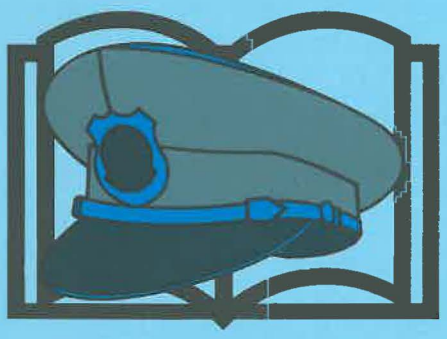
JUSTICE INSTITUTE OF B.C.

ISSUES OF INTEREST VOLUME NO. 47



POLICE ACADEMY

715 McBride Boulevard, New Westminster, British Columbia V3L 5T4

ISSUES OF INTEREST

VOLUME NO. 47

Written by John Post
August, 1995

TABLE OF CONTENTS

Page #

OFFICER ENUNCIATING GROUNDS FOR EXPERT OPINION THAT A DRIVER WAS GROSSLY INTOXICATED -- CORRECTNESS OF COURT CONVICTING ON SUCH EVIDENCE

REGINA v. FISET - BC Supreme Court, Prince George 27652, September 1994.

The accused was stopped in a roadblock. The officer noticed nothing out of order except bloodshot eyes. The accused explained to be very tired. Due to a strong smell from the dog the accused had in the cab of his pick-up truck, the officer did not detect any odours associated with alcohol. Immediately upon allowing the accused to drive on, the officer received information from a motorist that caused her to pursue the accused and pull him over. There was not anything wrong with his driving or the way he handled his documents. However, when the accused stepped out of his truck she could see that he was grossly intoxicated. All the signs and symptoms were blatantly there and the officer decided that any tests were superfluous.

At his trial for impaired driving the officer described the accused's condition in great detail and expressed the expert opinion that the accused was very and grossly intoxicated and impaired to drive. The trial judge accepted that evidence as proof of a fact, and convicted the accused. He appealed this verdict to the Supreme Court of BC claiming that the guilty verdict was unreasonable and could not be supported by the evidence which was exclusively the officer's opinion.

The Supreme Court held that upon the evidence as it was adduced in this case, the trial judge had reasonably and properly drawn the irresistible inference that the accused was guilty as charged.

Appeal Dismissed
Conviction upheld

CRIMINAL CODE WARRANT FOR THEFT OF ELECTRICITY EXECUTED BY DRUG SQUAD ALLEGEDLY TO FIND GROUNDS FOR A N.C.A. WARRANT

REGINA v. DAIGLE - Court of Appeal for BC, Vancouver CA 017376, September, 1994.

A BC Hydro worker attended the accused's home to disconnect the powerline for non-payment of power used. The worker noticed a power by-pass so power to the house would not be metered. BC Hydro security was alerted and they in turn called the police. All these personnel would be pretty naive if they did not know that 80% of by-passes of this kind are for the purpose of excessive power consuming hydroponics growing of marijuana plants. The police officer in attendance obtained a Criminal Code warrant to search and seize any equipment used to steal power and any used in the consumption of that stolen power.

Of the eight police officers who executed the Criminal Code warrant four were assigned to the drug squad. The accused was immediately arrested for theft of electricity and taken away from the scene. One of the drug squad officers entered a downstairs room, saw marijuana plants, closed the door and left the house. Then the drug squad people obtained a warrant under the Narcotic Control Act (s. 12) and executed it, seizing 90 marijuana plants.

The accused was convicted of cultivating and possessing marijuana. The latter charge was for the purpose of trafficking. He appealed his conviction and argued that the search was unreasonable. The police had not come to search for evidence to support a charge of theft of electricity. They came to search for narcotics. The whole police process was nothing more than a ruse and guise to search for narcotics with a "theft of electricity" warrant. When they found what they were looking for, then they got the necessary warrant to seize the contraband. In essence the defence argued that it amounted to a charade that amounted to an abuse of what the process should be. This caused the search as well as the seizure unreasonable under s. 8 of the Charter. The trial judge had held that the search and seizure had not been unreasonable and had admitted the evidence. Needless to say, much was made of the presence of four drug squad personnel to corroborate the police's real objective.

The defence brought a similar case[1] to the Court's attention where police armed with a "stolen property" warrant came with 7 officers to execute it. Several of these officers were from the drug squad and their objective was not silverware but cocaine. The accused in that case immediately showed the officers the items of silverware mentioned

[1] Regina v. Hoy and Penso - New Westminster 29373, 1992.

in the warrant. However, police continued to search and found cocaine. That search was unreasonable and the cocaine inadmissible in evidence.

The BC Court of Appeal agreed with the trial judge that his case was distinguishable from the one where police had a warrant for a rare set of silverware. In that case the warrant was exhausted as soon as the police were shown the set. In this case the warrant was broader and authorized search and seizure of equipment used for the by-pass and any apparatus or item used in the consumption of the stolen electricity. The warrant authorized things to be searched for that could operate in any part of the house. The warrant was not exhausted when the by-pass equipment was found at the meter box.

The warrant was directed to "peace officers in the Province of BC" and all the officers were regardless of their assignment. Quoting the Ontario Court of Appeal the BC Court of Appeal said:

> "A search does not become unreasonable by reason of anticipation or expectation of finding evidence of other offences."[2]

This is as much as the Court did say about this issue. It did not allow the defence to put forward the manner in which the Criminal Code warrant was executed with the drug squad obviously using this warrant to search for narcotics, to show that the search was unreasonable. Defence did not raise this particular issue at trial and was consequently not entitled to do so on appeal unless it is an exceptional case to balance this interest of justice to all parties.

Appeal dismissed
Convictions upheld

---

2 Regina v. Annett (1984) 17 C.C.C. (3d) 332. (Leave of appeal to the Supreme Court of Canada was refused).

THE "KNOCK-ON" OR "SNIFF" INVESTIGATIVE TECHNIQUE TO OBTAIN EVIDENCE FOR A SEARCH WARRANT IN CASES OF CULTIVATING MARIJUANA

REGINA v. C. EVANS AND R. EVANS - Court of Appeal for BC, Vancouver CA017104 & CA017105, September, 1994

An anonymous tipster phoned "Crimestoppers" and said that at a certain address marijuana was being cultivated by a man and woman who lived there. She, being familiar with the drug market, could smell overwhelmingly the odours of such cultivation.

Three police officers went to the address and when the door was answered they could clearly smell the growing operation. They arrested Robert Evans who had answered the door and while securing the house they saw marijuana plants in the home.

All of this was attested to by one of the officers before a justice and a warrant did issue. The execution yielded numerous marijuana plants.

Robert Evans and Cheryl Evans were jointly charged with:

1. Cultivating marijuana, and
2. Possession of marijuana for the purpose of trafficking.

The trial judge acquitted the two accused of the cultivation charge as there was no real evidence that they conducted the growing operation. The gravamen of the offence of cultivation is the exercise of labour and effort to effect the growing process.

The accused were convicted of possessing marijuana for the purpose of trafficking. The accused appealed this verdict arguing that the marijuana had been found by means of an unreasonable search and should not have been admitted in evidence.

The Court of Appeal for BC held that police attending at someone's door to sniff for tell-tale odours of growing marijuana constitutes a search.

There is a proposition in law that there is implied consent to enter on private property to "approach" the occupant's front door "whether that person comes to do the household good or ill". In as much as a burgler who comes to case the place for a break-in is not welcome, neither is the police to the householder who cultivates marijuana. Said the Court:

> "It would not be useful and, indeed, might be dangerous to attempt to enumerate those occasions upon which the law does give such a licence in the absence of a warrant."

Seemingly critical of the well known Kokesch decision regarding perimetre searches the BC Court of Appeal's majority judgment reads:

> "If a peace officer may not go without a warrant, on private property to ascertain if the offence of cultivating marijuana is in process, how can he or she go on property without a warrant to ascertain if someone has been kidnapped and is being held in that place, or if the property is a repository for stolen goods? It may be said that without sufficient evidence for a warrant to do any such thing. But what if the only basis is an anonymous tip?"

Nearly all cases on this point are warrantless perimetre searches to discover evidence of hydroponic cultivation of marijuana.[3] Where a warrant was obtained subsequent to a warrantless unreasonable search then the courts must determine if without the evidence obtained by that search the warrant is still supportable. In other words, could a warrant still issue without the information gained by that pre-warrant search.

The BC Court of Appeal then did an unusual "critique" as it were of the search provisions in the Narcotic Control Act. The Court pointed out that according to s. 12 NCA the officer who swears to the content of the application for the warrant does not require him/her to believe there are reasonable grounds for a search. The test is clearly objective - the justice must be satisfied that there are reasonable grounds. Then the justice must name the officers the warrant does license to conduct the search. However, such named officers must have the subjective belief, on reasonable grounds, that there are narcotics in the dwelling house (s. 10 NCA). Despite this, all applicants for these warrants express their subjective beliefs ("The informant says that he has reasonable grounds to believe and does believe that . . . .). This, the Court reasoned causes inconsistency or inequality. Subjective beliefs vary from person to person. A cautious officer or one who is prepared to leap to conclusions can make a big difference. The Court seemed to say that the objective test was deliberately provided for in s. 12 to prevent these inequities. The officer swears to the truth of the application and the justice then assesses the evidence objectivity to determine if a warrant should issue.

The BC Court of Appeal held that the evidence obtained by sniffing at the front door of the accused's home was a search and an unreasonable search under s. 8 of the Charter.

---

3 R. v.. Kokesch - 61 C.C.C. (3d) 27 - Volume 39, page 6 of this publication.
R. v. Grant - 84 C.C.C. (3d) 161 - Volume 45, page 1 of this publication.
R. v. Plant - 84 C.C.C. (3d) 203 - Volume 45, page 7 of this publication
R. v. Wiley - [1993] 3. S.C.R. 263.

This left the Court of Appeal for BC to decide if admitting the evidence would bring the administration of justice into disrepute. This was a difficult issue "because the section does not say among whom the administration of justice will be brought into disrepute". The mythical standard may be "among right-thinking persons" - but who are they? As it is, reasoned the Court, the administration of justice, particularly criminal justice, is not held in high regard by the "citizenry". "This is <u>not</u> because evidence is admitted which they would exclude".

The Court summarized that it is a "troubling proposition" to hold that it is an unreasonable search for a policeman to go up to a front door, knock and sniff when the door is answered. The "knock on" investigative technique will have to be abandoned "at least in instances of suspicion of cultivating marijuana". However, the Court seemed to predict that this precedent will soon apply to all investigations. Said the Court:

> ". . . . . to what extend, the infringing of constitutional right by going onto private property on a suspicion founded only on an anonymous tip will impede the police in the investigation of other sorts of crimes, or at least impede them in quick, inexpensive investigations, I am unable to predict."

The BC Court of Appeal held that excluding the marijuana evidence would bring the administration of justice into disrepute. Consequently . . . . .

The appeal was dismissed, conviction was upheld

Note:

Besides the above "extra comments" (obiter dicta) by the justice who authored this majority judgment there were other interesting gratuities that pointed out iniquities.

Besides sentencing showing a divergent view of the gravity of these types of offences, a troubling point was the apparent difference for the rich and the poor in the prosecution for them. Is that distinction a consideration under the exclusionary provisions in s. 24 (2) of the Charter? Will the fact that the poor man can be caught where the rich man cannot, shed a disreputal light on our administration of justice? The Justice knew of only one offence that could be detected by a "sniff" sufficiently to obtain a search warrant. This means that the rich person who can afford privacy in terms of the property around his home, will be protected by this decision and those by the Supreme Court of Canada. The poor man who lives "cheek-by-jowl" with the sidewalk police can "search" by sniffing while standing on public property.

The Crown did not appeal the acquittal on cultivating marijuana. The reason given by the trial judge for this verdict was the lack of evidence that either of the accused had exercised labour or effort to effect the growing of these plants. Said the authoring Justice gratuitously:

> "I would not wish to be taken as agreeing with the proposition of law inherent in those reasons, even though the proposition has some support in authority".

Simultaneously to this Evans decisions the Court of Appeal for BC released its judgment on an appeal by a Douglas H. Peterson (Vancouver CA017187). He was also discovered to be cultivating marijuana by means of a "knock on - sniff" method.

The Court found that his rights had been infringed by this investigative practice and that the evidence was obtained by an unreasonable search. However, in the Evans cases the Court of Appeal said that due to the size of the operation excluding the evidence would bring disrepute on the administration of justice. In the Peterson case the Crown had not adduced any evidence of the magnitude of his operation. Hence the foundation for holding as it did in the Evans appeal did not exist. Therefore, admitting the evidence would bring disrepute on the administration of justice. Peterson's appeal was allowed and his conviction for possessing marijuana for the purpose of trafficking was set aside.

UNIVERSITY SECURITY PERSONNEL DISCOVERING STOLEN PROPERTY IN DORMITORY ROOM - APPLICATION OF CHARTER - ARE THESE PERSONNEL AGENTS OF THE STATE?

REGINA v. FITCH - Court of Appeal for BC, Victoria V01852, September 1994.

The accused rented a room from a BC University in the student residency building. He defaulted on his rent and the university security police were alerted to carry out a routine procedure in these circumstances. The security person is to knock on the door and if there is no answer he/she enters the room with a master key to determine if the defaulter still resides there. As the security person W. opened the door it became apparent that someone occupied the room. He, however, saw in clear view, university equipment on which he had taken a theft report a few days before. The trial judge found that when W. did enter the room the items were not visible from the door.

The next day another university security person was sent to check the room. He also did not get an answer to his knocking on the accused's door and did enter the room. He spotted items in addition to those mentioned in W.'s report that were owned by the university. Out of "curiosity and nosiness" this second security person opened the drawer under the bed and saw a number of camera lenses and physics lasers. The supervisor did call the police.

The police officers who attended entered the room with university security personnel and were shown the collection of stolen property. Consequently the officers obtained a search warrant and some three hours after their warrantless entry they conducted a detailed search of the accused's room.

In the early morning hours of the following day one of the police officers conducted a warrantless inspection of the room. He had received information that someone had been in the room during the night. As a result of what he found he obtained a second search warrant that authorized a search of the room on the previous day. Not having noticed the error in the warrant, the officer searched the room and seized a number of items.

These events raised, of course, some questions under the Charter provisions, such as:

1. The Charter only applies to government agents and university personnel are not necessarily such agents;
2. Was the search by security person W. a search and if so was it reasonable under s. 8 of the Charter? After all his findings were fundamental to what followed;
3. Was the search by the second security the next day reasonable and was he at that time an agent of the Crown acting in its prosecutorial interest?

4. Was the subsequent warrantless action by the police appropriate. Did they conduct a search and were the seizures with the warrant contaminated with the infringements of the accused's rights by university personnel and their own warrantless actions, if any?

The trial judge had held that security person "W" had minimally intruded and that the purpose of his entry have been for a legitimate purposes to determine if the defaulting tenant had abandoned the room. This had not amounted to an unreasonable search.

The search of the second security person the following day was clearly to investigate a criminal activity on campus. He acted for the university but also as an agent for the Crown. That search should have been conducted with a warrant and was consequently unreasonable and a breach of the accused's rights under s. 8 of the Charter.

The search by the police officers was also unreasonable. The seizure of the stolen goods with the warrant was on the basis of what was discovered by unreasonable searches. It is trite law that a warrant cannot remedy an infringement of a right to be secure against unreasonable searches that were conducted earlier.[4] However, the trial judge had admitted the stolen property in evidence by applying a decision by the Supreme Court of Canada in 1987.[5] Admitting the evidence did not affect the fairness of the trial. The evidence was "real" and therefore distinct from evidence that would not have existed but for a Charter breach. Consequently the accused had been convicted of four counts of possession of stolen property. He appealed these convictions to the Court of Appeal for BC.

The arguments in the Court of Appeal took an interesting twist. The Crown argued that the accused's Charter rights had not been infringed. He submitted that the university security personnel are not agents of the state and accordingly the Charter does not apply to them (see s. 31 Charter). They acted in the private sphere as agents for the university in the role of renting living space to students. The BC Court of Appeal agreed and held that there was no proper evidence that

> ".....those employed to provide security for large, publicly funded institutions, such as a university, take on the mantle of state agents by reason of the character of their employer and the nature of their duties."

Neither were the security personnel and the local police in tandem with each other despite the fact that by the attendance of the second security officer entering and searching the room had for all intents and purposes embarked on a criminal investigation before involving the local police.

---

4 Regina v. Kokesch (1990) 61 C.C.C. (3d) 207 - Volume 39, page 6 of this publication (Supreme Court of Canada)

5 Collins v. the Queen 33 C.C.C (3d) 1 - Volume 27, page 1 of this publication.

The Court held that there was nothing legally amiss when the security person "W" checked the room. It was at this stage that the local police should have been alerted and from what "W" had observed police could have obtained a search warrant. However, as regrettable as it was that this was not done, not at any time was security personnel agents of the police nor did police have them do anything "resembling a finesse of the Charter" that they could not do to assist police in their prosecutorial interest.

Appeal dismissed
Conviction upheld

Note:

In fulfilling its education and research function in our society, under an Act of the province, the university is an agent of the state. This has been so held by our Courts in personnel disputes involving universities. The BC Court of Appeal being cognizant of that fact held that despite that being the case not every action of an university employee is that of the state agent.

The reasons for judgment clearly indicate that when the local police become involved they were taken into the accused's room and shown the university's property that had been reported stolen. This warrantless search resulted in a "seize" warrant being issued in that in essence the "searching" had already taken place before the judicial licence to do so had been issued. In certain circumstances this is appropriate but in this case, the trial judge held the practice to be unconstitutional. The local police officers had clearly joined the state in its prosecutorial interest and were its agents. For the purpose of the warrant the police pre-warranted entry was superfluous implied the Court of Appeal as they had sufficient grounds for a warrant even at the stage that "W" had seen the goods on the first "there is nothing wrong with" entry.

Somehow the matter seems to be left unresolved at the appeal level. At least the reasons for judgment do not indicate any reference to this except the trial judges' findings.

"DETENTION" WHEN QUESTIONING `SUSPECT' AT SCENE OF MOTOR VEHICLE ACCIDENT

REGINA v. STANFORD - Court of Appeal for BC, Vancouver, CA 017600l, September 1994.

A police officer (A) arrived at the scene of a motor vehicle accident. There was one car involved with two occupants. One person was in very serious condition and would probably die and indeed, did die shortly after. The other occupant of the car was in the back of an ambulance. There was an odour of liquor about him and the officer suspected that he might be the driver of the car. He asked that simple question, "Where you driving the car?" The answer was "Yes".

A second police officer (B) arrived on the scene shortly after this. Officer A told him that the driver of the car was in the ambulance. Officer B went there and asked the same question and he received the same answer. Officer B went through a series of questions and steps to identify that person as the driver of the car and he succeeded in assuring himself that he was.

The driver, the accused, was convicted of impaired driving causing death and dangerous driving causing death. He appealed these convictions arguing that all the evidence officers A and B gathered to prove he drove the car was inadmissible due to his right to counsel having been violated. His admissions that he had been the driver were obtained while he was detained and he should have been told firstly that he had right to a lawyer to receive counsel. Although the Court had found that the accused was "mobile", in other words his injuries were not such that he could not have walked away from the ambulance, he, the accused, claimed that the circumstances rendered him to be a detainee.

This was also based on the officers conceding that they would not have allowed the accused to walk away had he chosen to do so.

When the first officer spoke to the accused, he was sitting up in the ambulance. Officer A had not entered the ambulance or asked the accused for identification. He had simply asked the accused if he was the driver. When officer B interviewed the accused he had entered the ambulance and the accused was laying on a stretcher. In essence the same thing was established; the accused admitted to having been the driver.

The trial judge had held that the accused was not detained when either Officer A or Officer B questioned him, as someone who might prove to be the person who committed an offence. That does not cause detention to occur. Even if the accused had been confined to a hospital bed to receive medical treatment, this does not give rise to the constraints the Charter refers to when dealing with detention. The reasons

why he could not leave were medical and not legal. Hence there was no detention and the admissions were properly admitted at trial held the Court of Appeal for BC.

Appeal dismissed
Convictions upheld

DISTURBING A RELIGIOUS MEETING - CHARTER OF RIGHTS - FREEDOM OF RELIGION - MEANING OF "MEETING" AND "DISTURB"

REGINA v. REED - Court of Appeal for BC, Victoria, V01773 / V01871 - August 1994.

Section 176 of the Criminal Code makes it an offence to wilfully disturb or interrupt an assemblage of persons (two or more) meeting for religious worship, or to wilfully do anything that disturbs the order or solemnity of such a meeting. This section, despite its proximity to the offence of creating a disturbance in a public place, is in nearly all respects distinct and autonomous.

Mr. Reed, the accused, was once a Jehovah Witness. He disagreed with some theological doctrines to such a fierce extent that he was expelled from the Assembly. Ever since then, Mr. Reed has been before the Courts in regards to his activities in public, to bring his views to the attention of Jehovah Witnesses as they attend their conventions and worship services.[6]

In this case Mr. Reed stood in front of the entrance door to a Kingdom Hall with placards. The words he spoke to the congregation members who approached and those written on the placards, were considered offensive to the Jehovah Witnesses. Most members wanted to avoid Mr. Reed and as his position at the door was such that they had to go by him, they entered the Hall through a back door. The evidence showed that the socializing, prayer and silent contemplation in preparation for the service itself were disrupted, interfered with or did not take place, due to Mr. Reed's actions.

Mr. Reed appealed his two count conviction under s. 176 C.C. to the Court of Appeal for BC and argued:

1. that he had not disturbed a worship service as the service had not yet commenced when he stood in front of the door;
2. that his behaviour had not amounted to a disturbance; and
3. that the offence section did not comply with the Charter and was therefore of no force or effect.

The Court of Appeal held that at the time of the accused's actions at the door of the Kingdom Hall there was a "meeting" in progress that s. 176 C.C. protects from being

---

6 Some of the cases have been reported. What is noticeable is that Mr. Reed has an amazing record of acquittals. See Volume 44, page 30 of this publication.

disturbed. Testimony clearly showed that the period prior to the formal ceremony is one of quiet contemplation and prayer. The Court rejected the accused's argument and held that "the sanction of s. 176 C.C. began when two or more members of the congregation were diverted from the entrance of the Kingdom Hall to the side door".

Whether the accused's actions did disturb the solemnity of the meeting was a more difficult question as the precedents on this point are not too clear. The Court observed that the allegation against the accused is "wilfully disturbing the order or solemnity of a religious assemblage". There is in law a considerable distinction between the verb "disturb" and the noun "disturbance". When a person "disturbs" a meeting he / she does not necessarily create a "disturbance". The former occurs in terms of escalation, long before the latter.

The defence conceded that Mr. Reed's behaviour may have annoyed and caused emotional discomfort to the congregation members but it did not "disturb" the meeting. This, as the Supreme Court said in 1985,[7] that a conviction under s. 176 C.C. cannot be founded on an accused having caused annoyance, anxiety or emotional upset in the members of a congregation during a religious worship, "where the impugned acts are brief, essentially passive and peaceful in nature and are voluntary desisted from upon request...." Needless to say Mr. Reed had not desisted and yet had caused emotional upset.

Mr. Reed argued that his purpose was distinct from those who had been convicted under this section before. He likened himself to Martin Luther the reformer who protested the ways of Catholic Church and nailed his ninety some odd articles on the cathedral door. He was at the Kingdom Hall not to disturb the meeting, but to make his former fellow believers aware of their straying. He had a conscientious duty to deliver his message. How can religious dissent be a crime in a nation that guarantees freedoms in this regard, argued the accused.

Although this argument seems valid on the surface it must not be forgotten the most freedoms (including the freedom of religion) are protected to the extend that the manifestations of those freedoms do not injure the parallel freedoms of others. The accused had disturbed a religious meeting the trial judge had found and the Court of Appeal agreed.

Accused's appeal dismissed
Convictions upheld

Note: Also see R. v. Reed - Volume 44, page 30 of this publication.

[7] Stoke - Graham et al v. The Queen [1985] 1 S.C.R. 106; 17 C.C.C. (3d) 289.

WHO ADDRESSES THE JURY TEST?
FAIRNESS OF TRIAL

REGINA v. GUYATT - BC Supreme Court - Vancouver, CC 941195, September 1994.

It has always been considered an advantage to address the jury last. The party who gets to put his/her case to the jury last is considered to be most influential and counts on having made an impression that is freshest on the jury's mind when a verdict is considered. Also the party who presents his / her case last has an opportunity to counteract, rebut or negate any point the opposition has made.

The rule has generally been that if the accused person testifies, the defence loses the right to address the jury last. In addition s. 651 (3) of the Criminal Code specifies that where, "no witnesses are examined for an accused he or his counsel is entitled to address the jury last".

The accused charged with a criminal offence (not disclosed in the reasons for judgment) challenged these provisions in law for their constitutional propriety under the presumption of innocence and s. 7 of the Charter. He reasoned that for him to make a full answer and defence he had the right to address the jury last. In a fair system the accused person has the right to make a full answer and defence. That means that the accuser calls evidence and the accused has the right to put up a defence. That fairness must also be reflected in the sequence in which the jury is addressed by the parties in a criminal dispute, argued the defence.

The Supreme Court trial judge agreed and declared s. 651 (3) of the Criminal Code to be without any force or effect.

Note:

It is interesting to note that when a number of war crimes were alleged against leaders of the Third Reich in the wake of World War II in the historic trials of Nuremberg, the American prosecutor suggested that the prosecution should speak last. The Russian prosecutor had objected and expressed surprise. He had "never heard of such an unjust procedure".

THE *MENS REA* REQUIREMENTS FOR THREATENING DEATH OR SERIOUS BODILY HARM

REGINA v. CLEMENTE - [1994] 2. S.C.R. 758 - JULY, 1994.

The accused was told by social worker Ms. D that his file would be returned to his previous social worker M. He had become very angry and threatened that he would take a shotgun to Ms. M's office and blow it up. He also demonstrated by gestures how he would strangle M. A few days later he warned how M's dead body would be found in her office. Later he repeated these and like threats by telephone. He was convicted under s. 264.1 C.C. and eventually appealed this verdict to the Supreme Court of Canada (S.C.C.). The sole issue was the mens rea requirement for uttering a threat or causing someone to receive threats that serious bodily harm or death will be caused.

The accused argued that the Crown must show that the words were uttered to intimidate or instill fear. The Crown rebutted that it is enough when it is proven that the threat was uttered with the intent to be taken seriously. The Manitoba Court of Appeal had unanimously agreed with the accused's opinion on the required intent and the majority of that Court had found that there was sufficient evidence to support the trial judge's finding that the offence had been made out.

The Supreme Court of Canada agreed with both the Crown and defence versions of the mens rea requirements under this section. A serious threat to kill or cause serious bodily harm is inevitably uttered to intimidate or instill fear. Conversely, a threat uttered with the intent to intimidate and cause fear must have been said with intent to be taken seriously. Either formulation is adequate to show the required mens rea under s. 264.1 C.C.

The section protects the exercise of freedom of choice by preventing intimidation. Therefore the crime is complete as soon as the threat intended to be taken seriously, has been uttered. Based on this the trial judge's finding of guilt was correct.

The trial judge had also reasoned that a requirement to support a guilty verdict was that the accused had intended the threats uttered to Ms. D to be passed on to Ms. M, the intended victim. He had inferred such intent from the evidence. The S.C.C. emphasized that the uttering of a threat is the offence. It is not a necessary element of the crime that it was intended to be passed on to the intended victim.

The actus reus is the uttering of the threat; the mens rea is "that the words be spoken or written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or be taken seriously.

Accused's appeal dismissed.
Conviction upheld

DANGEROUS DRIVING - MENS REA - DRIVER FALLING ASLEEP

REGINA v. JACKSON - Court of Appeal for BC, Vancouver CA018130

The accused was following another car on a two laned highway. The lanes were separated by a double solid line where the cars approached the brow of a hill. The accused drove into the left hand lane designated for opposite traffic, and apparently made an attempt to drive onto the left shoulder of the road when an oncoming car appeared over the hill. This car collided with the right front of the accused's car. The driver of the oncoming car succumbed to the injuries she sustained. The accused was consequently convicted of dangerous driving causing death. He appealed this conviction to the Court of Appeal for BC.

The accused had testified that he had obviously strayed in the left hand lane as he had no intention to overtake the car in front of him. In term of recalling the details leading up to the accident his mind was a total blank. All he recalled was "waking up" when seeing the on-coming vehicle. He had then taken instinctive evasive action. He obviously implied that he had fallen asleep and had consequently ended up in the wrong lane.

Dangerous driving is a criminal offence with a prison term liability. The accused argued that the trial judge's instructions to the jury that they did not have to consider his intent to drive dangerously, was in violation of s 7 of the Charter. This section clearly indicates that an offence with prison sentence liability has a form of criminal intent as an essential element. In other words an objective test alone will not suffice to find that a person drove dangerously.

In the Hundal[8] decision the Supreme Court of Canada found in essence (as recently at March 1993) that due to the mayhem created on our highways an objective test is all that is required to convict a person of criminal driving offences. However, that test is "a modified objective test" held our highest court. The Court gave a number of examples that were supposed to explain the modification of the test. These examples were not too helpful as all described involuntary acts, such as heart attacks and seizures that occurred unexpectedly. However, falling asleep belongs to that category argued the defence, and considering the accused's testimony that is the only explanation for him inadvertently ending up on the wrong side of the road.

> "Sudden and unexpected onset of sleep is a human frailty of the kind referred to by the Supreme Court of Canada"

argued the defence.

---

[8] See R.v. Hundal, a decision by the Supreme Court of Canada on this very issue, for a more detailed explanation. Volume 44, Page 1 of this publication - 79 C.C.C. (3d) 97.

The Crown conceded that if the jury had accepted the accused's version of the accident he was entitled to an acquittal. He testified that when he woke up he found himself on the wrong side of the road and confronted by an oncoming car. He explained not to have pulled back in his own lane as he knew it would be occupied and he therefore had attempted to reach the shoulder of the oncoming lane. That testimony was a statement of his intentions. However, the jury returned a verdict of guilty and obviously, considering the instruction they received on this point, did not believe his explanation.

The defence, in addition, pointed out that the accused testified that he had not intended to pass the car in front of him and he was not on the wrong side of the road for that purpose. That, in the circumstances, would have been a marked departure from any normal standard of care.

The BC Court of Appeal disagreed with the Crown's concession that if the jury would have believed the accused had fallen asleep he should have been acquitted. Neither the offence section nor the Hundal precedent support that view. The Court also disagreed with the defence position that the trial judge had not adequately addressed the jury on the significance of the accused's testimony in regard to what he had intended. As they were, the instructions the judge gave were "favourable, indeed, overly favourable" to the accused. The jury was told that if they believed the accused he was entitled to an acquittal.

Appeal dismissed
Conviction upheld

STOPPING "STRANGERS" IN WAKE OF ARMED ROBBERY SEARCHING THEM WITH CONSENT - DETENTION - ADMISSIBILITY OF EVIDENCE

REGINA v. R.G.H.H. - BC Supreme Court, No. YOA 3484, Kamloops, October 1994.

An armed robbery occurred in a smaller community in the BC interior. Police were on the look out for strangers and suspects. The accused youth was found hitchhiking "late morning" the day following the robbery, on the highway some two kilometres outside the community. He was in the company of another youth "D".

A police officer spotted the duo and asked them for identification and used his radio for a CPIC check. The officer in charge of the robbery investigation heard the inquiry and attended at the scene. He searched the backpack of "D" and found a large quantity of marijuana. He then turned to the accused youth and asked if he was "carrying anything". "No man" was the reply and he opened the zipper of his waist pouch while inviting the officer to take a look for himself. The officer asked the accused to confirm his consent and did search him, finding a small quantity of marijuana. Both youths were arrested for possession of a narcotic. The accused youth appealed his consequential conviction to the BC Supreme Court claiming that:

1. police had no grounds to stop and search him;
2. the first officer had no authority to hold him until the investigator arrived;
3. he had been detained without cause;
4. there were no grounds for the search; and, consequently
5. the evidence (marijuana) should have been excluded.

The Supreme Court Justice rejected all the accused's arguments. In the circumstances the accused had not been physically or psychologically detained before he was arrested. He had invited the search and confirmed the consent to search his waist pouch.

Should I be wrong, the Justice said, the real evidence of marijuana should be admitted as doing so would not cause the administration of justice to be brought into disrepute.

Appeal dismissed
Conviction upheld

RIGHT TO COUNSEL - CANADIAN INVESTIGATORS INTERVIEWING A U.S. SUSPECT IN HIS OWN COUNTRY - PROTOCOL AND ADMISSIBILITY OF EVIDENCE OBTAINED -

REGINA v. COOK - BC Supreme Court, Vancouver CC 940075, September 1994.

The accused, an ex US marine, had frequented the BC Lower Mainland when he was stationed on Whidbey Island off the state of Washington Coast.

A taxi driver was robbed and murdered when the accused was on one of these jaunts into BC and he became a suspect. Police had sufficient evidence for a provisional warrant for the accused's arrest and the Crown commenced extradition applications.

Two days after a US Federal Marshal executed the warrant in Louisiana two police investigators traveled to New Orleans to interview the accused in regards to the murder.

Eventually the accused was tried for murder in British Columbia Supreme Court and the conversation the two officers had with the accused became subject to a *voire dire* to determine its admissibility. Between the "Miranda" warning the Marshall had given the accused and the abundant assurances by the officers, that he, the accused was in charge and could, if he would be uncomfortable "with what is going on here," say `sorry boys that's its, I'm out of here".... and can just go right back and climb into your bed". He was assured by these words: "You realize you don't have to talk to us", that he had a right to remain silent. Although the means were somewhat unorthodox compared to the official warning, the accused was, as the transcript of the lengthy interview indicated, quite adequately informed of his right to remain silent. The statements the accused made were uttered voluntarily.

However, the admissibility test under the Charter did not fare as well for the Crown. Particularly the "right to counsel" issue became an obstacle. About 20 minutes into the interview one of the Canadian officers said to the accused, ". . . . there's a couple of things I got to tell you here". After assuring the accused that due to the respect the military and the police have for each other "I'm not going to screw you around", he said, ". . . . You have the right to retain and instruct counsel without delay. And that means basically, and I realize that probably means nothing, ... you can talk to somebody, get advice." The officer then went on to explain the meaning of "counsel" (as it was applied under the Bill of Right (1960), prior to the Charter coming into effect in 1982). He said that he could talk to a lawyer, but that counsel means anybody - confidant, a religious leader or someone the person respects. (See comment for explanation).

In the wake of assurances to the accused that they would be "up front" with him, the officer asked the accused to explain how his fingerprints came to be on the crime scene, while this was not the case. The Court held that this technique at that stage of the interview, indicated that there was no intention to be "up front" with the accused. A falsehood like this does not render a statement inadmissible as it does not affect the voluntariness of the response, held the Court. However, it does affect the tenor, sphere and mood of the interview.

What complicated the matter of right to counsel was the failure of the US Federal Magistrate before whom the accused appeared to arrange for a local lawyer to be appointed for him. He had been promised counsel to represent him and to give him the advice he wanted and had asked for. By the time the Canadian police officers arrived at the gaol where he was held, the lawyer promised him had not yet shown up. The Canadian officers were unaware of all this and had made no inquiries in this regard. The Court was seemingly quite critical that Canadian authorities on US soil, investigating a US citizen, did not inquire before interviewing him what he had been told in terms of his rights in the US, whether or not he was represented by counsel, if he had exercised any of his rights. In other words to familiarize themselves with the accused's status within the US system this the Court held, was their "positive duty". In addition to that they did not tell the accused of his right to counsel or his right to remain silent until they were about 20 minutes into the interview. The questions asked during these 20 minutes were not all within the rubic of "background". Some questions related directly to whether or not the accused was involved in the murder.

In addition to the above references the officer made to the accused's right to counsel. he did say later that they could arrange for him to speak, free of charge, to a BC lawyer for advice and how he could obtain a BC lawyer's service, also for free, to represent him in Canada. All of this advise was so shrouded in irrelevant information that it became potentially confusing and distracting. The Court found that:

> ". . . the Charter advice given by the officer in the manner he chose to give it deprived the accused of the opportunity to make an informed choice about talking to the police without obtaining legal advice."

The references that the right to counsel "probably means nothing" and that counsel includes confidants and spiritual advisors, were found to be "misleading". The advice intended to be made available is legal advice. Furthermore, there should have been "an immediate" offer to put the accused in touch with a BC lawyer by telephone. He was not specifically made aware that such an opportunity was available to him. The Court held that where a police officer does not choose to use the printed warning card and its precise language, he or she must when informing a detainee of his / her rights be clear, business-like and above all accurate. The Court concluded that absent an explanation, it was justified to infer that the officers "intended the results obtained". The deliberate delay in making the accused aware of his rights and the misleading question about his fingerprints having been found on the scene support that conclusion,

reasoned the Court. The trial judge found that the statements from the accused were obtained as a result of a breach of the accused's right to counsel. Whether or not admitting those statements would bring the administration of justice into disrepute would be decided later in the trial.

Comment:

These reasons for judgment say very little about the content of the statements. It mentions that on two occasion the accused denied any involvement in the murder. However, the judge's observation that police "intended the results they obtained" implied that the statement was also incuplatory.

Explanation:

Under the Bill of Rights (1960) counsel did not necessarily exclusively mean a lawyer. The purpose of s. 2 (c) (i.i) of the Bill of Rights was to guarantee that no statute or "no law" of Canada (not including those of the provinces) would be so construed or applied so as to deprive a detained person of his / her right to retain and instruct counsel without delay.

It was assumed that a person was aware of his rights and there was no obligation on the part of the authorities to inform or remind the detained person of any rights. The warning of silence was given to assist in proving the voluntariness of any utterances by the detainee so as to render them admissible in evidence as proof of the truth of their content. This warning was not obligatory and not given to inform the detainee of a right to silence. In a sense the warning was self-serving on the part of the person in authority.

The Bill of Rights guaranteed a right to counsel, but not a right to be made aware of it. It was not only a guarantee to legal advice should the detainee who was aware of that right want to exercise, it also prevented anyone from being detained ex-communicado and indeed the Courts did at times reason that who the detainee sought counsel from was exclusively his / her business.

Until the "Miranda" decision by the US Supreme Court there did exist no right for a detainee to be made aware of his / her rights. The Miranda precedent placed a responsibility on the authorities, including the judiciary, that a detained person or one in jeopardy is made aware of his / her rights at each stage of the criminal process. This is very noticeable in the US Courts where judges will ensure that those who appear before them, whether represented by counsel or not, are aware of their rights at this juncture of the process. Investigative authorities "Miranda" their detainees to avoid the consequences of the strict exclusionary rule in many states.

In Canada no such precedent exists and no such explicit provision is included in the Charter. Our constitution provides that only one right Is brought to the attention of

every detainee as soon as possible and that is the right to counsel. Our Supreme Court of Canada has repeatedly held and implied that the right to counsel is the detainee's access to all his / her rights and options in the criminal process. Our approach to every detained person being aware of his / her rights at all stages of the process is by means of the guaranteed right to counsel and the right to be so informed. What is accomplished by the Miranda principle in the US, is in Canada met by our approach to right to counsel. It, in essence, is the pearly gate to all rights and options. Consequently counsel means legal counsel.

ROADSIDE SOBRIETY TEST AND STATEMENTS BY THE SUSPECT REGARDING HIS DRINKING BEFORE AND DURING THE TEST - RIGHT TO COUNSEL

REGINA v. MOBLEY - BC Supreme Court, Vancouver CC930850, October, 1994.

In 1987 the BC Court of Appeal held that a person undergoing a roadside sobriety test is detained and entitled to right to counsel and to be made aware of that right.[9] In 1989, the BC Court of Appeal reversed that decision[10] and held (consistent with precedents set by their counterparts in other provinces) that to elevate suspicion to reasonable and probable ground so demands for breath samples can be made, the right to counsel is suspended for the duration of a roadside sobriety test. The evil of impaired driving is so great that this suspension of that right is demonstrably justified in a free and democratic society (S. 1 of the Charter).

The Ontario Court of Appeal had already in 1988[11] provided for the suspension of counsel to accommodate a roadside sobriety test. However it held also that if an officer intends to question a suspect in regards to this consumption of alcohol or seek any other inculpatory statement during this test, then the right to counsel is not suspended.

In this case the accused was stopped for erratic driving. The officer asked if he had been drinking before, during and after the roadside sobriety test. Each time the officer received inculpatory answers. After this the demand for breath samples was made and the accused was then told of his right to counsel.

The trial judge had disallowed the inculpatory answers by the accused in evidence and held that without them the officer still had the reasonable and probable grounds to make the demand. The accused was convicted of "over 80" and appealed this conviction to the B.C. Supreme Court. He claimed the questions he was asked, the inculpatory answers the accused gave and the sobriety test were inseparable and made one whole that formed the grounds for the demand.

The Supreme Court Justice disagreed with the defense position. The officer had testified that once he saw the accused swaying he knew he was impaired. When he observed the accused doing the balancing test he was completely persuaded that there were grounds to make a demand. The trial judge had reviewed the subjective belief of the officer and applied an objective standard test to that evidence, absent the statements, and had found the officer did have adequate grounds to make the demand.

---

9 Regina v. Bonogofski - BCCA, CC007 - Volume 29, page 1 of this publication.

10 Regina v. Bonin - BCCA, CC008998, Volume 34, page 1 of this publication.

11 Regina v. Saunders - 41 C.C.C. (3d) 532

Appeal was dismissed
Conviction upheld

Note:

The Crown took the position that in R. v. CHU (1989 CA009343) the B.C. Court of Appeal extended the Bonin (supra) decision to include the statements by the accused regarding his/her consumption of alcohol made before or during the sobriety test. The Supreme Court Justice did say that this was not clear enough to him to confirm the Crown's claim.

WHAT *MENS REA* IS REQUIRED TO PROVE ON ABDUCTION OF A CHILD UNDER THE AGE OF FOURTEEN BY A PERSON OTHER THAN PARENTS - MEANING OF THE WORDS "UNLAWFULLY TAKES"

REGINA v. CHARTRAND - [1994] Supreme Court [of Canada] Reports. 864. March 1994.

The accused, a 43 year old man, was hitting golf balls in a soccer field of a school yard. Eight year old Tyler A. and two of his neighbourhood friends arrived on the field to play. The accused became involved in their play upon the initiative of these boys. After the novelty wore off, the accused and Tyler remained in the school yard and the two friends left to buy refreshments. When they returned they could at first not locate Tyler but found him later in a wooded area of the school yard where the accused was taking pictures of Tyler. As the friends interfered with the picture taking they were asked to leave. As that did not work the accused and Tyler ran from the boys but they caught up. When the accused made a serious attempt for the boys to "...leave us alone", the friends bargained and promised they would if one of them could steer the accused's car around the school yard. The boy sat on the accused's lap to do so. The friends left the car and in the process overheard the accused proposing to Tyler to go to a location with him that was along a river about 3 km away. The friends advised Tyler in vain not to go with the accused.

The friends told one of their parents who in turn told Tyler's dad what had happened. Police were alerted and after a 90 minute search Tyler's dad found the accused taking pictures of his son wearing the accused's sweater. When asked by Tyler's father what he was doing with his son the accused said he had intended to surprise him and his wife with pictures of Tyler.

The accused was charged with "unlawfully" taking a child under the age of fourteen away from the custody of the parents (s. 281.C.C.). The accused argued that he had not "unlawfully" taken Tyler. The boy had come on his own accord. No unlawful act did take place in taking the boy out for a ride and picture taking session. It may have at best been irresponsible, but not unlawful. The Ontario trial court and Court of Appeal agreed and the accused's acquittal was appealed by the Crown to the Supreme Court of Canada. The Ontario Courts had labeled the accused's actions as "socially inappropriate", reprehensible and annoying, but nonetheless, the Crown had failed to show it was done with the intent to deprive Tyler's parents of their custody of the boy. The heart of the dispute between the Crown and the accused was the *mens rea* requirement in s. 281.

The Supreme Court of Canada noted a distinction between the abduction by parents and by persons "not being the parents" of a child. In the former the word "unlawfully" is deleted. Other distinctions were explored between kidnapping, hostage taking,

abduction of a person under the age of 16 years, and abduction of a child under the age of 14 years. Only in the latter is the consent of the person taken not a defense. In that taking of the person (under the age of 14 years) only the consent of the parents is a defense. In other words, in the other offenses of taking persons the person taken is the victim. The parents are the victims where a child under 14 years is taken.

The S.C.C. concluded that under s. 281 C.C. the required intent is to deprive the parents of custody rights. Considering that the aim of criminal law is to prevent harm to society, s. 281 C.C. must be interpreted with this aim in mind. Consequently the aim of this section is to prevent harm to and provide protection of children by means of creating this offense against the parents and the guardians of them. Said the Court:

> "...the abduction of children by strangers is a sad reality and a great concern to society: one is too many."

In view of all this, what does the word "unlawfully" mean in this section 281 C.C.? This word in the text of law, must mean what makes that law meaningful in relation to its object. Among others it has been held to mean: "without lawful reason or excuse"; "without excuse or justification"; "without lawful authority"; "without lawful justification or excuse"; etc. The last one was preferred by the Court and found to be suitable and befitting the section and its object. The defense argued that "unlawfully" taking the child means that besides the taking of the child requires an additional unlawful act. In other words, the means by which the child is taken must in itself amount to an unlawful act. The Supreme Court of Canada responded that that would be at "cross-purposes with the mischief Parliament wanted to cure".

Often persons who abduct a child do so without violence, observed the Court. Furthermore, the requirement that the taking must be unlawful protects people who innocently, justifiably have an excuse to take a child out of the control of the parents.

> "Surely the aim and purpose of the section cannot be to convict people who have a lawful justification for taking children such as an honourable purpose by a good Samaritan."

However, if the requirement of "unlawfully takes" was placed in s. 281 C.C. exclusively for the purpose to protect innocent and good Samaritans, then the provision is redundant and superfluous as all those persons would find ample of protection under the common law defenses under s. 8 C.C., and authorities who may have to take a child from a parent have s. 25 C.C. as a shield.

Having examined all the interpretations the adverb "unlawfully" has received, and considering that it does not appear in the French version of s. 281 C.C., the Court concluded the word was "surplusage".

Then the Supreme Court of Canada turned to the issue of the intent the Crown must show on the part of a person accused under s. 281 C.C. The Court quoted from the section that the intent must be to deprive the parent or guardian of the possession of the child. The Court affirmed that the intended deprivation needs not to be permanent. Furthermore, any withholding of the child is not an element of the offense. Taking or enticement must cause the deprivation and not necessarily detention.

In terms of intent the S.C.C. reiterated the general rule that when we intentionally do something with a foreseeable consequence to our act, then we also intended that consequence.

The accused claimed to have had an innocent motive or purpose when he took Tyler along. However, that is irrelevant to the issue of intent. Intent, purpose and motive are not one and the same. A motive is the explanation of why we acted and that does not necessarily coincide with our intent. In terms of evidence motive is always relevant and admissible but is, in Canada, as a matter of law not an essential element to be proven by the Crown.

To put it succinctly, the presence of motive helps the Crown; the absence of it is an important fact in favour of the defense; motive may be evidence of intent, however proof of motive is not necessary to prove intent.

The S.C.C. summarized the mens rea requirement for s.281C.C. that it:

> "...can also be proven by the mere fact of the deprivation of possession of the child from the child's parents or guardians through the taking, as long as the trier of fact draws an inference that the consequences of that taking are foreseen by the accused as a certain or substantially certain result of the taking, independently of the purpose or motive for which such taking occurred."
>
> "In this light, and with the purpose of the section in mind, the intent requirement of s. 281C.C.. must be interpreted so that if a child is in a park or on the street with the knowledge or consent of the parents or guardians and therefore within the realm of control and possession of the parents or guardians, and is taken, it will be rare indeed that the deprivation of a child from the parents or guardians was not the intent of the impugned act."

The accused had taken Tyler with him in his car during which time Tyler's parents were unable to contact him or locate him. They had no idea where he was or what was being done with him and he was consequently out of the ambit of his parent's control. The accused had subjectively "desired to deprive Tyler's parents" of possession through the taking or foresaw such an inevitable consequence.

Crown's appeal allowed
New trial ordered.

JUSTICE OF THE PEACE ASSISTING POLICE IN DRAFTING INFORMATION TO OBTAIN SEARCH WARRANT

REGINA v. HOWE - Court of Appeal for B.C. Vancouver CA017918. December 1994.

A police officer drafted an information to obtain a search warrant. He had written that an informer found to have been very reliable in the past, had been in the accused's home during the past eight hours, told him that there was cocaine in the home. He also had written that the home had been watched and it was confirmed that this was the house the informer had referred to. The Justice of the Peace had asked the officer if any vehicles had been seen coming and going at that address and if that traffic had been consistent with drug trafficking. When the officer answered both questions in the affirmative, the Justice of the Peace had suggested to add that fact to the information. This was done and the warrant was issued. Drugs were found and the trial judge had admitted them in evidence. The accused's sole appeal to the Court of Appeal for B.C. was that admissibility of the evidence. It was argued that the Justice of the Peace had participated inappropriately in the content of the information to obtain a search warrant. The addition invalidated the warrant and rendered the search and seizure unreasonable under s. 8 of the Charter, claimed defense counsel.

When questioned in the witness stand what that "consistent" traffic had consisted of, the officer said there was one car only, that stayed for 13 minutes. It had been stopped and marihuana had been found in the vehicle. This was consistent with street-level trafficking, he said. Dealers do not restrict themselves to one kind of drug or narcotic only. He could not remember if he had told the Justice of the Peace these details.

The precedent[12] the defense relied on to show that the Justice of the Peace had abandoned the judicial role when she participated in the drafting of the information was distinguishable from this case. Firstly, in 'Gray' the information police suggested was, on advice of the Justice of the Peace, completely redrafted. That information was originally inadequate for a Justice of the Peace to issue a search warrant. He had advised them how to make it adequate. In this case, there was only one sentence added with a content that did make the information stronger but did not alter it from being inadequate for its purpose to being adequate.

The defense argued that the last sentence implies that there was continuous traffic of cars coming and going with the occupants staying short periods of time. The officer's testimony disclosed that there was one car only. Hence, when he swore the information he misled the Justice of the Peace. It was not misleading, held the Court of Appeal for B.C...

---

12 Regina v. Gray - 81 C.C.C. (3d) 174.

"...since one cannot expect precise prose or detailed disclosures in these circumstances."

The overall conduct of the officer had shown good faith on his part. Furthermore, the admission of real evidence needed to prove essential elements of serious crimes does not bring disrepute on the administration of justice.

The appeal was dismissed
Conviction upheld.

Note:

It is clear from the two concurring reasons for judgment in this case that the Court of Appeal for B.C. unanimously agrees with their Manitoba counterpart that collaboration on the part of a Justice of the Peace in the content of information is an abandonment of the Judicial role. The proceedings are not formal, in camera, and ex parte (not in the presence of the person (s) affected). It is the Judicial role to determine if these are reasonable and probable grounds on the part of the deponents to issue a judicial license to invade the most private places of citizens who are guaranteed a right to be secure against unreasonable search and seizure by means of an entrenched constitution. A private tête-a-tete with that judicial person lending a helping hand on what may make the cheese more binding, is hardly giving the appearance of impartiality.

PROCEDURAL CHANGES REGARDING 'DIRECTED VERDICTS' AS MATTERS OF LAW TO A JURY

REGINA v. ROWBOTHAM and ROBLIN - [1994] 2. S.C.R. 463.

At common law, a judge who finds that there is no evidence upon which a jury may return a verdict of guilty, must direct the jury to return a verdict of not guilty. He or she is not allowed to enter that verdict and by-pass the jury. This despite the fact that the judge is in charge of the law and the jury determines the facts. No evidence is a point of law while insufficient evidence is a point of fact. This procedure would not be problematic if juries were not independent and need not to comply with a "directed verdict" instruction from the trial judge.

In this case a no evidence motion succeeded and there was nothing for the jury to decide. "As a matter of law" the judge said to the jury, "you must return a verdict of not guilty." The jury returned with questions instead of a verdict. They wanted to know why they sat in the courtroom for over four weeks and in the end find there is nothing for them to decide. Furthermore, some jurors having understandable problems grasping the distinction between factual guilt and legal innocence, felt the accused persons should be convicted. The jury did obey the instruction the judge gave them and seemingly reluctantly returned a verdict of not guilty but not after one juror commented: "In a way it's been a bit of a waste".

The Supreme Court of Canada (S.C.C.) exclusively dealing with this procedural issue, found that it was overdue to make changes to this common law provision. The old procedures were implemented to avoid Judicial abuse of authority. This is no longer relevant observed the Court. The Court concluded:

> "...that the common law procedure with respect to directed verdicts should be modified in instances where in the past the trial judge would have directed the jury to return a particular verdict. The trial judge should now say 'as a matter of law, I am withdrawing the case from you and I am entering the verdict I would otherwise direct you to give as a matter of law'".

Comment:

It appears that these procedural changes include all cases where as a matter of law only one verdict is appropriate. This leads to the inevitable question if this includes cases where a verdict of guilty is the only correct verdict as the defense relied on is as a matter of law not available to the accused. 'Morgentaler' juries have received "directed verdict" instructions due to the trial judges holding that the common law defense of "necessity"[13] or the defense of emergent surgical procedures in s.45 of the Criminal Code, were not available to Dr. Morgentaler. Juries have, despite directed verdicts, returned verdicts of not guilty for procuring miscarriages.

---

13 Perka, Nelson, Hines, Johnson and The Queen - Supreme Court of Canada, October 1984. See Volume 18, page 5 of this publication.

AVAILABILITY OF INSANITY DEFENCE WHEN ACTING ON DISTORTED DELUSIONARY CIRCUMSTANCES.

REGINA v. OOMEN. - Supreme Court of Canada. 2 S.C.R. 507 [1994].

The accused suffering of psychosis of a paranoid delusional type, subjectively believed that a labour organizer was planning to take his life. On the evening he murdered a woman in his apartment who he had charitably given temporary shelter. He truly but mistakenly believed that she was in on the plot against him. He had a neighbour call police and he consistently explained that he saw the woman walk by his bedroom with a knife in her hand. "Instead of her killing me I went and lowered the gun and I killed her". The victim was in her bed when she was shot but was only pretending to be asleep, explained the accused.

The accused was acquitted by a jury after raising the defense of insanity. The Court of Appeal for Alberta ordered a new trial on the grounds that the trial judge had erred in his interpretation of insanity provisions. The accused appealed that order to the Supreme Court of Canada (S.C.C.).

The S.C.C. disagreed with the Court of Appeal opinion that where a person who normally knows the difference between right and wrong suffers the delusions that distort reality and commits a crime in response to that distortion, then he is not entitled to an insanity acquittal unless the defense would have been available had the distorted scene be real. In other words, if the circumstances in his apartment had been as he believed them to be, and had she intended to kill him, he would, as things were, not have been entitled to be excused for taking her life.

The S.C.C., disagreeing with that judicial view, reasoned that had the circumstances in fact been as the accused believed they were and had due to his mental disorder reacted as he did, deprived of knowing right from wrong, he could have been excused for acting as he did. The S.C.C. held therefore that the evidence was capable of supporting a conclusion "that the accused was deprived of the capacity to know his act was wrong by the standards of the ordinary person".

Crown's appeal dismissed
Acquittal upheld

TIDBITS

Admissibility made to undercover officer by a person not detained

The accused was arrested for murder. An undercover officer was placed in his cell but nothing was gained by this. The accused was later released and while free, he made inculpatory statements to an undercover officer. He was convicted for second degree murder and appealed that conviction to the Supreme Court of Canada. He argued that although he was free at the time he made the statements, he was still the subject of a murder charge and therefore those statements were not admissible in evidence.[14] The Supreme Court of Canada disagreed and held:

> "We share the view that the accused was not detained within the meaning of Hebert and Broyles. Furthermore, the tricks used by police were not likely to shock the community or cause the accused's statements not to be free and voluntary."

Accused's appeal dismissed
Conviction upheld

REGINA v. McINTYRE [1994] 2. S.C.R. 480.

* * * * * * * * * * *

Cultivation of marijuana on public property in plain view of public road - Unreasonable search.

The accused cultivated marihuana on Crown land in plain sight from an adjacent public dirt road. Police walked down that dirt road and saw the plants and seized them. The trial judge had ruled that the walk had amounted to a search that was unreasonable. The B.C. Court of Appeal reversed that decision and ordered a new trial. The accused appealed the order to no avail, to the Supreme Court of Canada. It held like the Court of Appeal that the accused had no reasonable expectation of privacy in respect to the area where the marihuana was being cultivated. In the circumstances there was no entitlement to the protection of s. 8 of the Charter.

Accused's Appeal dismissed
Order for new trial upheld

REGINA v. BOERSMA [1994] 2. 5 C.R. 488.

---

14 Regina v. Hebert - 57 C.C.C. (3d). See Volume 37, page 16 of this publication.

Note:

The reasons for judgment fail to identify what stage of the search was challenged; the walk by the public road or the seizure of the plants. Neither does it say whether the investigators obtained a warrant for the seizures.

* * * * * * * * * *

Intent required for Assault Causing Bodily Harm

The accused was convicted of assault causing bodily harm. As the Crown had failed to show that the accused had the intent to cause the harm, the Court of Appeal of New Brunswick ordered a new trial. The Crown appealed this order to the Supreme Court of Canada (S.C.C.) arguing that no such intent is required. The S.C.C. agreed and reiterated their decisions in 1992[15] and 1993[16] that the mens rea required is objective foresight of bodily harm.

Crown's appeal allowed
Conviction restored

REGINA v. GODIN [1994] 2. S.C.R. 484

* * * * * * * * * *

Flawed Direction to Complainant

In a photo-line-up, the complainant of an alleged sexual assault was asked by the investigating officer: "...pick out the one who looked most like the person who assaulted you". The Court held that the direct and determined testimony of the complainant had overcome the flaw contained in that question. The direction the officer gave the complainant does cause one to infer that the picture of the suspect is included in the photographs shown her This, the Supreme Court Justice held, is "quite contrary to police practice."

REGINA v. MINH DUNG DOAN. B.C. Supreme Court - Vancouver CC930611 November, 1994.

---

15 Regina v. De Sousa [1992] 2 S.C.R. 944. See Volume 43, page 31 of this publication.

16 Regina v. Creighton [1993] 3 S.C.R. 3. See Volume 45, page 21 of this publication.

Is Recanting Perjurous Evidence within the Same Trial
a Defence to Perjury?

The accused gave perjurous evidence and recanted that evidence within the same trial. He appealed the conviction for perjury claiming that the recantation had negated the perjury. The Supreme Court of Canada disagreed with the accused. It held that the evidence was given to mislead the trial Court and was clearly falsehood under oath. When the evidence was adduced the offense of perjury was complete and the recantation did not negate the original intent of the accused to mislead with falsehoods. The accused's "good but misguided" notions when he gave the perjurous evidence and his change of heart, should be considered favourably in the sentencing process, but it did not provide him with a defense.

REGINA v. ZAZULAK [1994] 2. S.C.R. (5) May 1994.

* * * * * * * * * * *