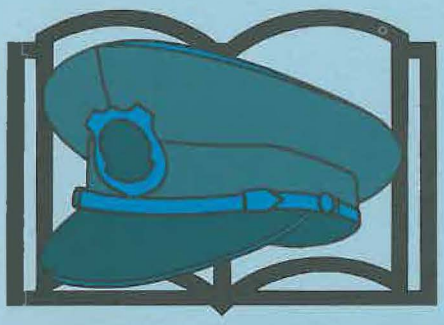

# ISSUES OF INTEREST

## VOLUME NO. 30

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

# ISSUES OF INTEREST

## VOLUME NO. 30

Written by John M. Post

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LEGAL TID-BITS

## CONSTITUTIONAL VALIDITY OF OUR CONSTRUCTIVE MURDER PROVISIONS

*VAILLANCOURT and The Queen and The Attorney General for Ontario* - Supreme Court of Canada - December 1987

The accused agreed to be a party to an armed robbery in a pool hall. The weapons to be used were knives. However, his partner showed up with a gun. The accused testified he had insisted that it be unloaded and he be given the ammunition. The partner removed three bullets from the gun and gave them to the accused. He must have left ammunition in the gun as during the robbery the principal partner shot and killed someone. He made a clean get-a-way but the accused was apprehended. Three bullets were found on him.

The relevant law can be found in section 213 C.C. The applicable portion of that section reads as follows:

> "Culpable homicide is murder where a person causes the death of a human being while committing robbery if he uses a weapon or has it upon his person during or at the time he commits the offence and death ensues as a consequence."

There was no doubt that the accused was in on the robbery, but was he a party to the murder? His intent was unrelated to the murder the principal offender committed. Yet the accused was convicted of second degree murder as s. 21(2) C.C. rendered him criminally liable. He and the principal offender in relation to the murder, had formed an intention in common to commit an armed robbery and to assist each other in carrying out that common purpose. The principal offender committed murder in addition to the unlawful purpose (armed robbery) they intended to commit together. As the accused ought to have known the murder would be a probable consequence to an armed robbery he was not only a party to the armed robbery but also to the murder his partner committed. He was consequently convicted of second degree murder and continued to appeal until he ended up in the Supreme Court of Canada.

The accused took a broad shot at the constitutionality of all the sections mentioned. It seems fair to say that he argued that the law reached too far to include him in something that was not part of what he intended.

It is a principle of fundamental justice that the lawmakers cannot render us criminally liable for causing a particular result unless we at least had some degree of intent in respect of that result. Particularly murder, which has "specific intent" as an essential ingredient to be proven by the Crown, should not be subject to the shortcuts the Crown had in its armour for this case. Specific intent means that the results of an action were specifically intended. In this case, it can, at best, be said that there was a general intent to the unlawful act of robbery, but no intent at all in respect of the murder.

Furthermore, the "reach" by section 213 (d) and/or 21(2) C.C. violated the accused's right to be presumed innocent until proven guilty. This presumption consists of two familiar principles:

(a) the right to remain silent, and

(b) the burden of proof being on the Crown to prove beyond a reasonable doubt that which it alleges.

In this case, the Crown needed only to prove the murder, the common intent to the robbery and the knowledge that the partner carried a weapon. Hence, the legislative reach that dragged the accused into this murder as a principal offender in the second degree, is an evidentiary shortcut and amounts to over-reach from a constitutional viewpoint. Consequently, the statutory provisions are inconsistent with the Charter of Rights and Freedoms and are as such without force or effect, argued the defence.

Parliament reiterated that murder is an offence requiring specific intent when it enacted s. 212 C.C. which states that murder is where a person who causes the death of a human being means to cause that death. However, right in the wake of this opening statement Parliament relaxes the apparent rigidity by providing that where one intends and does cause bodily harm to another person, which he knows is likely to cause death and is indifferent whether his victim dies, then if death does result from the wounding, the perpetrator committed murder (s. 212 (a) (ii) C.C.). In other words, the Crown does not have to prove <u>any</u> (specific or general) intent to cause death, but only intent to wound.

Then Parliament removes itself even further from its statement that murder requires specific intent to cause death by enacting s. 212(c) C.C. It simply states that a person who, in the pursuit of an unlawful goal, does anything that he knew or should have known is likely to cause death, then even where he wanted to attain that goal without causing death, or any bodily harm to anyone, he commits murder, if death is caused by that pursuit.

The intent in such circumstances does not even include indifference if death results. All that needs to be proved is that the pursuit caused the death and proof of no-intent to cause death is unable to defeat this murder provision.

Then, of course, there is the relaxation of specific intent being prerequisite to conviction for murder, by means of the section (213 C.C.) that reached out and brought the accused within criminal liability for murder despite the fact he did not intend and personally did nothing to cause death to anyone despite the fact he intended to commit robbery with a partner who was armed with what he thought to be an unloaded firearm.

This, the accused claimed, is legislative excessiveness that is inconsistent with his right to be presumed innocent. The Crown needed not even to prove, for this most serious crime we can commit, subjective foresight or even objective foreseeability of the likelihood of death. This foresight or foreseeability has been substituted by Parliament by the above explained

provisions which amount to statutorily constructed murder (constructive murder) which ignores the principles of fundamental justice.

The Supreme Court of Canada began its deliberations by recognizing how Parliament has limited its supremacy by including the Charter of Rights and Freedoms in our new entrenched constitution. They, the appointed Judiciary, can by interpreting the constitution supersede the elected representatives whose resolves are assumed to be the will of the people. If before 1982, Parliament disagreed with the Judiciary's interpretation of statute law, (Parliament) could supersede them by amending the enactment. Now, if a constitutional issue renders an enactment without force or effect, one way which Parliament can supersede the Courts is by amending the constitution. Considering it took Canada 55 years (from the Imperial Conference of 1927 till the proclamation of our constitution on April 17 of 1982) to come up with an amending formula for our constitution, any amendment to that constitution of ours will be a major undertaking.

This is what the reasons for judgement record:

> "Prior to the enactment of the Charter, Parliament had full legislative powers with respect to criminal law, including the determination of the essential elements of any given crime. But, the Charter has restricted these powers. Under s. 7, if a conviction will result in a deprivation of the life, liberty or security of the person of the accused, then Parliament must respect the principles of fundamental justice."

Murder is the worst kind of homicide. "Malice aforethought" distinguished it from manslaughter. The Supreme Court of Canada hastened to add that malice aforethought did not limit murder to premeditated causation of death. Malice included intentional killing (not necessarily premeditated) and implies recklessness (not to be confused with negligence) which means doing something deliberately, knowing, but being indifferent to the likely consequences of the act.

Parliament in providing that causing death during the course of the commission of an indictable offence is included in murder, is not unique. It has been an historical practice. One seventeenth century author explains that "If the Act is unlawful, it is murder." If the glance of an arrow aimed at an animal belonging to another for the purpose of stealing it, kills a person who was out of the archer's sight, then the homicide is murder. If the animal was wildlife he was entitled to hunt, the killing of the person is sheer misadventure. A century later this was only applied if the unlawful purpose amounted to a serious criminal offence (felony).

Our section 213 C.C. is a direct descendant from that ancient common law except that it restricts the offenses during the commission of which the causation of death amounts to murder to the most serious indictable offenses only. As explained above, the provision is known as "constructive murder". England, the nation where the constructive murder provision originates, did away with it in 1957. In the U.S. it is widespread but losing support. Others have downgraded the cause of death while committing a crime to manslaughter and some have included a form of intent to cause the death as an element to the provision.

The Supreme Court of Canada decided to strictly deal with the constitutionality of section (213(d) C.C.) and not with the broad attack on every section that releases the rule of specific intent to cause death. Neither would the Court deal with section (21(2) C.C.) and its alleged inconsistency with the Charter. This, especially as the Attorney General of Canada did not intervene in this appeal. However, this decision will undoubtedly affect those provisions.

In this case, the accused was held criminally liable for the unintended results of an intended criminal act. The major question is whether that is inconsistent with the principles of fundamental justice. After all, s. 213 C.C. does not call for any subjective foresight or objective foreseeability on the part of a person in a situation the accused found himself in. The court concluded that murder belongs to a category of crimes where, due to the very nature of it (as well as the stigma attached to a conviction and the severe penalty that must be imposed) conviction is unthinkable unless there is a criminal intent "reflecting the particular nature of that crime". The Court used theft as an example of also belonging to this category. Although it does not compare in terms of the gravity of the offence, it does in regard to requisite intent. If there was no requirement to show that the taking of someone else's property at least involved dishonesty then all of us would be unreasonably vulnerable to conviction. After all, if we were criminally liable for all the unintentional consequences of our acts, we could not afford to get out of bed in the morning. The Court, therefore, decided that if Parliament wants to relax the requirement of specific intent to cause death for the crime of murder committed during the commission of an intended criminal act there must, at least, be proof beyond a reasonable doubt of subjective foresight, meaning that the accused foresaw the results of this robbery and nonetheless went ahead. A lower threshold for the Crown would be a requirement to prove objective foreseeability, meaning that in circumstances where anyone could foresee the possibility of such results still proceeds with the intended crime. Concluded the Court:

> "I will therefore, for the sole purpose of this appeal, go no further than say that it is a principle of fundamental justice that, absent proof beyond a reasonable doubt of at least objective foreseeability, there surely cannot be a murder conviction."

This means that to convict under s. 213(d) the Crown must not only prove all the essential elements included in the section, but also those s. 7 of the Charter imposes, in this case objective foreseeability.

By enacting section 213(d) C.C. Parliament substituted for the minimum requirement of intent to cause death (objective foreseeability) proof beyond a reasonable doubt of "certain forms of intentional dangerous conduct causing death". In other words, the section is unconstitutional as it does not include as an essential element that one ought to know that death is likely to ensue for a conviction for murder to be possible. The current wording allows a conviction for murder despite the fact that a jury may have a reasonable doubt that the accused ought to have known that death was likely to ensue. Recognizing that the accused was brought into the murder offence through the operation of s. 21(2) C.C. which does include objective foreseeability ("...each of them who knew or ought to have known that the commission of the offence would be a probable consequence..."), s. 213 C.C. must nevertheless have a similar provision. It also means that the partner in a crime to be convicted must have a measure of intent to cause death while the principal can be convicted without having to prove any intent. Neither is the measure of deterring the use of weapons as applied in s. 213(d) C.C. "demonstrably justified in a free and democratic society" (see s.1 Charter). If Parliament wants to deter such behaviour it can provide for it under the offence of manslaughter or the Crown can use s. 83 C.C. to prosecute. These sections carry sufficient maximum sentences to punish for and deter such behaviour.

The Supreme Court of Canada concluded:

1. Section 213(d) C.C. violates the principles of fundamental justice and the presumption of innocence (s. 7 and 11(d) of the Charter).

2. Section 213(d) C.C. is consequently of no force or effect.

3. The constitutional question of s. 21(2) in combination with s. 213(d) C.C. was not answered although there was an implication that the former does not offend the Charter.

4. The conviction for murder must be set aside and a new trial was ordered.

Comment:

A new trial seems difficult in the circumstances. The very section under which the accused stands charged was declared without force or effect. This would leave one to presume that constructive murder as it existed under s. 213(d) C.C. is no longer an offence known to law. It seems doubtful that the Crown, by virtue of the order for a new trial, may prosecute the accused for another offence that may be applicable.

What may be of interest also, is that this decision was not unanimous. One justice implied that the Court has gone too far, as the narrow question they were entitled to address was the law as it applied to the accused. He (the

accused) was captured by s. 21(2) C.C. which includes objective foreseeability and he, therefore, had not been deprived of his right to the principles of fundamental justice. He further observed that the Court agreed that the crime deserved severe punishment and, in essence, said that the argument was not about the content, but rather, the wrapping of the package; it was one involving the label rather than the substance. He concluded that the judiciary should not have interfered in the Parliamentary decision reflected in s. 213(d) C.C.

The Supreme Court of Canada reiterated its views on statutory provisions that either excuse the Crown from proving essential elements of an offence; allow a fact to be presumed upon the proof of other facts, or requires an accused to disprove on the balance of probabilities an essential element of the offence. In all of these, the accused must create more than a reasonable doubt to rebut what may be presumed. These provisions clearly violate the presumption of innocence and the principle of fundamental justice that any reasonable doubt must be resolved in favour of the accused.

What is also of interest is that the Court held:

> "Section 7 and 11(d) will also be infringed where the statutory definition of the offence does not include an element which is required under s. 7."

In this case, that was an intent of at least objective foreseeability. Principles of law have always been applied to interpret the statutes. If our constitution requires that there must be an intent related to causing death in s. 213 C.C., why could the Court not simply have left the section operable and set the precedent that intent is, by principle of law, an essential element. Many enactments are interpreted differently since the Charter came into effect.

*LAVIOLETTE* v. *The Queen* - Supreme Court of Canada

The accused and two companions broke into a parish house to find things to steal. He had handed, upon the request of one of his companions, a steel pipe to him when they entered the house. When the parish priest awakened by the noise, came out of his room the chap with the pipe "beat him to death". This fellow plead guilty to second degree murder while the accused and the other perpetrator were also convicted of that crime upon a joint trial.

The Prince Edward Island Supreme Court ordered new and separate trials for the duo and the Crown appealed this decision to the Supreme Court of Canada. The issues in this appeal were identical to those in the Vaillancourt case. Needless to say, the Crown was not successful and new trials were ordered.

Comment:

I have kept track of and been preoccupied with the principles, and doctrines of our criminal law. Despite this obsessive immersion having made me understand the need for the safeguards and principles contained in these legal philosophies and theories, I have never become accustomed to the apparent callousness of our Courts.

The kernel of the horrendous criminal act involved here gets no more than "Stephen beat him to death with the pipe" in among pages and pages of reasoning and examining how the system victimizes those the court found to be responsible for the crime. I do perfectly understand how I may arouse the wrath of those who will correctly point out that heinousness of the crime should not make the person(s) accused of committing it any more vulnerable to conviction than those who commit a crime of lesser gravity; that dramatization by the court may make one doubt the requisite impartiality and absence of bias on the part of those sitting in judgment; etc.

I full well realize that the public will not likely read reasons for judgement. If they did, a different tone may well be necessary to maintain a level of acceptable reputation with reasonable lay persons.

To preserve this reputation we have gone as far as expanding the meaning of the blindfold on the goddess of justice to not only depict impartiality, but also deliberate blindness to facts. Surely, if we can go to that extent in terms of the application of law, we can make a bit more of an effort in the cosmetic end of things and show some sensitivity for those who experienced the agonies of crime. A petty point perhaps, but....

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## JURY DELIBERATIONS

*The Queen v. ZACHARIAS* - B.C. Court of Appeal - Victoria V000096 - November 26, 1987

We continue to enforce the tenor of law that "thou shall have faith in being tried by thy peers". This mode of trial initiated in our system in 1215 by means of the Magna Carta continues to be the holiest of holy in the administration of justice. Questioning its validity in contemporary society is still the equivalent of speaking out against motherhood in the hallways of the maternity ward. Our laws, which strictly prohibit any revelations of what went on in the jury rooms, appear like evidence of willful blindness that verdicts may be reached by duress, the strong minded intimidating their lessers, or in ignorance of the law despite what must appear to them ramblings and renditions of law known as judicial instructions to the jury. The laws even prevent research to explore the validity of the system. For instance, tests of jury members on how well they understood the judicial instructions may be revealing, particularly when the instructions have, in terms of time, gone well beyond the average human attention span. Tests done on students exposed to a hypothetical address to a jury, or those who were specifically (in the U.S.) asked to sit through an entire trial and were subjected immediately upon the address to the jury to oral and written tests on their understanding of the instructions given to the jury, are claimed to have attained marks not exceeding 35%. This is not embarrassing to the reasonable and intelligent citizens who make up our juries. Most competent judges are sometimes told by more superior courts that they have erred in law. Considering the current complexities of that law which the jury must apply to find facts and determine a verdict, it is no affront to say to our peers that they are no longer competent or qualified to render a verdict. Whenever the system permits a peek behind the screens surrounding juries there is evidence of unawareness of the law. When we "fly" without a jury the system crosses all T's, and dots all I's meticulously to ensure flight. When we "fly" with a jury we are equally as meticulous except we do not carry out the inspections to ensure airworthiness.

In this case, Mr. ZACHARIAS was tried before a jury, with defrauding his employer, a Credit Union. After conviction defence counsel had a visit from the jury's foreman. Information from credit union personnel, (conveyed other than by means of testimony), who had worked under the accused's supervision, had left the impression with the jury that the accused had been convicted of similar fraud elsewhere and that he was a hard and mean man to work for. In general, the message was that he was a person likely to commit the offence for which he was being tried. Defence counsel went with this allegation of obstructing, perverting or defeating justice (s. 127(2)C.C.) to the Crown. This resulted in the R.C.M.P. and a senior lawyer conducting an investigation. Jury members were interviewed and questioned by the lawyer. Under s. 576.2 C.C. they were excused for disclosing "information relating to the proceedings of the jury". The answers given by the jurors did not support the suggestion that someone had influenced them.

The second ground for appeal was that the investigation revealed that the jury was hung and that they laboured under the misconception that they needed to deliberate at least one or two weeks before the court would accept that they could not unanimously decide on a verdict. The foreman described a scene of considerable tension among the jury members. (He was the one holding out on unanimity). He had been continuously reminded:

> " 'Look we've got families to get back to, and we've got this to get to, and I want to get back to work', and, you know, how can you, you know, eleven people be wrong and one person be right; and, you know, 'it's going to be two - we're going to have to wait a week or two weeks before they term it a hung jury; look it, Bob, what the hell is going on?', and I basically hung out until 11:45 and I could see nobody was going to change their mind; nobody was going with me and like a damn fool I voted guilty just to get them off my back."

This, and other statements made about what was going on with the jury, caused the B.C. Court of Appeal to remind the parties to the proceedings that the investigation into the second ground of appeal was highly inappropriate. The jury members were not exempt from disclosing this information as it did not relate to the allegation of obstructing justice.

The B.C. Court of Appeal said that the disclosures by the jurors were likely true and that the verdict of guilty had probably resulted from their misconception of a hung jury and the courses open to them.

> "As this is all attributed to the Attorney's General interrogation of jurors in breach of s. 576.2, I think the Crown is in no position to say that the verdict should be allowed to stand."

Warning that the peculiarities of this case stripped it of any precedent-setting value for probing jury's deliberations in other cases, the Court ordered a new trial.

Appeal allowed
New trial ordered.

## THE OFFENCE OF THREATENING

*Regina* v. *SAULNIER* - The County Court of Cariboo - Prince George 10524, July 1987

The accused had his truck repaired and discovered that the bill exceeded the estimate he received. A dispute arose over an outstanding amount and a private bailiff went to the accused's residence to seize the truck. The bailiff was armed with a distress warrant under the Repairer's Lien Act but was met with extreme hostility when he served the document on the accused. A detailed description would leave the reader with the impression that the accused had gone berserk. He, despite strong advice to the contrary, moved the truck from the street on to his property. When the bailiff followed with his vehicle the accused swung at him and his partner with a crowbar. He then ordered the bailiff off his property while continuing the threatening gestures. The bailiff complied and called police who arrested the accused "because of their concern that a breach of the peace might occur". On their way to the police station the accused continued his verbal hostility. About the garage who repaired his truck, the accused said to the officers (when they suggested he try to settle his dispute with them civilly). "Fuck that. I'm going to take a baseball bat down there and kill the cocksuckers." When asked where the garage was situated he responded: "Follow me after you let me out of gaol. I'm going down to kill those fuckers...etc." The accused was charged with possession of a weapon (the crowbar) dangerous to the public peace and with uttering a threat (s. 243.4.C.C.).

With regard to the first charge the accused claimed that the bailiff was a trespasser and that he had a right under sections 38,39 and 41 C.C. to use as much force as was necessary to remove the bailiff. The County Court held the crowbar was, in the circumstances, a weapon and that the bailiff had lawful possession of the truck, and therefore, the accused's possession was not peaceable. His behavior had amounted to endangering the public peace or the normal state of society. Furthermore, he had used the crowbar beyond what was necessary to remove an unwanted intruder. He was convicted.

In regards to the threatening, the County Court Judge said that the section was clear and that the gravamen of the offence is the making of a threat that was intended to cause alarm. The Judge saw nothing in the section that required the Crown to prove that there was an intent on the part of the accused to carry out the threat or that it be passed on to the intended victim.

Accused found guilty on both counts.

Comment:

The Court did not review the history of section 243.4 C.C. The section used to be s. 331 C.C. in Part VII of the criminal code which deals with "Offences against rights of property." In 1985 it was amended and included in Part VI of the code which deals with "Offences against the person and reputation". The original wording of the offence section was:

> 331. "Everyone commits an offence who by letter, telegram, telephone, cable, radio, or otherwise, knowingly utters, conveys or causes any person to receive a threat.
> (a) to cause death or injury to any person, or
> (b) to burn, destroy or damage real or personal property, or
> (c) to kill, maim, wound, poison or injure an animal or bird that is the property of any person."

There have been some interesting cases under this section. In one B.C. case a person charged with impaired driving in the pre-breathalyzer days went to the police station a few days later and said he would kill the physician who had given him a sobriety test. He did not request that the message be passed on to the doctor, he simply made the statement with such apparent conviction that he was arrested and charged under the above-quoted section.

The B.C. Court of Appeal gave lengthy reasons for judgment. The Crown had, in terms of the uttering and conveying of the threat relied on the word "otherwise" to bring the accused's actions within the section. The Court concluded that the tenor of the section, particularly due to the words "by letter, telegram...etc.", indicated that parliament intended to create an offence for alarming a person by threatening him. The offender's intent, therefore, had to be that he wished the threatened person to receive the threat. Another element (although not essential) was the perpetrator hiding his identity to amplify the devastation on the recipient of the threat. At least, the offence included the passing on of the threat to the intended victim. Whether or not there was any intent to carry out the threat was irrelevant to the offence Parliament created. Causing another person to live in fear on account of threats was what the section intended to prohibit.

The Supreme Court of Canada seemed to take a similar approach to interpreting this section when it, in 1974, gave reasons for judgment in R.V. Mabis (6 WWR 304). Mabis had spotted in a pub, a person who had recently testified against him. He had gone to this person and said: "Now I got you where I want you, I am going to kill you." The Court held that the section strongly implied that simply uttering a threat, face to face is not covered under this section. Also, the offender had to go beyond simple uttering and had to intend to have the message conveyed. ("Already proceeded from words to deeds and thereby

manifested his resolve.") The Court suggested that the definition of assault (which includes threats) was better suited for face-to-face confrontations.

Since 1985 the section reads:

> s. 243.4 "Everyone commits an offence who, in any manner knowingly utters, conveys or causes any person to receive a threat (a) "...etc. (as above, with the exception of an insignificant change in wording of (c))."

As indicated in the "note" following this section in Martin's Annual Criminal Code 1988, the judicial decisions made in respect to the old section apply to the new one. The tenor in terms of having the threat conveyed to the intended target and that the gravamen of the offence is to alarm the target and not just to utter the threat, still seem the same.

In view of all this, one wonders if the conviction of Saulnier, the unhappy truck owner, would stand up if appealed further. In view of the ruling by the B.C. Court of Appeal and the Supreme Court of Canada under the old section and the new section seemingly having the same object, this County Court's liberal and broad interpretation of the sections may not stand.

Another aspect of this case was the arrest made by the officers. It is indicated that they did so to prevent a breach of the peace and were entitled to maintain custody of Mr. SAULNIER as long as there were grounds for believing there would be a breach of the peace if they released him. Mr. Saulnier supplied an abundance of grounds for that belief. Despite the fact that sections 30 or 31 C.C. seem not to include powers to arrest to prevent a breach of the peace, a decision by the B.C. Court of Appeal in a civil suit for false imprisonment*, made it clear that at common law, (prevention being a duty) prevention of such a breach is included.

Finally, the legal status of the private bailiffs in this case is of interest. It was also an issue not addressed in this case other than a ruling by the County Judge that the bailiff who found the truck parked on the road in front of the accused's home "took possession" of the truck and prepared a notice of seizure. That is when the fireworks started. The Bailiff continued his attempt to seize the truck and went onto the accused's property. If the accused had no right under the well known sections to protect his property he did in fact by his very threatening gestures with a crowbar assault the bailiff. The County Court Judge held that the bailiff acted lawfully and was justified in aggressively pursuing the seizure despite the fact that the owner and possessor of the truck refused to part with the property.

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* **Hayes v. Constables Thompson and Bell** - Volume 20, page 4 of this publication.

An interesting case on this point was decided by the Ontario Court of Appeal in 1960*. A Mr. Doucette had purchased a T.V. set on payments. When he was in default the lienholders went to a private bailiff and signed a distress warrant. The bailiff, with the assistance of police, overcame the resistance by Mr. Doucette and carried away the T.V. set. Mr. Doucette was charged with assaulting the bailiff as a person in the lawful execution of a process against goods (s. 118 C.C.). The Ontario Court of Appeal explained that the private bailiff in the circumstances is no such person. The Court ruled that section 118 C.C. only refers to persons who execute a Court order, but not those who act on the instructions of a private party who claim a legal interest in property. The court explained that when a private bailiff is told by the possessor that he disputes the claim, then he is to leave. A tug-of-war on the spot is not a means of settling such a dispute; the courtroom is the appropriate place. The criminal law does not extend protection to those who wish to lay claim to property in someone else's possession. A private bailiff acting on the part of another person, has no special status and when he is told to leave and refuses, he is a trespasser. Section 39(1) C.C. seems to indicate the same views in law. It states that the possessor may defend his possession under a claim of right even if the other party was entitled by law to possession.

The views of the Ontario Court of Appeal have had a wide following in Canada.

Since writing the above, the reasons for Judgment in ***Regina v. Underwood*** were distributed. This was a judgment by the County Court of Vancouver Island (Victoria 42921) rendered in December of 1987.

Underwood was charged with knowingly uttering a threat to his girlfriend who he was living with "off and on". When things were not so good between them she wanted him "out", but he declined to go. The scenario that resulted was him laying on the chesterfield while his girlfriend and her sister-in-law argued with him from the kitchen. At one point the accused said to his girlfriend, without changing his bodily position; "If you don't shut your mouth I'll stick a knife into you and you will shut up." This frightened the sister-in-law who alerted the police. The charge of threatening resulted. There were no threatening gestures and there was no evidence of anyone having been drinking. The question was whether the Crown had made out a case under the new section in this "face to face" threat where the violence was exclusively verbal.

This County Court Judge did review the Nobis decision by the Supreme Court of Canada and applied various aspects of it to this Underwood case. However, without giving reasons for this conclusion the court said:

> "Parliament has now determined that oral face to face threats in fact constitute a crime."

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* *R v. DOUCETTE et al* (1960) 129 C.C.C. 102

The Supreme Court of Canada had held that the old section did not prohibit such an act because "countless are those who do not weigh their words."

The County Court Judge in this case recognized that fact as a dilemma for the Courts and held that consequently mens rea at the time the threat was uttered is now an essential ingredient to the offence the new section creates. The circumstances surrounding the giving of an oral threat must be considered to determine if such mens rea was present.

Said the Court:

> "... only those threats that are intended to be taken seriously are covered by the (new) section."

The Crown had failed to prove that the words admittedly spoken by the accused were demonstrating a real intent to actually threaten his girlfriend.

Accused acquitted

Note:

Obviously, this County Court Judge does not agree that judicial decisions made under the old section apply to the new definition of the crime of threatening. Also note that in *R. v. Howlett* (See page 28 of this volume) the B.C. Court of Appeal never questioned the propriety of including a face to face threat in this offence. Neither did the defence raise the issue.

## "CONSTITUTIONALITY OF PRIVACY ACT ALLOWING UNILATERAL CONSENT TO INTERCEPT A PRIVATE COMMUNICATION"

*Regina v. WIGGENS* - Supreme Court of B.C. - Vancouver, B.C.
No. CC851985 - May 1987

The accused approached a Mr. S and asked his participation in importing hashish into Canada. S went to the R.C.M.P. who supplied S with a "bodypack" and intercepted with his specific consent, the conversations he (S) had with the accused. The conversation was transmitted and simultaneously recorded by the R.C.M.P. At his trial for conspiracy to import a narcotic, the accused served notice (under the provisions of the Constitutional Question Act) on the Federal and B.C. Attorneys General challenging the consitutional validity of the Criminal Code's "Invasion of Privacy" provisions that -

(1) render interceptors in these circumstances immune,
(2) allows one person to unilaterally consent to the infringement of another person's right to privacy (after all, one person in a communication with two or more persons can, by himself, consent and thereby deprive others from that right), and
(3) that this one person can also consent to the admission of the communication in evidence that may well be against the others.

When the Charter of Rights and Freedoms came into effect, it was predicted that it (specifically s. 8 - "unreasonable search and seizure") would not apply to intercepting private communications. It has long since been conceded that the Charter does apply and that such an interception is a search and seizure. All searches and seizures that are warrantless are by their very nature unreasonable said the Supreme Court of Canada in 1984*. Therefore, the interception if allowed without authorization (as long as one participant consents) is as unconstitutional, argued the defence, as the provision in the then Combines Investigation Act which allowed searches that were in essence warrantless.

What is of interest in this case, is that there was general agreement that, in view of the definitions of "intercept" and "private communication" there would have been no argument if S. had simply taped the conversation. It was the simultaneous transmission to and interception by a third party that brought the matter within the "Invasion of Privacy" provisions, some of which were constitutionally challenged in this case.

The Crown argued that Parliament's consent for this sort of interception (search) renders these warrantless searches reasonable. The defence responded that Parliament cannot guarantee, by means of entrenched constitutional law, that we have certain rights and then take them away with ordinary legislation. Furthermore, the Constitution says that where Parliament's laws are inconsistent with the constitution that law, in as far as it is inconsistent, shall be without force or effect. That is the supreme law.

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* *Hunter v. Southam Incorporated*, Volume 18, page 12 of this publication - and (1984) 14 C.C.C. (2d) 97.

Another issue is the Supreme Court of Canada's ruling that s. 8 of the Charter does not guarantee an absolute protection, but only where there is a reasonable expectation of privacy. Furthermore, by means of judicial licence (authorization) the rights of the undividual must give way to the public interest which justifies the encroachment by law enforcement.

Our privacy provisions are very similar to those in the U.S. They also have a provision in their laws that one person can by his consent deprive others from a privacy the constitution guarantees them by means of its Fourth Amendment. Consequently, it makes sense to discover how they resolved this issue which was kernel in some major cases. The U.S. Supreme Court in essence concluded: "What is the difference?"

If an agent had a direct conversation with the accused and records it in his notebook afterwards, it is perfectly permissible for the agent to relate that conversation to the Court. The same goes for recording the conversation simultaneously to it taking place. Said the U.S. Supreme Court:

> "If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or <u>transmitted</u> the conversations which are later offered in evidence to prove the State's case." (Emphasis is mine).
>
> "Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will, many times, produce a more reliable rendition of the unaided memory of a police agent."

The U.S. Court concluded that if the Fourth Amendment does not protect anyone from having his conversation repeated in testimony by unaided memory, then how could that Amendment prevent the admission of a far more reliable version of that conversation. When we share our wicked plots with others, them testifying against us is a risk we take.

The U.S. Supreme Court, for instance, ruled admissible the taped conversation in which a citizen offered a revenue agent a bribe for a favourable audit. Despite the strong and unambiguous language by the Supreme Court of Canada in 1984. (Hunter v. Southam), the interception with the consent of S fell short of breaching s. 8 of the Charter, said the B.C. Supreme Court Justice. Also here, it is impossible to distinguish between the "no live" or "live" monitoring by police.

Application by accused was dismissed. Conversation was ruled to be admissible in evidence.

## NO GREATER FAVOUR CAN BE AFFORDED A SUSPECT THAN TO VIOLATE HIS RIGHTS OR FREEDOMS

*Regina* v. *OLSON* - B.C. Court of Appeal - CA 007379
October 1987

The accused accompanied a police officer and supplied breath samples on demand. No arrest was effected and the accused was not made aware that he had a right to retain and instruct counsel without delay.

At his trail for impaired driving he attempted to have all of the evidence suppressed on account of the infringement of his right to counsel. However, the accused testified and it was disclosed that he was a store detective and was quite experienced in detaining people. He even had a Charter warning card in his wallet and he conceded to have not only an awareness of the definition of detention, but also had a reasonable understanding of the possible consequences if a suspect's right to counsel is infringed. When asked why he had not phoned a lawyer and exercised his right the accused responded:

> "Strictly for the fact that I was very well aware that you have to be read your rights, like, that is part of the law."

The trial judge had concluded that the accused had deliberately not wanted to deprive himself of the potential defence he raised at trial. Therefore, admitting the evidence despite the infringement of the accused's right, would not bring the administration of justice into disrepute. This issue ended up before the B.C. Court of Appeal.

The accused relied heavily on the Therens decision by the Supreme Court of Canada* which establishes that an infringement of right to counsel automatically renders evidence that a person by law is compelled to provide, inadmissible. Acceptance of the evidence in the circumstances, would in view of that compulsion always bring the administration of justice into disrepute, argued defence counsel. However, this Olson case was distinct from Therens held the Court as it was a proven fact that the accused, Olson, was aware of his right far beyond what the Charter warning would have accomplished.

Comment:

Although the circumstances are unique and interesting, the judgment does not seem to be too much of a trend-setter. Some may read too much into the Court's reasons. Please note that the court did not say that where the detainer knows the detainee to be aware of his rights to counsel he need not inform him of that right. The Court only said that in view of the proof, the administration of justice would not be brought into disrepute by admitting the

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* See Volume 21, page 21 of this publication or 18 C.C.C. (3d) 481.

evidence <u>despite the infringement of the accused's rights</u>. Unless our Courts hold that awareness is the objective of s. 10(b) of the Charter (and that informing a detainee is only a means to that end) could it be said that failing to inform an aware detainee is not an infringement of this Charter right. Such ruling is not in the cards and could create greater problems than preventing the absurdity of reading Charter rights to, for instance, a legal expert.

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**ROAD CHECKS - RANDOM STOPPING OF CARS FOR INSPECTION OF DOCUMENTS - ARBITRARY DETENTION**

*Regina v. LADOUCEUR* - 35 C.C.C. (3d) 240
Ontario Court of Appeal

Two municipal constables in Ontario randomly stopped motor vehicles to check driver's licences and inspect ownership and insurance documents. The accused had quite a driving record and was in the habit of driving whether his licence was suspended or not. The officers were totally unaware of this and the accused's driving was normal and within the law when they decided to stop him. It was discovered that his driver's licence was suspended for non-payment of traffic fines. He was issued a summons ticket under the Highway Traffic Act.

There were no warnings or reading of rights, no suggestions of arrest. When asked for his licence he simply told them the status of the document. The entire contact was over in approximately 10 minutes. The accused's lawyer agrees that in terms of behaviour, and in treatment of the accused, nothing improper or underhanded happened. There was no suggestion that anything untoward took place between the accused and the officers.

The accused appealed his conviction for driving while suspended strictly on constitutional arguments. That this Court of Appeal considered this matter to be weighty is reflected in the granting of a one year adjournment when it found that the Crown came inadequately prepared to argue its position.

Like all provincial traffic statutes, and police acts the Ontario statutes provide that:

1. no one shall drive without or with a suspended driver's licence;
2. every driver must carry his driver's licence, registration and insurance documents with him and shall surrender them for the purpose of inspection to a constable;
3. a constable may require a motorist to stop who shall immediately come to a safe stop;
4. a constable shall apprehend offenders and cause proceedings to be commenced against them; and
5. the enforcement officers have been given power to enforce the doing of a prohibited act or thing, and such power is given as is necessary to enable the person, officer or functionary to enforce the doing of such act or thing.

The Crown argued that the statutes explicitly and implicitly gave the officers the powers to do as they did. Explicitly under the statutes and implicitly by common law.* These powers are granted for the protection of the public welfare and the laws authorizing the officers to act must therefore be given a broad, fair, and liberal interpretation to best assure the attainment of that protection.

The defence had not much of an argument with the Crown's position but submitted that the officers only have those powers when they have "reasonable grounds for believing that unlawful behaviour has occurred or is taking place." The Charter of Rights and Freedoms has now placed a restriction on those powers. If reasonable grounds are not pre-requisite to exercising those powers the enactments would be without force or effect as they fly in the face of the supreme law which guarantees among other things:

1. that we shall have the right to life, liberty and security of the person and shall not be deprived of this right other than by the principles of fundamental justice;
2. that we have a right to be secure against unreasonable search and seizure; and
3. that we have a right not to be arbitrarily arrested or detained.

Reasonable limits to these rights and freedoms may be prescribed by law only where that is demonstrably justified in our free and democratic society. (S.1 Charter).

The defence argued that the laws supporting the officers' actions are not reasonably justified unless the courts make them subject to the officers having reasonable grounds for believing an offence has or is taking place. The Crown argued that no such prerequisite ought to be created. If the enactments are inconsistent with what the Charter guarantees then they amount to reasonable limitations to the rights mentioned above and are demonstrably justified in our fallible though free and democratic society.

The Ontario Court of Appeal held that section 9 of the Charter is at the heart of this issue. It guarantees the right not to be arbitrarily detained. The questions to be answered are whether there is detention when a driver is stopped by police and if, in this case, that detention was arbitrary.

In belabouring the definition of detention the court turned to the leading post-Charter case decided by the Supreme Court of Canada in 1985**. One description of detention was when a police officer assumes control over a person in circumstances that may have significant legal consequences ... Mr. Therens was found to be impaired by alcohol. Needless to say the above

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* Supreme Court of Canada. *R. v. **DEDMAN*** - 20 C.C.C. (3d) 97. Also see Volume 22, page 17 of this publication. (Road blocks for impaired drivers).

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

description applied to him. As police had not noticed anything amiss with Mr. Theren's car or driving it was inescapable that:

> ".....in essence, the police stopped and detained the appellant arbitrarily to investigate whether he might be committing a criminal offence."

said the Supreme Court of Canada in 1985.

The Supreme Court of Canada in 1986* also gave some guidance on the test whether a law that is found to be inconsistent with the Charter is a reasonable limit to its provisions. (This is the case where this Court declared s. 8 of the Narcotic Control Act to be without force or effect). The Court held that the party seeking to uphold the limitation of a Charter right or freedom must demonstrate justification for this upon preponderance of probabilities. To do this the party (nearly all of the time The Crown) must show that the objectives for the limitation "relates to concerns that are pressing and substantial in a free and democratic society." That is the first step. The second one is to show that the law in question has a rational connection to the objective; does minimally impair the right or freedom, and is proportionate in terms of its purpose and effects. Therefore, a broad "go ahead and do it" or "catch all" provision is not likely to pass this test regardless of its noble objective.

This brought the Ontario Court of Appeal to examine mankind and its automobiles; the highway as the human abattoir where we need protection from ourselves and the actions of others.

Crown counsel submitted that his learned friend's argument that a motorist should not be stopped unless the officer has observed something that gives him reason to do so would defeat the law maker's obligation to make the highways as safe as possible. The human suffering resulting from malfunctioning vehicles, unqualified drivers, and impairment are so immense and voluminous that the random stop to prevent and detect these is very minor by comparison. By the time these things become "observable from the outside" it is often too late. Accidents are frequently the scenes where such mechanical and competence flaws become apparent.

Surely if, for the purpose of collecting taxes, we make spot audits of business or personal books (where we are obliged to explain and make statement) we can justify spot checks of our vehicles (during which we need not to be searched or make any statements) submitted Crown Counsel.

In Canada there is one suspended driver for every 37 driving on our highways. There are an average of 13,000 convictions per year of unlicensed drivers who cause the greater proportion of accidents which are on average more serious than those caused by licensed drivers; and the uninsured cause nearly two and

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* *R. v. OAKES*, 24 C.C.C.(3d) 321. Also see Volume 23, page 16 of this publication.

one-half times more personal injury accidents than the insured drivers. However, the Crown's data also showed a decrease in accidents and convictions over the years preceding 1985 and failed to demonstrate that the random stops by police had anything to do with this decrease or any comparison of charges resulting from such stops and those preferred on discovery of offences by other means. Consequently, the Crown failed to meet its burden to demonstrate that the random stop procedure is a reasonable limit of the right not to be arbitrarily detained.

The Ontario Court of Appeal then turned to U.S. juris prudence. Although its constitution does not contain a right not to be arbitrarily detained, the issue is dealt with under their fourth amendment which is more or less the counterpart of our s.8 of the Charter (unreasonable search and seizure). Their spot check is simply considered to be a search. Unbridled discretion to stop anyone at whim is considered excessive and unconstitutional in the U.S. Therefore, random stopping of vehicles be it for traffic rules, wildlife checks or agricultural or environmental purposes, is a consitutional taboo. Reasonable grounds are a prerequisite to stopping vehicles.

The Ontario Court of Appeal concluded that "purely random stopping power" infringes s. 9 of the Charter and cannot be considered as a reasonable limit to the right guaranteed under that section. However, the sections of the Highway Traffic Act that grant such powers were not declared to be without force or effect. <u>The law is valid but not to be used by police officers except upon the basis of some reasonable, articuable or some other basis that accords with the provisions of the Charter</u>. The Ontario traffic laws do stipulate that the power to stop vehicles must be exercised in the officer's lawful execution of his duties and responsibilities.

Consequently, the evidence that the accused drove while under suspension was obtained by a means that infringed his Charter rights. Admitting the evidence could, in the circumstances, bring the administration of justice into disrepute. However, the accused must show on the balance of probabilities that that is so. He failed to do that and therefore the fact that his licence was suspended should not be excluded.

Accused's Appeal was dismissed.

<u>Note</u>:

Road checks for impaired drivers as part of <u>an organized and announced program</u> is not affected in Ontario due to the Supreme Court of Canada decision in *Regina v. Dedman*. There is also enough room in this judgment to say that where something becomes problematic and affects public safety and interest, road checks may be proper if they are part of an organized and announced law enforcement effort. In the U.S. this would not likely be possible due to the distinction in the status of the officer there from his Canadian counterpart. However, that is a separate topic. Also note that this decision is not binding on B.C. Courts. The closest we (in B.C.) come to decide on this was in the BONOGOFSKI case - see Volume 29, page 1).

## ADMISSIBILITY OF STATEMENT - WAIVER OF RIGHT TO COUNSEL

*Regina* v. *Johnston* - County Court of Westminster - New Westminster X017902 - August 1987

The accused, a man in his mid-twenties, was, due to mental retardation ranked in the bottom 6% of the I.Q. level for the general population. He allegedly committed sexual assaults upon two children. The information was passed onto the police in the location where the accused resided, for the accused to be interviewed. This information included the name of the accused's lawyer and the fact that he did not want the accused interviewed unless he was present.

The police officer assigned to question the accused gave him the proper warnings and made him aware of his rights to counsel. He began the interview by saying that he had "heard" from the accused's lawyer and advised him to call the lawyer. A near 10 minutes trying resulted in only getting an answering machine. The officer did supply the accused with a different number and contact was made. The accused was given privacy and upon the conclusion of the conversation the officer asked: "Did you talk to him?" to which the reply was, "Yeah." Then a statement was taken and it was the admissibility of it that was the issue.

The discussions and submissions were not in regard to voluntariness, but whether the accused had waived his right to counsel when he made the statement. The leading case on this is one decided by the Supreme Court of Canada in 1986*. There, an intoxicated woman explicitly said she did not want a lawyer's advice and then gave a statement how she had taken her husband's life. The Supreme Court of Canada held that before the Charter, the requisite fact to find that she waived her right to counsel was that she declined legal advice and gave her statement with "an operating mind". The post Charter requirements are application of judicial fairness which includes a finding that the person knows what he/she is doing and understands the consequences of waiving the right and giving the statement.

The accused in this case did not have the mental capacity to have such understanding (as Mrs. Clarkson didn't due to intoxication). The abstract concepts involved were beyond the accused's capability to understand. Furthermore, the officer who had done everything he could to ensure the accused did speak to his counsel should have inquired, "What did he say? or "What did he ask you to do?". He was already aware of the lawyer's wish that he wanted to be present during any interview. While inquiring into the communications between a lawyer and his client may be sensitive, there was, considering the accused's mental handicap, an obligation on the officer "to go further in explaining the right if there is something in the circumstances which suggests that the accused does not understand."

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* *CLARKSON* v. *The Queen*, Volume 24, page 38 of this publication.

The accused had not waived his right to counsel when he made the statement, as such an act requires a clear and unequivocal understanding of the right itself and the effect of the waiver.

Though the officer had acted in good faith in that he believed he had complied with all his legal obligations, in fact he hadn't. Further inquiries as to the question of waiver were mandatory in the circumstances. Hence, there was an infringement of the accused's right to counsel and the administration of justice would be brought into disrepute if the statement was admitted in evidence.

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## IS A SUBJECTIVELY DEGRADING AND UNNECESSARY STRIP SEARCH UNREASONABLE?

***Regina* v. *KALIN*** - County Court of Vancouver - No. C.C. 870602
September 28, 1987

When the accused was booked for impaired driving he was frisked and subjected to normal body search. He was then taken to a separate cell, asked to drop his pants, bend over and spread his buttocks.* An officer shone a light on his anus. He was not touched or ridiculed. However, the accused found the search degrading, embarrassing and unnecessary.

When he came to trial the accused moved under s. 24(1) of the Charter that as a remedy for the infringement of his right to be secure against unreasonable search a judicial stay of proceedings be entered.

The Crown did not call any of the officers involved with the accused to determine their state of mind at the time or their possible reasons for that search. There was only evidence of total cooperation by the accused and "friendly chatter" between him and the arresting officers. On the other hand, the accused had served two years for robbery and was likely still on probation at the time of this arrest. The Crown suggested that this may have prompted the gaoler to search the accused because he was a man convicted of a crime of violence and not a mere routine search in compliance with policy.

In reviewing the law on this issue the Court was aware that the Ontario Court of Appeal is of the view that a strip search in these circumstances is legal.** In other words, the search itself won't render it unreasonable but the manner in which it is carried out may do so. However, that view was not binding on this County Court and the judge did not find the judgment of the Ontario Court of Appeal persuasive. He held that unless the Crown can show a justifiable reason for the strip search (routine or policy are of no assistance in this) it was an infringement of the accused's right to be secure against unreasonable search.

That left the question whether the remedy the accused suggested was proper. The offence of impaired driving is serious and the accused has a long-standing history of convictions for drinking and driving offences.

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* At that time it was department policy to search the anus of all male prisoners. This policy was dropped shortly after.

** ***Regina* v. *Morrison*** - Ontario Court of Appeal September 1986.

The search was by a male officer and was made as minimal as possible in terms of being degrading. Therefore, the unreasonable search did not call for "the application of the strongest of remedies".

Application refused.

## UNION CERTIFICATION - THREATS AND WEAPONS

*Regina* v. *HOWLETT* - B.C. Court of Appeal - Vancouver
CA 007446 - December 1987

The employees of a nightclub applied for union certification. Consequently, a soured relationship existed between the employer and the employees. Thefts of money became apparent and the employer became the recipient of threatening phone calls.

To put an end to all of this the employer sealed the place off at the end of one working day and addressed his employees armed with a loaded shotgun and warned in the prelude to what he had to say, "Anybody who tries to leave won't make it to the door."

With this he fired the gun into an old door he had put across the doorway. Although he never pointed the gun at anyone, there were employees in the vicinity of the target. Consequently, a charge of possession of a weapon dangerous to the public peace was laid. The Crown appealed the accused's acquittal.

The trial judge had found that the gun had only been used by the accused to intimidate the employees to listen to him. The old door was deliberately placed across the doorway to receive the shot that conveyed, 'I mean business'. This was not dangerous to the public peace said the trial judge. (He added he would have convicted had the charge been "intimidation".)

The B.C. Court of Appeal disagreed with the trial judge and held that "dangerous to the public peace" encompasses a lot more than placing people in physical danger.

The accused had also been acquitted of the face-to-face threat he made to his employees in case they wanted to leave the meeting place. The trial judge had found that there was a threat but not one to cause bodily harm or death. There must be an intent to make the prohibited threat whether you want to carry it out or not. "On the evidence, it was possible to have a reasonable doubt that the respondent intended to threaten to cause bodily harm or death."

Crown's Appeal allowed in regard to possession of the weapon
Crown's Appeal re threatening was dismissed.

**Comment**:

Firstly, it seems fair to say that in B.C. at least face-to-face threats are included in s. 243.4(1) C.C. although it seems there is sufficient room in the wording to say that the cases under the old section apply. The reasoning by the Supreme Court of Canada under the old section suggesting absurdities if "face to face" threats are included, still seems persuasive.

It is quite difficult to understand the findings by the two courts that there was a reasonable doubt as to the intent of the threat (nothing to do with the intent to carry out). A group of people were in essence unlawfully confined by a person who held them literally at gunpoint and strongly implied that if anyone would leave he/she would not make it to the door. Then this is followed up by an exclamatory gunshot into something that represents the exit from the meeting place which would at least imply to anyone that should he/she want to exercise his/her right to leave, their demise would be similar to that of the shattered door.

It seems to be our national past-time to make labour issues ugly and venomous. Our behaviour at labour scenes sometimes is a facsimile of civil war. The evidence shows that the accused in this case may have endured the brunt of such behaviour. Whether he had invited such treatment or that his act was a desperate response to stop intolerable intimidation seems irrelevant to the considerations in regard to a criminal verdict. Any sympathy should be reflected in the sentencing.

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## ARREST AND SEARCH

*Regina v. BECK* - County Court of Cariboo - Fort St. John 3738
September 1987

A Constable D had encountered the accused over a period of three years in relation to transporting and trafficking narcotics. The method of operation was well known and the numerous times the constable received information from informers was found to be reliable. Searches of the accused's home and vehicle had nearly always paid off and had resulted in the seizure of narcotics. Information and corroborative evidence gave the officer grounds for believing that the accused was supplying an Indian Reservation with narcotics and transported the contraband in the very early morning hours when he thought there "were no police officers on duty".

Constable D on his way to an unrelated call, went with his partner down the highway at 0500 hours. He spotted the accused driving his truck. The accused was stopped, arrested for possession of narcotics and then the truck was searched. A considerable quantity of narcotics were found in the spare tire upon a "cursory" search. The tire was apparently in the open box with the lead not being sealed to the rim and it immediately became suspect to be the package.

Needless to say, the defence argued that the search was conducted upon an arbitrary arrest. Therefore, the search was unreasonable and the evidence found ought to be excluded.

The Court found that the prerequisite grounds for the arrest and the search are the same. Either can only be legally effected upon reasonable grounds for believing that the accused possessed narcotics.

Consequently, the Court reasoned:

> "If the search was reasonable, the detention of the accused was also reasonable to carry it out. Whether that detention was by way of formal arrest or otherwise is not important."

Considering the knowledge Constable D had of the accused's method of operation he had the reasonable grounds to do what he did, and therefore, there was no infringement of the accused's right to not be arbitrarily arrested or detained and to not be subjected to an unreasonable search.

In the event he was mistaken, the County Court Judge indicated that he would still admit the evidence as the reputation of the administration of justice would not be affected by it. The officer had acted in good faith; his conduct was not capricious considering his knowledge of the accused; his actions could not be considered harassment; the offence is one of considerable gravity, etc.

Defence Motion to suppress the evidence was denied.

Comment:

There are some points in these reasons for judgement that may receive different considerations from other judges. If there was any merit to the defence's submissions it was in regard to the claimed arbitrary arrest of the accused. This Court recognized that, but then concluded that it really made no difference. The Court implied that the accused was detained in any event, whether the constable effected the arrest or not. However, there are some possible counter arguments to that conclusion.

Arrest is by the "Judges' Golden Rules" a gateway to a lawful search for evidence. Detention can come as a result of a search and can exist without an arrest having been effected. In other words, the cause and effects are reversed and detention is included in arrest but not the other way around. Detention can consequently be quite distinct from arrest but both trigger the same Charter rights. Another trial judge may find that if the search caused the detention it does not assist in rendering the search lawful. If the arrest was lawful so was the search (at common law). Thus to say that how detention was attained is of no consequence, may be arguable.

Also, to find that the grounds for a lawful arrest under s. 450 C.C. and grounds to conduct a lawful search under s. 10.1 of the Narcotic Control Act are the same could cause a debate. The arrest could only be effected on belief based on reasonable and probable grounds while the search could be conducted on belief on reasonable grounds only. In the case of an arrest, the grounds for believing that a person has committed an offence must not only be reasonable but must also make it probable that that is so. The grounds for the search are less stringent than the grounds for an arrest. One may conclude that the beliefs of the officer in this case were no doubt reasonable, but that the accused was in possession of narcotics was in the realm of possibility rather than probability. Consequently, stopping the accused was not arbitrary and the search was lawful. However, to effect an arrest on those beliefs may well be short of the prerequisites the law stipulates.

If this is correct the officer had the power to search (provided, of course, the Court finds that where the accused was found is a "place")* but not to arrest, and if the arrest is unlawful it is capable of becoming the poisonous tree on which no good fruit can grow.

Another member of the judiciary could have reasoned that the officer should have simply searched the truck based on the reasonable grounds he had to do so. This would have caused the accused to be detained during the search and would have entitled him to the same rights as when he would have been arrested.

However, that judge could likely have reasoned similarly to the trial judge in this case, that admission of the evidence would, in these circumstances, not bring the administration of justice into disrepute.

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* See *Regina* v. *SKINNER* on page 33 of this Volume.

## REASONABLE SEARCH - ADMISSIBILITY OF EVIDENCE

*Regina v. KOKESCH* - County Court of Vancouver Island - Nanaimo CR 3585 - November 1987

Acting upon information from police in another community, police officers followed a certain vehicle to an address.

The house and vehicle were kept under surveillance for four days. Then the officers attended at the address at 0200 hours and went up the 100 yard driveway to the house and searched around the house. They noticed condensation on the sealed off basement windows. From a louvered vent a smell of marihuana emitted, as well as heat excessive for normal heating. There was also a humming sound coming from that basement. The officers had come right up to the house and had attempted to look in.

When asked if he was of the opinion to have had reasonable grounds to search at that time, the officer conceded he only had a suspicion that an offence was being committed in the house.

The officers obtained a search warrant for the dwelling. With this warrant they also searched the vehicle they had followed. The warrant had been issued on the basis of what was discovered during the early morning stroll for discovery at and near the dwelling house in question. The County Court Judge ruled that the yard surrounding the dwelling house is a place that may be searched without a warrant provided the police have reasonable grounds for believing that narcotics are illegally held or kept there. The officers had no such grounds nor had they attempted any alternative investigative means of discovering them. Therefore, the search was unlawful and this rendered the subsequent search warrant invalid. Hence, the search of the house during which the evidence for possession for the purpose of trafficking and cultivating marihuana was obtained was warrantless.

The next question was whether the search was unreasonable. In view of the fishing expedition, based on unsubstantiated information, the search was unreasonable. The next question then was whether the administration of justice could be brought into disrepute if the evidence resulting from the unreasonable search would be admitted. Mainly, in view of the officers availing themselves of the illegal investigation methods without trying alternative ways of securing the requisite grounds to do what they did, the administration of justice would be brought into disrepute if the evidence was admitted.

**Evidence excluded.**

## SEARCH OF PERSON AND CAR FOR NARCOTICS

*Regina* v. ***SKINNER*** - County Court of Vancouver - No. C.C. 871252
December 1987

The accused was found driving the wrong way on a one-way street. His ability to drive appeared impaired. He admitted to have smoked marihuana which was corroborated by a strong smell of that narcotic coming from his breath. The officers searched the accused and his car and found the evidence which was the basis for the allegation that the accused was in possession of a narcotic. The trial judge had not admitted the evidence and the Crown appealed this decision.

The County Court Judge held that the officers had, considering the circumstances, reasonable grounds for believing that the accused possessed a narcotic. However, such grounds only give the right for a peace officer to search a "place" and any person found in such a "place". The trial Judge had held that the accused had been found on the street and that is not included in the meaning of "place". This being so, there was no authority to search the accused despite the grounds for believing he possessed a narcotic, unless he had been placed under arrest.

The Court rejected this defence position and applied the findings of the Ontario Court of Appeal on this issue in 1984*.

> "The word 'place' when found in a statute is usually associated with other words, which control its meaning. The word 'place', however, may include an automobile. It does not, however, include public streets, or other places."
>
> "The word 'place' includes places of fixed location such as offices or shops or gardens as well as vehicles, vessels and aircraft."

In 1986 the Ontario Court of Appeal** reiterated its ruling on this point and held that an automobile is included in the word "place". Although these rulings were not binding on this B.C. County Court, they were found to be persuasive by this B.C. Judge and others.

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* *R. v. **RAO*** - 40 C.R. (3d).

** *R. v. **DEBOT*** - 30 C.C.C. (3d) 207.

The argument that the accused was searched on the street outside the car was also defeated as he had been "found" in the car.

The search had been lawful and reasonable and the evidence should have been admitted.

Crown's appeal allowed
New trial ordered.

## RIGHT TO COUNSEL - BURDEN TO PROVE INFRINGEMENT ON ACCUSED

*Regina v. LEITCH* - County Court of Vancouver - No. C.C. 861864 - April 1987

The accused collided with a police car. His condition was such that blood samples were demanded of him. He phoned a lawyer and spoke to her for fourteen minutes. When asked: "Did you get hold of your lawyer?" He replied, "Yes, but she told me I should contact another lawyer...". This lawyer lived in the Yukon and the accused was allowed to place the long distance call (from Vancouver). Some 25 minutes later, after police making every effort to contact this lawyer for the accused, it was found that his number was no longer in service.

This created an impasse. The officers demanded the accused to take the test while the accused refused to do so without his lawyer. After it was explained that he was obligated to blow, the accused gave the required samples. The first sample was given 1 hour and 16 minutes from the time of the accident. Thirty-nine minutes of that time was spent by the accused in speaking to his lawyer and trying to get hold of the one he was referred to. The trial judge found that the police officers had accommodated the accused to "a great extent" and that his Charter right to counsel had not been infringed. She convicted the accused of "over 80 mg." and the accused appealed.

Defence counsel argued that the right to counsel includes receiving competent legal advice. He used the police's extensive efforts to try to contact the Yukon lawyer as evidence of their knowledge that the advice the accused received from his own lawyer had not been adequate and competent.

The County Court Judge found that the 14 minute conversation the accused had with a qualified lawyer is adequate time to gain advice. All he said to police after that call was that he was to contact another lawyer some distance away. He did not say why, neither was there any evidence that this was for him to gain expert or more competent advice. The Court was left to guess that and defence counsel invited the Court to draw that inference.

The County Court Judge reminded defence counsel that the burden of proving (on a balance of probabilities) that the rights of the accused were infringed are on the accused. He failed to do so.

**Appeal dismissed**
**Conviction upheld.**

## REASONABLE BODY SEARCH

*Regina v. WIEDEMAYER* - The County Court of Yale - Kelowna 87/16
October 1987

A police constable, who was considered to be a forthright and truthful witness had been told by an informer that the accused had a narcotic on him. The officer confronted the accused on the street and said, "David, you are going to be searched for narcotics." "Go ahead.", said the accused while he spread his arm. Marihuana was found on him and he was consequently charged with possession.

When the exhibits and the certificate of analysis were presented the accused objected to their admission into evidence. He claimed that the search was unreasonable and therefore had infringed his right under s. 8 of the Charter.

The Court held that the officer had real evidence that the accused was in possession of a narcotic. He had to act when he did or else the evidence would likely not have been found. The Judge was of the opinion that the search was reasonable and said that should he be wrong he would still admit the evidence as in the circumstances it could not bring the administration of justice into disrepute.

The evidence found existed prior to the detention, and search. The evidence had not been obtained by means of some self-incriminating situation which would deprive the accused of a fair trial. In addition, the officer had acted in good faith.

Evidence was admitted.

Note:

The Judge held that the accused was detained from the time the officer told him he would be searched. He was not told of his right to counsel until he was arrested subsequent to the search. No issue was made of this delay in making the accused aware of his rights. It would seem that the B.C. Court of Appeal on November 18, 1987 has opened the door to this Charter argument. A suspected impaired driver subjected to a sobriety test is considered detained and must be made aware of his rights to counsel prior to the test. That B.C. Court of Appeal decision may in principle not to be distinct from this case. However, this decision was handed down two months prior to the B.C. Court of appeal judgment.*

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* *R. v. BONOGOFSKI* - See Volume 29, page 1 of this publication.

## THEFT, FALSE PRETENCES OR FRAUD

*Regina* v. *CORMAK* - County Court of Vancouver Island - Victoria 44963 - September 1987

The accused took a cassette tape player out of a display case in a department store, put it in a bag with the store's name on it, went to the cashier and claimed he purchased the item the day before and now wanted his money refunded. He was given the money and was arrested as he left the store. A charge of theft of the cassette player was preferred and the accused was convicted. He appealed.

False pretences and fraud are distinct from theft in that in the latter the owner does not wish to part with the property (other than by the offer of a contract). In false pretences and fraud the owner knowingly parts with the property. The means by which the owner was persuaded to give up the ownership constitutes the crime. The accused argued that his intent was not to steal the recorder, neither had he moved it from the display case for the purpose of depriving the owner of the recorder. His sole intent was to defraud the store of funds equal to the amount mentioned on the price-tag. Consequently, he may have committed a crime but not that of theft.

The County Court Judge held that the accused obtained the "refund" money by a false pretence or fraud. However, there was also a theft although a short lived one. The recorder was moved by the accused for the purpose of converting it to his own use. In other words, he stole the recorder to use it in the separate and distinct crime of false pretences.

Appeal dismissed
Conviction of theft upheld

Note:

It seems much safer to charge false pretences in circumstances like these. It is also likely that the judiciary will not recognize this as a precedent where someone switches price tags and then presents an item to the cashier to have the benefit of a lower price. There are cases where an allegation of theft has been soundly rejected in such circumstances. False pretences was held to be the appropriate charge. The distinctions are self-explanatory.

## UNNECESSARY ARREST - ADMISSIBILITY OF CERTIFICATE OF ANALYSES

*Regina* v. *MEYERS* - B.C. Court of Appeal - Vancouver CA 008399
February 1988

A constable stopped the accused, arrested him for impaired driving and subsequently (prior to taking breath samples) issued him a 24 hour suspension notice. As a result of the analyses of two breath samples given upon demand, 17 minutes apart, a certificate was adduced in court showing a blood alcohol content well in excess of the legal limit. He was convicted of "over 80 mg." and applied for leave to appeal his conviction to the B.C. Court of Appeal on two grounds.

1. The arrest was unlawful as it was contrary to s. 450 (2) C.C. and thereby did infringe the accused's right under the Charter (s.7); and
2. The Certificate of Analysis was inadmissible as the Crown failed to prove the samples were taken at least 15 minutes from one another.

The Arrest:

The officer testified that he had effected the arrest to prevent continuation or repetition of the offence of impaired driving and to secure the necessary evidence for the indictable offence he had reasonable and probable grounds to believe the accused had committed. Defence counsel argued that the officer could have accomplished his objectives without the arrest. A demand for samples of breath would have been sufficient.

The B.C. Court of Appeal gave a very short reply to this argument. It reiterated its 1984 decision* on this point, that since the officer relied upon the statute which authorized him to effect the arrest, "the detention by any definition that could possibly be applied, was not arbitrary".

Admissibility of the Certificate:

Defence counsel had asked the accused and a defence expert in examination in chief and the constable in cross-examination, if it takes time to take a breath sample ("Is there a period of time between commencement of the taking of a sample and the conclusion of taking a sample").

By this he proved that any human activity takes time. He was very careful not to ask any of these witnesses how long the taking of a breath sample takes.

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* See *R. v. McIntosh* - B.C.A.A. 002074 Vancouver 1984. Also, Volume 18, page 19 and Volume 29, page 21 of this publication.

The B.C. Court of Appeal, also for this argument, reiterated another decision they made in 1984*. It said <u>again</u> that the statement in a certificate that a sample was taken at a certain time and another was taken 15 minutes or more later, is conclusive and final. Said the Court of Appeal:

> "The Criminal Code does not require that the certificate of analysis should clearly state the time in which the taking of the first sample was completed and the time at which the taking of the second sample was commenced".

Leave to appeal denied
Conviction to stand.

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* *R. v. MOORE* - B.C.A.A. 001604 (1984). See Volume 18, page 32 of this publication. "How to prove there is 15 minutes between the taking of samples of breath."

## CRIMINAL NEGLIGENCE - VICIOUS DOG

*Regina* v. *HOUGH* - County Court of Vancouver - C.C. 850039

The accused's "Mugsy", a pitbull terrier, was kept in an inadequate kennel at the rear of the accused's home. The accused knew the kennel could not detain Mugsy and he also knew from neighbours, friends and others that his dog had bitten adults and children alike on several occasions. Putting his teeth into human flesh seemed a pastime for Mugsy. When a neighbour discussed the dog with the accused he suggested that Mugsy would not bite children. The accused had replied, "No, he will bite." After the accused owned the dog for several months and was fully aware of the vicious propensities of his Mugsy, the dog was at large again on two successive days. On the first day, he indulged himself on a lady and the second day on a doctor. The indiscriminate activities on the part of Mugsy on these two occasions resulted in allegations of criminal negligence causing bodily harm.

The court firstly rejected the accused's submission that the charges were preferred on account of the recent negative publicity the breed (pitbull terrier) received. The evidence of the dog's behaviour, regardless of breed, and the owner's knowledge and disregard for the safety of others will have to support the allegations.

The accused was fully aware of Mugsy's propensities and the fact that the kennel had no preventative value in keeping Mugsy from getting out and actively pursuing his hobby. He knew people were continuously victimized by Mugsy and the accused, despite his awareness, did nothing to prevent continuation of the intolerable jeopardy everyone in the neighbourhood was subjected to.

**Accused Convicted**

**Note:**

In Volume 13 (page 24) there is a far more elaborate synopsis of the law surrounding domesticated animals and the criminal as well as civil liability of their keepers. It deals with the well known B.C. case of the Rotweilers that chewed up two children (*R. v. Manfred and Vera Mayerhofer*).

STATEMENT - VOLUNTARINESS - CREDIBILITY

*Regina* v. *THORNITT and PIERRE* - County Court of Vancouver - No. 870956 - November 1987

The wife of an accused person pleaded with the co-accused to confess. This would result in her husband going free she said. The co-accused did confess. It was clear that police had not instructed the wife to approach the co-accused, but they had provided her with the opportunity and "her words were capable of arousing in him the hope that the police would make good their promise if he confessed". The confession was ruled inadmissible.*

In this case, the two accused (young adults) were seemingly caught in the act of attempting to break and enter premises. House breaking tools were seized and the accused were apprehended. A detective interviewed the accused Thornitt. He told him he had a "feeling" that he had been involved in other B and E's. Thornitt rejected that idea.

The same detective then interviewed the accused Pierre and told him that a charge of possession of house breaking tools would be preferred and invited him to clear up any other B and E's he had been involved in. Pierre phoned his brother-in-law (a policeman) and then said he wanted to make a clean breast of things. He confessed to seven additional break-ins he and Thornitt had been involved in. Before making the confession, Pierre had unsuccessfully requested that Thornitt could be present while he made his statement. A short time later, a period during which the two accused were in the vicinity of one another with nothing to prevent them from conversing, Thornitt also confessed.

Both accused testified during the voire dire and their version of how the confessions were made differed from that of the detective. They claimed that the typical inducements were made: "If you don't cooperate it won't look good for you in Court." "The judge would look down on us for being resistant." "It would be better for us to clear things up." etc.

In terms of credibility, there was no contest. The accused's testimony had an air of unreality and could not be accepted. This, along with Pierre's testimony that he felt he had let his family down and wanted to redeem himself beginning by coming clean, made it quite clear that it was his remorse that made him confess rather than any inducement by the detective. The detective saying: "I think all B & E charges may perhaps be dealt with at the same time.", was not an inducement or promise but a neutral statement that does not misrepresent the criminal process.

However, was that also the case with Thornitt? There were no improprieties on the part of police directly, but there had been no desire to confess on his part. As a matter of fact, when he heard that Pierre had told all (including the other B & E's they had been involved in together) he had been angry. His

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* *The Queen* v. ***BALLANGER*** is a British case. No references were given in the judgement.

lawyer claimed that there was no distinction between what happened in this case and the circumstances in the case of the wife who pleaded with her husband's co-accused to confess. In other words, what Pierre had said to Thornitt subsequent to making his confession, could by Thornitt, be assumed to have come from the police. The court drew the inference from Pierre's evidence that he had also attempted to persuade Thornitt to confess. The test, whether or not there was an inducement, is a subjective one. It does not matter whether it was the police who directly or indirectly held out the inducement. Voluntariness is a prerequisite to admissibility so we can rely on the truth of the content of the statement and an inducement may make the statement unreliable. Therefore, it is what the person, who makes the statement, believes, that is important.

The detective had referred to the process he followed as a new investigation technique. From this the court inferred that the method used was designed to have an accused persuade a co-accused to confess. "I think that was what had been the hope of ..." the detective.

The court concluded that there were no inducements, threats or promises. Thornitt no doubt confessed because of what passed between him and Pierre but that "doesn't affect the issue one way or the other" said the court. Without elaborating any further, the judge held that the circumstances in this case were not analogous to that in the case of the accused's wife pleading with his co-accused.

Statements admitted in evidence.

## REASONABLENESS OF SEARCH

*Regina* v. *CHOWANIEC* - County Court of Westminster X018247
October 1987

A constable spotted the accused standing next to a pick-up truck in the middle of the night. Although the truck was owned by the accused and parked in front of his home, the constable remained suspicious due to the accused's nervousness and the fact that he claimed to be checking a tire for a slow leak at 2:30 a.m. This suspicion grew when the officer learned from the office while staking out the truck, that the accused had a lengthy criminal record including convictions related to narcotics. Shortly after, the accused came out of the house again, headed for the truck while looking in both directions. When he obviously spotted the police car he withdrew back into the house. This confirmed it for the constable that there was contraband in the truck the accused was attempting to unload. Having been discovered anyway the constable used his flashlight to see if there was anything visible in the truck. Again, the accused came outside and he expressed annoyance with the officer's preoccupation with his truck. The accused asked if there had been any B and E's in the neighbourhood. The officer answered in the affirmative and said in the same breath: "What are you hiding in the truck?" He received no answer.

The information the officer by now had, coupled with the fact that he had dealt with the cultivation of marihuana at the house from which the accused kept appearing, caused him to propose that the accused allow him to search the truck. The response was a definite "No."

This prompted the constable to promise that he would stay around night and day until the accused would move the truck. Instead, the officer returned to his office and sought advice from more experienced colleagues. He was told, "If you believe there are drugs in the truck you have grounds to search." The Court held that at this point the officer had solid grounds to be suspicious, but did not have the reasonable grounds to search.

Here, the reasons for judgment make a quantum jump and deal with the admissibility of the fruits of a search of the truck which resulted in the accused being charged with possession of a narcotic for the purpose of trafficking.

The Court was very complimentary to the constable in respect to his commendable deliberations to comply with complex law. His conduct was not deliberate, flagrant or wilful.

This caused the Judge to hold that, despite the fact that the search was warrantless and unreasonable, disallowing the evidence would not find approval in the eyes of the community or any reasonable man.

The narcotics were admitted in evidence.

## VALIDITY OF SEARCH WARRANTS - UNREASONABLE SEARCH

*Regina v. WATT and HICKS* - County Court of Vancouver - No. C.C. 870523 - November 1987

A "Crime Stoppers" tip reported that marihuana was being harvested "today" at a certain address. Immediate surveillance of the house resulted in a van being searched that left the premises with two male occupants. Upon instructions to stop the vehicle under any pretext and search it resulted in seizing one pound of freshly cut marihuana. In the meantime, a search warrant was applied for based on the "tip" and what was found in the van. One J.P. refused to issue the warrant. After learning that one occupant of the van had said the marihuana "came from" the address (the other had said it came from elsewhere) the same information was taken to another J.P. who did issue the warrant. However, it had been added that "another informant" said that he knows cannabis is grown in the basement of the address.

Apparently the premises were searched and contraband was found as the entire judgment is dealing with the admissibility of that evidence.

The application for the warrant did fail to disclose that the "other" person in the van had said that the marihuana came from another address. The investigator had not included this in the information as he had disbelieved that statement. The Court held that his beliefs were substituting those of the J.P. It is the J.P. who, based on all of the evidence, must believe that the applicant has the prerequisite grounds for a search.

The application also had left the erroneous impression of continuity in relation to the address, the van and the pound of marihuana. In fact, the van was only followed a short distance from leaving the address. "Other officers searched the van a considerable distance away" under the apparent pretext that they were searching it as a van of similar description was involved in a robbery the previous evening. There was no evidence to show there was such a robbery.

The second J.P. had been present during a radio conversation the investigator had with the officers who stopped and searched the van and he therefore was aware of all the information. That, the Court held, is not good enough as the J.P. cannot go beyond the sworn evidence.

Due to a lack of "proper" evidence before the J.P. upon which he could exercise his discretion the warrant was declared invalid and the search was consequently warrantless. As the Crown declined to show that the search was nonetheless reasonable the evidence was excluded.

Accused acquitted.

Comment:

We are only in the early stages of this sort of scrutiny of applications for judicial licences. As a consequence, a number of issues are far from settled. This Judge has dealt with some of those issues as though they were well established in law in that he gave no reason why they were like that.

One of these is what a J.P. is told by the applicant is part of the information some courts have held. In this case, the sworn evidence contained in the information was held to be the sole source upon which the J.P. can exercise his judicial discretion. The court, in essence, quashed the warrant by declaring it invalid. There is considerable law to indicate that a trial judge cannot quash a warrant but can only declare a search unreasonable if he finds flaws and faults in the way it was obtained.

No doubt, some liberties were taken in this case and the application could have been improved upon. The judge did not wish to say that the investigator had been deceptive but held that the possibility of it was sufficient to rule as he did. With that, it seems implied that if the misleading of the J.P. is unintentional the search may still be reasonable. Also, that is not completely in line with the precedents on these issues.

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## REFUSING TO GIVE BLOOD SAMPLE

### WHAT NEEDS TO BE PROVED?

*Regina* v. *MARTIN* - County Court of Vancouver - No. C.C. 870101 - October 1987

As it was obvious that it would be impracticle to take breath samples from the accused a demand was made of him (in hospital) to give a sample of his blood. He bluntly refused but later told a nurse she could take a sample provided she would not give any of it to the police. He was consequently convicted of refusing and he appealed the conviction.

The accused argued that it was simply not sufficient for the Crown to prove grounds for the demand, the demand itself and the refusal to obtain a conviction. In addition, it should also have to prove beyond a reasonable doubt that requisite conditions for the taking of a blood sample as outlined in s. 238(3) C.C. existed (impracticability of taking breath samples, physical condition which incapacitates the person from giving breath samples and that the taking of a sample would not endanger life or health of the person).

The Crown submitted that the accused refused - period. What did it matter if conditions for taking the blood sample were in place?

The Court held that s. 238(3)(C) C.C. outlines the prerequisites to the demand and refusal. It would be absurd to call doctors and nurses to say that if the accused had not refused, a sample could have been taken. A refusal based on one of the conditions that must be in place to take the sample is not a refusal as referred to in the C.C. For instance, if a policeman, after a demand, would attempt to take blood with a syringe at the scene of an accident, and the suspect would not allow it, that would not be a refusal. In this case the refusal was unequivocal.

Conviction upheld
Appeal dismissed.

## THEFT BY FINDING OR BY CONVERSION

*Regina* v. *HUNTINGFORD* - *County Court of Vancouver - No. C.C. 861811 - February 1988*

The accused and fellow workers attended at the home of a colleague for an after-work bash. One of the libatants broke his leg in the driveway when he went searching for his car to go home. Needless to say, everyone went outside to comfort and render aid to the unfortunate fellow until the ambulance took him away. Picking up pillows, coats and such after the excitement was all over, the accused claimed he found two rings in the driveway. He kept them and promptly sold them for $50 each the next morning. He said to police he had considered the rings "scrap" and had not asked who owned them as he anticipated false claims of ownership. Of course, him selling the rings defeats the claim of them being no more than scrap without value. Consequently, the accused was charged with breaking, entry and theft, and possession of stolen property. The first charge was based on a Crown theory that the rings were not found but taken from the home the following day when he was dropped off to pick up his car while everyone had gone elsewhere to continue the 'celebration'.

Three interesting legal questions arose:

1. Must the intent to steal be present when the conversion takes place or can it arise subsequently, completing the offence at that time?

2. Can a thief be guilty of possessing the goods he stole. Is, in those circumstances, possession not an act of necessity to theft and therefore an included offence.

The Court held that if someone finds something it does not amount to theft until that person forms the intention to convert what is found to his own use.

In this case, no charge of theft was preferred and the accused could not be convicted of theft as an included offence to breaking, entry and theft. There was simply no evidence to support the Crown's theory and all charges were dismissed.

**Comment**:

If the Crown had prosecuted along the lines of the accused's version of how he obtained the rings (by adducing his statement as proof of the truth of its content) a conviction on the common law theory of theft by finding seemed to have been probable.

## SIMILAR FACT EVIDENCE

***Regina* v. *SCHWAB*** - *Supreme Court of B.C.*
*Vernon 17239 - November 1987*

In 1981 the accused took a 16 year old girl for a sight-seeing ride. He took her to a remote spot, overpowered the girl and smashed her in the eye. He wore a knife in a sheath which was threatening to the girl. In compliance with his dictates she allowed him to have intercourse with her. When he drove her home he offered to give her a $500 car he just purchased. He spent four years in jail for that crime.

In June of 1987, the accused offered an 18 year old girl a ride home. He drove her to a secluded spot, put a knife to her throat, forced her head onto his penis and demanded intercourse. He also drove her home and offered her $20 and 100 hits of acid.

During his trial for the latter alleged sexual assault the Crown called the 1981 victim to relate what had happened to her as similar fact evidence.

Needless to say, similar fact evidence cannot be adduced for the purpose of demonstrating that the accused has committed a similar crime before and therefore he had likely done it again. It can only be tendered to show similarities in the modus operandi, or peculiarities the acts of the past and those alleged have in common. A prejudicial effect of tendering such evidence is inevitable; however, it must be relevant and its probative value must outweigh the consequential prejudice. Modes will assist to prove identification and rebut any suggestion of innocent association. The modes in the two cases above are indeed similar as was the wording of the threats and the apparent need to compensate for what was done. Yet, they are not unheard of if one considers other cases.

The similarities between the two incidents were too general and failed to include in each a peculiarity that makes it safe to conclude that both acts were performed by the same person. Consequently, the jury did not get to hear the evidence of the 1981 incident.

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## SEARCH WARRANTS - REASONABLE SEARCH

*Regina* v. *COCORAN and BATE* - County Court of Vancouver
Powell River 05553 F - October 1987

Police had reasonable and probable grounds to believe the two accused (who apparently lived common law) cultivated and possessed marihuana for the purpose of trafficking. As the couple was in the process of moving, search warrants were issued for both premises. Nothing was found in either house. However, police spotted a separate building on the property and an additional search warrant was taken out. This search warrant was identically worded to the one issued on the new premises. The grounds remained the same. However, there was an additional building that, in their opinion, should be checked, based on their "observations". Because the information for the third warrant was copied from the first two, the building is attested to be the dwelling of the accused. This, of course, was not a full disclosure and was inaccurate. Considering what the officers knew and the actual grounds for the third warrant, the information on which it was issued was inconsistent with reality. The officers had made an erroneous shortcut "which was patently wrong" despite their lack of malicious intent.

Although the judgment did not clarify this point, one can infer that the charges against the accused were based on what was found by means of the third warrant. Thus, the Judge had to consider the admissibility of the evidence.

The accused were not "known traffickers". However, the community's confidence in the justice system could be shaken if evidence was admitted which had been obtained with a faulty warrant. The warrant rendered the search unreasonable.

**Evidence excluded**
**Charges dismissed.**

## MISREPRESENTATION TO GAIN ACCESS TO A HOME FOR THE PURPOSE OF GATHERING EVIDENCE

*Regina v. HANDSOR* - County Court of Westminster - New Westminster No. X017911 - June 1987

Recently, the Saskatchewan Court of Queen's Bench excluded the evidence of a wildlife officer who had purchased meat from a suspect. The purchase was made in the suspect's home to which the officer gained access by deception (by not identifying himself as a wildlife officer).* In this case a police officer, who did not identify himself, was invited into the accused's home on two occasions for the purpose of purchasing marihuana from him. A search warrant was subsequently executed and a modest amount of marihuana was seized. Needless to say, the defence used the Saskatchewan case to argue that all evidence should be excluded due to the unlawful intrusion upon the rights of the accused.

The County Court Judge had great doubts if any Charter right had been infringed by the deception. Even if there was an infringement of a right the administration of justice would not be brought into disrepute.

Evidence admitted.

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* See page 45 of Volume 29 of this publication - *Regina v. Bamford*.

## JUSTIFICATION FOR REFUSING A FIREARM ACQUISITION CERTIFICATE

*MICKLE and The Queen* - Supreme Court of British Columbia
Vancouver CC 8700972 - November 1987

Mickle had applied for the acquisition certificate he required to purchase a rifle. He was a member of a well known and allegedly disreputable motorcycle club, and consequently the certificate was refused. He applied to a provincial court judge to have the reasons for refusal reviewed and the decision by the firearms officer reversed.

At the hearing before the provincial court judge a police witness had testified that members of the motorcycle club the applicant belonged to "are involved in many activities from intimidation, contract murder, drug involvement, money laundering, loan sharking, weapons, theft of vehicles, and that sort of thing." He had gleaned this knowledge from personally monitoring the club members and reading numerous files. The applicant was the president of a local chapter of the motorcycle club which expanded "to worldwide proportions involved in drug trade...murder...intimidation of witnesses". The chapter headed up by the applicant consisted of 12 members. Much of the police evidence was no doubt hearsay and there was nothing in the police files that showed the applicant was personally involved in any of such criminal activities.

At this stage of the proceedings the hearing was adjourned. The applicant's counsel, by correspondence, demanded that the police expert produce the police files containing the information testified to so he could conduct a proper cross-examination. When the hearing resumed a member of the R.C.M.P. special squad monitoring the activities of motorcycle club testified that he was a person interested within the meaning of s. 36.11 of the Canada Evidence Act and objected to disclosing the information the applicant demanded,

> "...on the grounds of a specified public interest being the disclosure of certain information contained in R.C.M.P. Special E files could reveal information sources, police investigation techniques, or the nature of ongoing investigations by the unit or other police agencies that coordinate their efforts with Special E Squad."

The hearing was again adjourned for the applicant to petition the Supreme Court of B.C. to determine if the R.C.M.P. were obliged to disclose the information the applicant demanded. (See s. 36.1(3) Canada Evidence Act).

The Justice of the Supreme Court firstly described the proceedings before the Provincial Court judge in terms of process and purpose. The rules of evidence need not be adhered to and hearsay evidence may be admitted as long as the judge finds it credible. The purpose is simply to examine if the decision of the Firearms Officer not to issue a permit can be confirmed. The burden of

proof is on the Crown to show justification for the refusal to issue the permit; the degree of proof is on a balance of probabilities.*

A Staff Sergeant testified that due to the violent tendencies of those in the motor cycle gangs information can only be obtained through informers. Even disclosing the reasons for his objections to disclosure would do irreparable harm to the work of the special squad which monitors the club activities. A Chief Superintendent indicated that disclosure would reveal informants and undercover agents thereby jeopardizing their lives. It would also disclose police tactics and operations.

The applicant's lawyer argued that here the Crown had called a witness to give the most damaging evidence against his client and the organization he belongs to, and then he is blocked from cross-examining that witness due to State secrecy rules. Furthermore, the Crown should show that the information the applicant sought access to is jeopardizing the anonymity of informers.

In respect to the common law regarding informers, the Supreme Court Justice was very mindful that it favoured the strictest protection of identity and information. Despite the explicit post Charter decision** by the Supreme Court of Canada on the point, the Justice observed how there had been some departures from this principle (all in wiretap authorization cases). A difference of opinion among the provinces is obvious, despite the explicit ruling by the Supreme Court of Canada:

> "It has been decided once and for all, subject to the law being changed, that information regarding police informers' identify will be, because of its content, a class of information which is in the public interest to keep secret, and that this interest will prevail over the need to ensure the highest possible standard of justice."

In this case, the matter was not guilt or innocence but merely if the applicant should be extended the privilege of a firearms permit. The need to maintain confidentiality outweighed the application of the highest standards of justice in processing the application for a firearms acquisition certificate.

Concluded the B.C. Supreme Court Justice after saying that the applicant expected too much of s. 7 of the Charter:

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* *R. v. DHILLON* (1981) 64 C.C.C. (2d) 483. B.C. Court of Appeal.

** *BISAILLON v. KEABLE et al* (1983), 7 C.C.C. (3d) 385 - Supreme Court of Canada. Also, see Volume 15 of this publication.

"There is no absolute right to a firearms acquisition certificate and there is no right to perfect fairness and disclosure in every proceeding. Every privilege, including informant and Crown privilege, both of which were recognized at common law, make lawful inroads upon perfection and if s. 7 applies at all, it can tolerate the reasonable limitations contained in s. 36.1 of the Evidence Act."

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## WAS THE ASSAULT A SEXUAL ASSAULT

*Regina v. EDWARDS* - The County Court of Vancouver - No. CC 861751

Near midnight "a young female" walked by a church building. "A young male" person wearing a mask came from among the shrubs and grabbed the girl from behind, around the facial area. She screamed, fought and hit him with a paint tray she was carrying. The assailant attempted to drag the girl into the bushes that were part of the landscape of the church building. She made so much noise that passers-by became aware of what was going on. The assailant then released the girl, called her a bitch and fled.

There was no doubt that the accused was the assailant. He was charged with sexual assault. His counsel argued that what occurred amounted to ordinary assault only in that the attack was not of a sexual nature or was capable of violating the victim's sexual integrity. He implied that what the Crown invited the Court to infer from the circumstances (that when he got in the bushes with the girl he would have violated her sexual integrity) was no more than conjecture.

The Court rejected the defence's position. Both the accused and his victim were young persons; there was no attempt or apparent interest in depriving the girl of the wallet she was carrying which fell on the sidewalk during the struggle. He pulled her to an area where they would not be seen and in the process began to pull her clothing over her head. Said the Court:

> "Combined, these circumstances satisfy me beyond a reasonable doubt that this attack comes within the definition of a sexual assault as outlined....in the Queen versus Doltan Chase.*"

Accused convicted of Sexual Assault.

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* See "Meaning of Sexual Assault". Supreme Court of Canada decision on page 35 of Volume 29 of this publication.

LEGAL TID-BITS

## QUESTIONING OF YOUNG OFFENDER CONTRARY TO Y.O.A. CONSTITUTIONAL BREACH?

A citizen alerted police of a break-in in progress in the house next door. This report resulted in a description of the culprit. Police spotted a youth of similar description nearby. He ran, shedding the stolen property in the process. He was apprehended, and was given all his rights. He selected to remain mute. During the ride to the station a constable went into the back with the youth and questioned him without any result. Needless to say, this was unfortunate and unwise in view of the specific provisions of the Y.O. Act on this point. The defence claimed this amounted to an infringement of the youth's constitutional right and called for a judicial stay of proceedings as a remedy under s. 24(1) of the Charter. This was declined as nothing resulted from this "unwise" move on the part of the constable. The B.C. Court of Appeal agreed that there was no need to decide if there was a constitutional breach as no evidence was gained from it. The conviction was upheld.

*R. v. M.G.W.S.* - B.C. Court of Appeal - Victoria V00553
November 1987.

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## DOES 24 HOURS D.L. SUSPENSION BAR PURSUIT OF DRINKING-DRIVING OFFENCES?

The accused had been stopped and received a 24 hour driver's licence suspension. He was also charged with impaired driving and "over 80 mlg". He relied on s. 26 and 11 of the Charter to have the prosecution for those charges stopped. He contended that a driver's licence suspension is a form of punishment and that prosecution could lead to be punished twice for the same offence.

The B.C. Court of Appeal held that the 24 hour suspension from driving does not constitute punishment. The suspension does not amount to a "charge" which s. 11 of the charter includes as a requisite to double jeopardy.

Accused's appeal dismissed.

*Regina v. ART*, B.C. Court of Appeal, Vancouver CA007422
October 1987

## PRIVACY WHILE CONSULTING COUNSEL

All seemed to go well and in a cooperative fashion when the accused was processed for impaired driving. He spoke to his lawyer from a phone booth and so did the arresting officer. Yet, the accused refused to blow and gave lack of proof that he drove as a reason. At trial and two subsequent appeals by the accused regarding his conviction for refusal, that lack of proof was not the issue but the open door of the telephone booth was. The officer conceded he could hear what the accused said to his lawyer. This was an infringement of his right to counsel according to the trial and Appeal Court judges. However, the burden of proving that the administration of justice could be brought into disrepute if the evidence of the refusal was admitted was on the accused, and he had failed to meet that burden. Neither did he demonstrate any connection between the infringement (lack of privacy) and the refusal. Furthermore, closing the door of the booth would have been a simple remedy to the accused's problem said a County Court Judge. The accused then went to the B.C. Court of Appeal which refused to grant him leave to appeal. The Crown had argued before this Court that there had been no infringement of the accused's right to counsel. This was not responded to but it agreed with the Appeal Court judge's (County Court) interpretation and application of s. 24(2) of the Charter.

*Regina* v. *RUSIN* - B.C. Court of Appeal - Vancouver CA007718
November 1987 - * For synopses of County Court judgment, see Volume 28, page 31 of this publication.

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## "DOES ACQUITTAL OF SPEEDING PREVENT ADMISSIBILITY OF SPEEDING EVIDENCE IN 'OVER .08 TRIAL'

The officer worked radar and due to a reading from the car the accused drove, the accused was stopped. A demand for breath samples followed and an analysis of .180 mlg. resulted. The officer, due to commitment to a higher court failed to show for the accused's trial for speeding and a dismissal was granted for lack of prosecution. Subsequently, the officer testified at the accused's "over .08" trial and told how he had stopped the accused for speeding. Defence counsel appealed the accused's conviction to the County Court arguing that the officer's grounds to make the demand were the results of the stop for speeding. In view of the dismissal, the speeding did not take place and that evidence was therefore inadmissible. The County Court Judge disagreed. He held the evidence was adduced not to prove the accused was speeding, but that the officer believed he was speeding.

*Regina* v. *KAYE* - The County Court of Vancouver - No. CC 842082 - December 1987