, the Court agreed with Courts of other nations which held that provisions, as found in s. 146(1) C.C., are there to protect young females even from themselves.

In terms of the consequences of striking the offending words in s. 146(1) C.C. that effectively remove mens rea in respect to knowledge of the girl's age, the Court found that the Crown would then have to prove that the accused knew the age of the girl. The Court implied that, other than in cases where the age is obvious or where by means of a subjective test that knowledge can be proved, the section would be a legislative tiger with very serious dental problems. Hence, there is a rational connection between the elimination of the mens rea as to the girl's age as an element of the crime, and the protection Parliament intends to provide.

Based on all these, and various technical reasons, the B.C. Court of Appeal held that the limitation of personal liberty in s. 146(1) C.C. is reasonable and demonstrably justified.

Appeal dismissed - Crown
Conviction Upheld.

Note:

This B.C. Court of Appeal decision was not unanimous. One of the three Justices dissented and would have allowed the appeal. This lack of unanimity gives the appellant a right of access to the Supreme Court of Canada. This means he needs no leave from that Court to appeal. Should the Supreme Court of Canada declare the section to amount to an excessive and unjustified limitation of rights, it has no authority to substitute anything for what it eliminates. However, since the B.C. Court of Appeal heard Ferguson's appeal,

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* *R. v. Oakes*, Volume 23, page 16 of this publication, or 24 C.C.C. (3d) 321

the Parliament of Canada adopted Bill C-15. This Bill received Royal Assent, but has not been proclaimed, and it is difficult to assess why it is held up. In any event, the Bill does amend s. 146(1) C.C. by removing the offending words and substituting a reverse onus with a due diligence test. In respect to the knowledge of age, the Bill proposes to say that it is no defence to a charge of statutory rape...

> "that the accused believed that the complainant was fourteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant."

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THE MEANING OF PROWLING AND LOITERING

Regina v. Willis - County Court of Vancouver Island - Victoria, No. 40750-C, June 1987

The accused and a companion were found "at night" on private property near a dwelling house. They were concealing themselves, and the trial judge was of the view they did so as they had attempted to break into the house. Probably because the Crown was short of evidence to prove the latter, the twosome were charged with prowling by night. Willis appealed his conviction claiming that he was a mere trespasser, but not a prowler.

The County Court Judge confirmed that a prowler is a trespasser, but that every trespasser is not a prowler. Then, what makes a trespasser a prowler or loiterer? There are not too many cases on these points, but one that always seems to be favoured is the decision by an Alberta Magistrate in 1970*. The Courts are quite consistent in defining the two verbs (to prowl - to loiter), but the Alberta Magistrate had read more in Parliament's intent to prohibit such behaviour around a home during the night hours. He could not believe that stealthily roaming on a property, making every effort not to be detected (prowling) or just aimlessly "hanging around", not caring if detected (loitering), was all the Crown needed to prove to convict a person of the offence now found in s. 173 C.C. The Magistrate added that the prowling or loitering must be predatory in nature meaning that the person must be on the scrounge to steal, to break in or to invade the privacy of dwellers in some way. He found comfort for his views from the fact that a lawful excuse for prowling or loitering renders the prowler immune. He said:

> "Therefore, unless the evidence satisfies a Court beyond a reasonable doubt that an accused person was hunting in a stealthy manner for an opportunity to carry out an unlawful purpose, I do not think he can be held to be prowling."

The B.C. County Court Judge disagreed and held that it is not necessary for the Crown to prove that the prowler or loiterer is hunting to carry out an unlawful purpose. (If that was so "peeping" would not be included in s. 173 C.C.).

> "In other words, if the Crown establishes the prowling (or the loitering as the case may be), an accused is then required to provide a lawful excuse, otherwise he is guilty as charged."

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* *R. v. McLean* (1970) 1 C.C.C. (2d) 277

This being so, the County Court Judge considered hiding after attempting to break-in hardly a lawful excuse.

Appeal Dismissed.

ADMISSIBILITY OF STATEMENT - CONFLICTING EVIDENCE - CREDIBILITY INDUCEMENT - AWARENESS FOR WHAT PURPOSE STATEMENT MAY BE USED

The Queen and Walsh - B.C. Court of Appeal - Victoria C.A. No. V00403, June 1987

The accused had been convicted of breaking and entering a home and committing an indictable offence therein. A kernel issue at trial was the admissibility of a statement the accused had made to the officer who had arrested him. The evidence given by the officer, and that of the accused during a voir dire were consistent except for the crucial parts. The officer attested that, upon arrest, the accused had been informed of his right to counsel and the right to remain silent, but that anything he would say might be used at his trial. This warning, and the information re: right to counsel where given at the scene of the arrest, and again at the police office before the disputed statement was taken. The accused had testified that at no time was he informed of any rights, but was only told that "things would go better for him" if he made a statement. The trial judge had admitted the statement in evidence. The accused appealed the conviction arguing that his statement should not have been admitted.

The trial judge had found that the "...weight of the evidence in this matter favours...the officer." Based on this finding, he had ruled the statement admissible, particularly as in every other aspect the versions of the officer and that of the accused, of all that happened was without conflict. What the trial judge had not indicated was that he believed the officer on the points in issue, and had rejected the accused's version of these matters. A trial judge has that prerogative, but must consider an issue involving credibility in criminal cases to be such that he can say to have no reasonable doubt as to the facts. Here, the reference made by the trial judge leads one to infer that he considered that, on the balance of probabilities, he believed the officer. His comment indicates that he was inclined to believe the officer over the accused. That does simply not meet the Crown's burden of proof in criminal law.

Accused's appeal allowed
New trial ordered.

IS EVIDENCE OF COMPLAINT OF SEX OFFENCE ADMISSIBLE DESPITE THE ABROGATION OF "RECENT COMPLAINT"

Regina* v. *OWENS - 33 C.C.C. (3d) 275
Ontario Court of Appeal

A school teacher was accused of having sexually assaulted grade 2 children under his care. When these children testified the defence implied falsification and influence by the parents. To rebut these allegations the Crown adduced evidence of the complaints the children had lodged by telling their parents ot what the teacher nad done to them.

Defence counsel had not objected at the time that evidence was adduced, but had raised the propriety of the use of the evidence when he appealed the accused's convictions for sexual assault. The trial judge had been very careful to explain the use and evidentiary value of the parents' testimony. The parents' evidence could not serve to prove the truth of the content of the statements the children had made to them, but only to show the children complained and that there was consistency between these statements and the children's testimony. This also gave defence counsel an opportunity to assess that consistency, determine if there was recent fabrication, and to test if the parents had influenced the children. He (the trial judge) had not used the evidence from the parents to "bolster" the children's testimony. An inevitable consequence, of course, especially with a jury, is that such consistency assists to establish the children's (complainant's) credibility.

The Ontario Court of Appeal held that the trial judge had been accurate on the law in this issue. Defence counsel seemingly argued that as he had not alleged that the children's evidence was fabricated, but had only wondered out loud, as it were, if the children had, under the parents' influence, fabricated their testimony, he had not opened the road for the Crown to call evidence of previous consistent statements. The Ontario Court of Appeal responded:

> "It is not necessary to show that an allegation of recent fabrication has been expressly made before prior consistent statements become admissible: The allegation may be implicit from the conduct of the case."

Prior to the common law doctrine of recent complaints being abrogated (January 4, 1983 - s. 246.5 C.C.), police investigators would, particularly in complaints of sex offenses, take statements from persons the victim had complained to. The defence used to reason many years ago, that if a woman was trespassed upon sexually, her indignation, hurt and trauma would cause her to complain to a confidant at the first reasonable opportunity. Such an unsolicited statement was admissible in evidence to show credibility on the

part of the complainant and consistency in her version of the events. If a female victim had not raised a "hue and cry", the defence could find support in its submission that then perhaps it did not happen, or happened differently from what she testified to. (Later, this doctrine was extended to any victim of crimes which are likely to cause hysteria on the part of the victim, such as kidnapping, unlawful confinement, etc... It should be noted that the recent complaint doctrine ought to still apply to the latter as the abrogation is only in regards to sex offenses). However, the abrogation of the rule has not affected the evidence provision applied in this case. It seems inevitable that the defence will imply in cross examination, or by their conduct of the case that the complainant's testimony is a fabrication. If that is done, then others may testify that the complainant's out-of-court statements are consistent with his/her testimony. It seems that taking statements, from those to whom the complaint was made, should not be abandoned.

Accused's appeal dismissed.
Convictions for sexual assaults upheld.

Note: On "recent complaint" being an exception to the "oath help" rule, despite the abrogation, see also ***R v. GEORGE*** (1985) 23 C.C.C. (3d) 42 and ***R v. Page*** (1984) 12 C.C.C. (3d) 250.

THE MEANING OF SEXUAL ASSAULT

Regina* v. *CHASE - Supreme Court of Canada
October 1987

The accused went uninvited into his neighbour's home when the fifteen year old girl, who resided there, was home alone with her much younger brother and a very elderly grandparent. The accused was quite aggressive in attempting to overcome the girl's resistance to him touching her genitals. He had grabbed her around the shoulders and had held her breasts. She had fought back and prevented the accused from searching her genitals. "My hands were too fast", testified the complainant. The accused had said: "Come on dear, don't hit me, I know you want it." When he left, due to someone having phoned another neighbour for assistance, the accused said he would tell everybody that the complainant had "raped" him.

The New Brunswick Court of Appeal had reduced the accused's conviction to the lesser and included offence of common assault. This Court found that no assault is 'sexual' unless the genitalia were touched. The breasts have "secondary sexual characteristics", and if the touching of all parts of the anatomy, which may encompass sexual characteristics, were included in a broad definition of sexual assault, absurdities would result, held that Court. It implied that an assault with some sexual overtones is not necessarily a sexual assault. The Crown appealed.

The Supreme Court of Canada observed that "assault" is defined by statute with a good measure of common law filling in all of the gaps, but "sexual" is not defined. This offence was included in the Criminal Code of Canada only a few years ago and this was the first time that the Supreme Court of Canada was specifically to answer the narrow question of law: "What is a sexual assault?"

The Supreme Court of Canada held:

1. that all subsections of s. 244 C.C., which defines assault, apply to sexual assault (an actual touching is not necessary).

2. that the test to determine if an assault is a sexual assault is an objective one (makes it a point of law), and

3. that a "sexual assault is an assault...which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated."

Like several Courts of Appeal had already done, the Supreme Court of Canada totally rejected the views of the New Brunswick Court of Appeal.

Crown's Appeal Allowed
Conviction of sexual assault substituted for that of common assault.

UNFOUNDED JUDICIAL SCATHING OF POLICE AND CROWN; CONTROL OVER AGENT IN UNDERCOVER OPERATION; ENTRAPMENT

Regina v. *Gudbranson* - B.C. Court of Appeal
CA 005837, Vancouver, October 1987

In Volume 25 of this publication is a synopsis of the reasons for Judgement by a County Court Judge, who sat with a jury to try the accused for trafficking cocaine. He was very critical of police and Crown Counsel and concluded that they had been deceptive (in obstructing the defence from locating and calling the undercover agent police used) unfair and conducted themselves questionably. He held that this had deprived the accused of making a full answer and defence. This had justified him to stay the proceedings. The Crown appealed this decision.

The trial judge had been critical that the police operation was set up in such a way that W., the civilian undercover operator, would not be involved in the transactions the Crown relied on to substantiate the charge. This would not make it essential for him to be a witness to prove the trafficking. All W did, according to him, was that he got the accused to sell cocaine to a police officer. According to the defence theory (not rejected by the trial judge) W had sold the cocaine to the accused so he, in turn, could sell to the officer. The sale to the accused was by a party only known as "Ken". Police had not been able to identify this Ken and W denied to know that person or to have arranged for anyone to supply the accused with cocaine.

At the preliminary hearing, defence counsel gave notice to the Crown that W was required by the defence. This, it was later argued, was essential to show entrapment. If anyone had importuned and enticed the accused to provide the cocaine, it was W and not the police. This notice had not resulted in any action on the part of the police or the Crown to locate W who police claimed had disappeared for parts unknown. Crown Counsel was "censured" too, for not instructing police to locate W for the defence. It was the Crown's duty. said the trial judge, to know W's whereabouts at all times during the trial process. It was not until the trial judge had threatened to cure this impasse by means of a judicial stay of proceedings that the Crown and police produced W.

It should be noted that W was an agent provocateur and not an informer. His identity could therefore not be protected and he was competent and compellable as a witness.

Another interesting point is that the defence wanted W to show entrapment and the trial judge had held that the failure to produce W had deprived the accused at the preliminary hearing already, of making a full answer and defence. Entrapment is <u>not</u> a defence but an aspect of abuse of the process of the Court. A preliminary inquiry court is not a court of competent jurisdiction to grant a remedy under s. 24(1) of the Charter. Is it also

incompetent to determine entrapment and stay the proceedings of a preliminary inquiry? This interesting question was not answered by the B.C. Court of Appeal as the defence never raised the issue of entrapment at the preliminary hearing or involved the presiding Judge in its attempts to locate W. All defence counsel did was put the prosecutor on notice that he wanted W at the trial.

The B.C. Court of Appeal decisively disagreed with the Trial Judge on nearly everything that had caused his sharp criticism of police and Crown.

The Court of Appeal could not see where there was any basis for the trial judge's conclusion that the police had been deceptive and had misled the defence. If defence counsel had wanted W, he should have involved the judge and simply have applied for a subpoena. If the defence was relying on entrapment, W was the star witness. Not only had the defence to take the initiative to compel W, but also had to raise the issue of entrapment and sustain its existence. The Crown does not have to prove that there was no entrapment.

Said the B.C. Court of Appeal:

> "I think the record before us is devoid of any evidence to support the apparent conclusion of Judge Hogarth that the Crown refused 'to make every reasonable effort by those means to find the witness' and that the Crown's failure was tantamount to obstructing justice."

At the preliminary hearing there had been no deprivation of the accused's rights to make a full answer and defence, and in respect to that the "stay" was unjustified.

The B.C. Court then examined whether there was any other justifiable reason for a judicial stay of proceedings. The trial judge had been very critical of a number of events that lead up to the accused's arrest. The trial judge had found:

1. that the accused had, at the outset, not been a person who was likely to traffic in drugs;

2. that W had been persistent that the accused sell drugs to the undercover constable;

3. that police, although not responsible for W's tactics, were aware of the methods W used to put pressure on the accused to comply;

4. that W himself was trading in drugs during this time, and that police had inadequately controlled or kept tabs on W to prevent these illegal activities;

5. that the cocaine the accused had purchased to sell to the constable was probably W's property and police had made no effort to ensure that such would not be the case.

It is of interest to note that the stay of proceedings the trial judge ordered was not for entrapment (he obviously found that there was not sufficient evidence to hold that this was a "clear case" of entrapment) but because W had not been produced at the preliminary hearing. He held this had deprived the accused of a full answer and defence. Secondly, he had held that it...

> "...is a clear case of unfair and highly questionable conduct that, under the circumstances, is oppressive and thus an abuse of process."

These two matters were sufficient grounds to enter a stay of proceedings the trial judge had held.

The B.C. Court of Appeal found there was no evidence the police or Crown had been deceptive in any way. Defence counsel had not followed the proper procedure to compel W to appear. Neither had he met the burden of proof on the defence to show that a stay was justified.

The Court of Appeal also wondered what made the trial judge believe that the Crown needs to know the whereabouts of witnesses it is not calling. Furthermore, the trial judge had placed too great a burden on police in an undercover operation. An agent "must have room for manoeuvre", said the Court. If W was trafficking in dugs, it was irrelevant to the allegations against the accused. At best, it could affect his credibility. Although evidence of W supplying and profiting from supplying the very narcotics which were subject to the charge against the accused might lead to the conclusion that there was entrapment, there was simply no evidence of this. The trial judge's findings in this regard had been no more than "supposition" and nothing more.

Concluded the B.C.Court of Appeal unanimously:

> "On the whole, I am of the view there is <u>no evidence</u> to sustain the Judge's conclusion that this was a clear case of unfair and highly questionable conduct that under the circumstances was oppressive and constituted an abuse of the process."

Crown's Appeal allowed
Stay or proceedings set aside
New trial ordered.

LEGAL TID-BITS

DEMANDING 'ROADSIDE' BREATH SAMPLES OF PERSON WHO HAS BEEN DRIVING

A peace officer is empowered under s. 238 C.C. to demand a sample of breath from a person "who is driving a motor vehicle or who has the care and control of a motor-vehicle", if he suspects that that person has alcohol in his body.

In this case, the accused took his conviction for refusing to supply such a breath sample upon demand to the Manitoba Court of Appeal, arguing that the circumstances in which he was found were not included in those which authorized the officer to make the demand.

In compliance with the section, the allegation was that the accused had been driving when the demand was made of him while in fact the car had left the road after some erratic driving, and was parked somewhere in a field. The officer found the accused behind the wheel and the demand was then made.

The defence reasoned that due to the "is driving" the roadside demand must arise from a suspicion of the suspect having alcohol in his body immediately upon cessation of driving.

The question was whether the "is driving" includes the past tense (has been) provided the driving was recent when the roadside demand is made. As an enactment must receive a liberal and broad interpretation to meet its object. (Interpretation Act), the demand was justified and binding on the accused. His appeal was dismissed.

Regina v. Johnson, 32 C.C.C.(3d) 126

IMPROMPTU AND VOLUNTEERED STATEMENT

A police officer attended at a one-car accident. The accused walked up to the officer and, without being asked any questions, identified himself as the driver of the car. Consequently, there was a conviction of "over 80 mlg.". The accused appealed this to the Nova Scotia Court of Appeal arguing that the statement ought not to have been admitted in evidence without a voir dire. The Court held that no voir dire is necessary if the statement made is not a response to a question.

Regina v. Moulaison - 32 C.C.C. (3d) 188

UNREASONABLE SEARCH

A police officer stopped the accused for reasons under the provincial traffic laws. He had a general conversation with her and asked what was under a cover on the back seat. As the accused gave her answer: "my clothing", the officer reached in and removed the cover. He found woman's clothing with price tags still attached. It was subsequently discovered that the clothing was stolen and a charge of possession of stolen goods was preferred. The Quebec Court of Appeal held that the search was unreasonable and that admitting the clothing into evidence would bring the administration of justice into disrepute. Acquittal was upheld.

R. v. Vaughen, 33 C.C.C. (3d) 426

TAKING BLOODSAMPLE - UNREASONABLE SEARCH

The accused was injured as the driver in a single car accident. While in hospital in an incoherent and delirious state, a physician took, without warrant, a sample of blood from the accused and turned it over to police. The sample was not required for medical purposes. Despite this unreasonable search, the accused was convicted for "over 80 mlg." and the trial judge's verdict was upheld by the Manitoba Court of Appeal. The Supreme Court of Canada, however, disagreed. The search was unreasonable (the Crown conceded this), and admission of the evidence would bring the administration of justice into disrepute.

POHORETSKY v. The Queen, 33 C.C.C. (3d) 398

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WORTHLESS CHEQUES

PRESUMPTION OF KNOWLEDGE OF INSUFFICIENT FUNDS

The accused received gasoline and cash on three occasions within a four day period. He was convicted of false pretences and challenged the convictions based on the well known presumption in s. 320(4) C.C. that if a cheque bounces it may be presumed the issuer knew it was worthless unless he has reasonable grounds to believe that there were sufficient funds on deposit to cover the cheque. The Alberta Queen's Bench held that the objective of the presumption

was unable to override the constitutional protection the presumption of innocence provide. In other words, the presumption was not demonstrably justified in our free and democratic society. Secondly, the presumption falls short of the "rationality test", that is, that there must be a rational connection between the proven fact and the presumed fact (the proven fact must make the presumed fact nearly a probability). Thirdly, the wording of s. 320(4) C.C. removes all judicial discretion in that it states that knowledge "shall" be presumed. Fourthly, the merchants took a business risk that should not be decreased by means of criminal law. "Having found that this section does not survive the rational connection test, it follows that the infringement in s. 11(d) cannot be saved by s.1 of the Charter." Short of saying that s. 320(4) C.C. is without force or effect, the Justice set aside the convictions.

Regina v. *DRISCOLL* - 34 C.C.C. (3d) 283
January 1987

Note: This ruling is not binding on B.C. Courts

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CONSTITUTIONAL VALIDITY OF IDENTIFICATION OF CRIMINALS ACT
PROPRIETY OF FINGERPRINTING PRIOR TO CONVICTION

The two accused were each compelled to attend at the police station for photographing and fingerprinting. The one was so ordered by means of an appearance notice; the other by summons. The charges against these persons are unrelated to one another. Both refused to appear and challenged the validity of the Identification of Criminals Act. This dispute ended up in the Saskatchewan Court of Appeal. This court concluded that it was against the liberty and security of the person (s.7 Charter) to be mugged and printed prior to conviction. The challenged Act provides for this degrading experience prematurely and creates a selective fingerprinting. The Court held that, unless the persons were convicted, they were not required to attend as ordered.

Regina* v. *HIGGINS* and *Regina* v. *BEARE
34 C.C.C. (3d) 193

See case note, bottom of page 11.

Note: On December 17, the Supreme Court of Canada reversed this decision after a reported 15 minute deliberation by all nine justices. Reasons for judgement will be given on a later date.

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SEARCHING WITHOUT WARRANT UNDER N.C. ACT
REENTERING TO INSTALL VIDEO EQUIPMENT - REASONABLENESS

Police received information that narcotics were stored in a garage. They searched without warrant under s. 10 N.C. Act and found as they were informed. They returned and installed video equipment. The accused was recorded as the person who was handling the narcotics. The trial judge had admitted the video evidence. The Quebec Court of Appeal held that the original search may well have been reasonable, but the planting of the video equipment was a breach of s. 8 of the Charter (reasonable search). As the trial judge had erroneously ruled that s. 8 of the Charter did not apply as the garage was used for criminal purposes, he had given inadequate consideration to the admissibility of the taped evidence. A new trial was ordered.

Regina v. ASENCIOS - 34 C.C.C. (3D) 168

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VIDEO EQUIPMENT USED TO GATHER GAMBLING EVIDENCE
NO WARRANT - REASONABLESS OF SEARCH

The accused rented a hotel suite for gambling purposes. Police received information of this, as well as information that the room was to be the scene of a robbery by persons not in any way related to the organizers. With the full knowledge and cooperation of the hotel management, surveillance of the room was maintained and it revealed evidence that the information regarding the gambling was correct. With the assistance of the hotel, video equipment was installed in the room without any sound equipment attached. An abundance of evidence was gained and after three nights of taping police walked in, arrested the principals and seized all kinds of evidence. No authorization or warrants were involved at any time. The trial Judge rejected all of the evidence and the Crown appealed the accused's acquittals. The Ontario Court

of Appeal held that video taping is a search and a key consideration was whether the persons observed, by means of the camera, had a reasonable expectation of privacy. No authorization for intercepting private communication could have been issued as none were, or were intended to be recorded. In the circumstances, s. 8 of the Charter does not apply since there was no reasonable expectation of privacy as there were numerous invitations sent out to join the gambling group of about 35 people. Consequently, the video evidence should have been admitted as should the evidence seized upon the arrests. No warrant was needed to enter the room where police had reasonable and probably grounds that an indictable offence was being committed. Crown's appeal allowed and a new trial ordered.

***Regina* v. *WONG* et al** - Ontario Court of Appeal
34 C.C.C. (3d) 51

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REASONABLE SEARCH - PROTECTION OF INFORMER

The common law and the Supreme Court of Canada have made it clear in the strongest of terms that the identity of a police informer (not agent) must not be disclosed. Since the Charter, defence counsel have made inroads into this dictum. In this case, it was submitted the information that provided the prerequisite grounds for the search was needed to make a full answer and defence to what was alleged. This includes the testing of the search and seizure against s. 8 of the Charter which grants a right to be secure against unreasonable search and seizure. Hence, when for that purpose the information (application) of the warrant is requested or required, the identity of an informer may become known. This creates a self-explanatory judicial dilemma. In this case, the Crown appealed the accused's acquittal on possession of narcotics for the purpose of trafficking. The narcotics were found in the accused's penthouse which was searched with a warrant obtained on the basis of information from a reliable informer. No editing of the sworn information would prevent disclosure of the identity of the informer. The Ontario Court of Appeal held that the informers must continue to be protected; however, in view of the Charter being supreme law, if the identity is revealed even by editing the information the Crown has an option not to proceed, seek consent of the informer to reveal his identity or proceed on the basis of a warrantless search. Crown's appeal allowed and a new trial ordered.

Regina* v. *HUNTER - 34 C.C.C.(3d) 14

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"FRAUDULENTLY" TELLING FORTUNE

For $15, the accused told a police officer his fortune and future. She was convicted under s. 323(b) C.C. and appealed until she ended up in the Supreme Court of Canada. She claimed that since childhood she enjoyed special powers to predict the future; consequently, her fortune telling was not fraudulent. The Supreme Court of Canada held that as "The accused knows full well that she has no basis for her claim to be able to predict what will happen in people's future", the defence of belief is not open on the facts of the case. Accused's appeal was dismissed.

33 C.C.C. (3d) 220 - *LABROSE* v. *The Queen*

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OFFICER MISREPRESENTING HIMSELF AND THEREBY GAINING ACCESS TO ACCUSED HOME WHERE EVIDENCE WAS DISCOVERED

A Wildlife officer answered an advertisement offering meat for sale. He did not identify himself and pretended to have a personal interest to purchase some meat. He was invited in the home and he discovered that the meat was wildlife. Charges under Wildlife Act resulted. The trial Judge, however, reasoned that the officer had entered the home for the purpose of search and seizure. The deception, and the fact that the search was warrantless, rendered it unreasonable and the evidence was excluded. The Saskatchewan Court of Appeal upheld this view and observed that when it comes to a man's home, his castle, the authorities must announce their presence and demonstrate their authority by stating their lawful reason for entering. This was not done. The test whether the officer was such an authority is obviously an objective one. Crown's appeal was disallowed and acquittal was upheld.

Regina v. *RAMFORD* - 32 c.c.c. (3d) 221

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SECURITY SEARCH OF UNARRESTED SUSPECT

The accused was stopped for speeding and symptoms of impairment were detected when the officer spoke to him. A request was made of the accused to accompany the officer to the police car to give a sample of his breath in the roadside screening device. Without asking for permission to do so, the officer

searched the accused for "security reasons" before he allowed him to enter the police car. He had explained the purpose of the search to the accused. A quantity of marijuana was found on the accused, but the evidence was excluded at his trial for possession of a narcotic as the search and seizure had been unreasonable. This ruling was upheld by the Manitoba Court of Appeal. Said the Court: "While at common law there exists power to search a person as incident to an arrest, a search, apart from statutory authority, cannot precede an arrest and serve as part of the justification". Had the officers grounds for believing that his safety was in danger he should have effected an arrest and then he could have searched the accused. It was the intrusiveness of the search that had some bearing on the Court's finding. If a weapon is what the officer was concerned about a "pat down" search would have sufficed. Also, the officer could have asked for permission. However, he had searched as though he had a right to do so. That was an unreasonable intrusion in the circumstances. Crown's Appeal was dismissed.

Regina* v. *MATHE - Manitoba Court of Appeal - 32 C.C.C. (3d) 272

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ROUTINE STOPPING OF CAR - ARBITRARY DETENTION

Accused was stopped for no specific reason and he was asked to produce his driver's licence. He couldn't do so as the licence was suspended. The Saskatchewan Court of Appeal (in a 2 to 1 decision) found that the stop had constituted arbitrary detention contrary to the Charter. Consequently, the evidence of driving was inadmissible. Accused's conviction was quashed and acquittal was entered.

Regina* v. *IRON - 33 C.C.C. (3d) 157

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CARE OR CONTROL OF A BOAT OUT OF GASOLINE

The accused was adrift and signalled another boat passing by. As he was out of gas he was towed into shore. Police attended and concluded the accused was impaired. He refused to give any breath samples and was convicted of impaired boating and refusing to blow. He appealed, arguing that since he was out of gas, he was not likely to do anything with the controls of the boat that would set it in motion.* The County Court Judge disagreed, and held that the accused had the care or control. He was to keep a steady lookout, and use the oars to direct the boat as it drifted.

Appeal dismissed
Convictions upheld

Regina **v.** ***TROSELL*** - County Court of Vancouver
CC 861796

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* See ***R. v. Toews*** *- Volume 22, page 24 of this publication.*