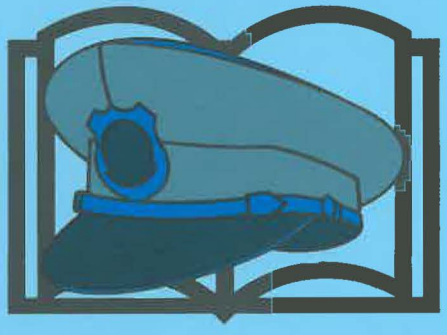
JUSTICE INSTITUTE OF B.C.

ISSUES OF INTEREST VOLUME NO. 46



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

ISSUES OF INTEREST

VOLUME NO. 46

Written by John M. Post
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TABLE OF CONTENTS

Page #

INCEST AND THE CHARTER OF RIGHTS AND FREEDOMS

REGINA v. M.S. - Vancouver Registry, CC 930288, BC Supreme Court, February, 1994

The accused was charged with having committed incest by having sexual intercourse with his biological daughter who was an adult at the time of the alleged offence. In response to the charge the accused challenged the constitutional validity of s. 155 C.C. which prohibits incest. He reasoned that the criminal sanction against two related consenting adults is creating a victimless offence. The crime of incest in such circumstances infringes the freedom of conscience and religion; freedom of thought, belief, opinion and expression; and freedom of association. Furthermore he argued that the section is *ultra vires* Federal Government as the matter belongs under family rather than criminal law.

The Court responded that incest did have an appropriate place in criminal law. Incest is just not a social taboo. The genetic risks are phenomenal as are the social and psychological consequences. Often the consent to the sexual intercourse is questionable in terms of true consent. Frequently there is a dominance involved by a father over his daughter that does not cease at a given age. Many of these relationships are exploitive and harmful.

The accused also argued that the Criminal Law of Canada provides protection for children under the authority of adults from sexual exploitation by those adults. When the children become of age they are protected by the assault provisions in our criminal law. This makes the incest prohibition superfluous and not rationally connected to its objective. The Court responded that there is a distinct difference between consent and acquiescence when it comes to a father and daughter of any age. Furthermore this argument does not include the progeny affects of incest as a reason for its prohibition.

In terms of the law prohibiting incest, the accused argued that it found its roots in church dogma and should not be part of public law as it interferes with the freedom of religion. The Court rejected this submission. Many prohibitions imposed by the Church are similar to public prohibitions but are each for different reasons and subject to totally different validity tests. The offending fathers are not in any way interfered with by the public incest prohibition to exercise any religion they wish.

The incest prohibition infringes the freedom of a father to "express" feelings between him and his adult consenting daughter. This is an intrusion into his Charter freedom of expression. The Court agreed that the incest prohibition limits the freedom of expression but that restriction is demonstrably justified in a free and democratic society (s. 1 Charter).

The freedom of association includes "intimate" association argued the accused. The Crown had contended that this Charter freedom only refers to association with peaceful assemblies and organizations. However, the Court found that should intimate association be included then incest prohibitions are still justified by s. 1 of the Charter.

Finally, the accused submitted that the incest prohibition impairs the right to life, liberty and security of consenting adults merely on the basis of status - their blood relatedness. As an example he used his anxiety over these pending criminal accusations and proceedings. The Court observed that this was unrelated to the validity of the incest prohibition. Should the period be excessive, the law provides for a remedy; a judicial stay of proceedings.

The petition of the accused was dismissed. S. 155 C.C. is valid law.

CAN A PERSON BE CONVICTED OF ACCESSORY AFTER THE FACT OF A CRIME WHERE THE PRINCIPAL OFFENDER WAS NOT CONVICTED DUE TO THE CROWN ENTERING A STAY OF PROCEEDINGS?

REGINA v. CAMPONI - 82 C.C.C. (3d) 506. Court of Appeal for BC.

The accused and Gee, the man she lived with, entered a neighbouring apartment with the intent to rob Mr. May who was rumoured to carry thousands of dollars on his person. Gee hit the victim over the head with a bottle and when the accused made Gee aware that May was still alive he stabbed him three times in the chest. May only had $200.00 on him which Gee took.

The accused cleaned up Gee's clothes, his knife and the bottle. She removed fingerprints, disposed of incriminating articles in the garbage container and removed splatters of blood in the apartment. She then phoned the ambulance telling the dispatcher that she had found Mr. May in this condition when she entered his apartment to complain about her toilet flooding. All of this information and the accused's actions were learned from her telling an undercover investigator these details and a confession from Gee.

Gee's confession was ruled inadmissible in evidence when he was tried for murder and the Crown had then entered a stay of proceedings. This caused defence counsel to argue that the accused could not be prosecuted for being an accessory after the fact to a murder committed by Gee unless Gee was convicted of that murder. The trial judge disagreed and the accused was convicted. She appealed this verdict to the BC Court of Appeal.

The Court of Appeal held that the Crown had proved the accessoryship alleged. The accused had knowledge of the circumstances in which the person she assisted to escape detection and conviction, was a party to the murder. Therefore the offence of accessory is free standing. If this was not so then the more successful the perpetrator is in meeting the very objective of the offence (to help a person escape criminal prosecution by rendering assistance and comfort) the more immune he becomes.

Safe, perhaps, where the principal offender was acquitted <u>on the merits</u> can another person not be convicted of being an accessory after the fact to the offence the principal offender was alleged to have committed. However, there was no acquittal involved here.

Appeal dismissed,
Conviction upheld.

DONATING H.I.V. CONTAMINATED BLOOD TO RED CROSS - PUBLIC NUISANCE

REGINA v. THORNTON - 82 C.C.C. (3d) 530. Supreme Court of Canada

To test the system and see if he could "get away with it", the accused, knowing that he tested HIV positive, did nevertheless donate blood to the Red Cross. He knew that his blood could cause Aids and would be used for transfusions by the medical services. Consequently the accused was convicted of "having committed a common nuisance" by not informing the Red Cross that his blood was contaminated with HIV antibodies. He thereby had endangered the lives and health of the public. He appealed his conviction to the Supreme Court of Canada (S.C.C.).

The accused argued that his conduct did not amount to an offence known to law. The offence of common nuisance is defined in s. 180 C.C. and specifically states that the endangering of lives or health must be done by "an unlawful act" or "failing to discharge a legal duty". There simply was no law the accused violated by donating his blood and consequently the focus of this case is the "legal duty" on the accused in these circumstances. The accused's blood had been eliminated in the Red Cross testing program, he knew not to be full-proof.

The S.C.C. weighed this case on the basis of the well known phrase that the biblical commandment to love your neighbour is in human made law "You must not injure your neighbour". Unless statute or common law provides otherwise we are not under any legal obligation to stand on guard for our fellowman. However, we must not commit an act to injure someone else. To refrain from doing so is a duty imposed by common law. Furthermore, s. 216 C.C. imposes a duty on us in these circumstances. The applicable portion of the section provides that everyone is under a "legal duty" to use reasonable care when administering medical treatment to or commit any other lawful act that may endanger the life of another person. This duty the accused blatantly failed to meet.

Appeal dismissed.
Conviction Upheld.

ADMISSIBILITY OF VIDEOTAPED STATEMENTS BY UNDERAGE WITNESS - S. 715.1 C.C.

REGINA v. JFA - 82 C.C.C. (3d) 295. Ontario Court of Appeal

An eight year old was allegedly sexually assaulted by her father. The girl's stepmother took her to the police and a statement from the girl was videotaped and adduced in evidence at the accused's trail for sexual assault. The admissibility of the content of the tape became an issue. The tape was admitted by the trial judge and the accused was convicted. The case then was appealed to the Ontario Court of Appeal.

The stepmother had been present during the taping and on several occasions she had answered questions the police interviewer directed at her. On at least one occasion she prompted the girl's response to a question directed at the girl. All of this dialogue included the stepmother's observations of the girl as well as conversations she had with her. All of this led to the interviewer asking the girl if she had been assaulted by the accused on other occasions. The girl then described certain incidents.

The Ontario Court of Appeal held that the tape should not have been admitted in evidence. The Court held that the words "the acts complained of" in s. 715.1 C.C. means the acts encompassed by the indictment. The girl's description of other incidents with the accused was at best "similar fact" evidence which cannot be adduced by means of s. 715.1 C.C. Any utterances by the stepmother were inadmissible and contaminated the interview and its evidentiary value.

Accused's appeal allowed.
New Trial ordered.

"OBVIOUS POLICE 'SCHEME' TO AVOID PROTECTION GIVEN TO SUSPECTS". ADMISSIBILITY OF EVIDENCE THEREBY OBTAINED

REGINA v. NOVAK, VUKELICH AND GORSEK - Supreme Court of BC, New Westminster X036442.

A municipal police officer testified that a source informed him that the three accused, one of which had been the target of police investigations in the officer's municipality, were hydroponically cultivating marijuana in the house they occupied in another municipality some distance away. That municipality is policed by the RCMP. The power needed for this operation was, according to the informer, stolen from BC Hydro by means of by-passing the meter. The officer failed to classify the credibility of the informer.

On the 2nd of September the officer drove in the company of the informer, approximately 65 km to the home of the accused. He testified that while the informer went for a walk he viewed from the road, the house and its immediate surroundings. He told the Court that he could see a Camero automobile with four flat tires and that he "had received or was able to obtain" its licence number. The car was registered in the name of one of the accused. The officer further testified that on that day the informer told him that the theft of electricity was not to grow marijuana but tomatoes.

The officer testified further the he had, as a drug section head, not paid any attention to the investigation's file. One of the section members had contacted the RCMP subdivision in which the house is situated. That member had told him that they "had showed little or no interest". The officer told the Court that he had not been able to ignore the theft and had to, "in some fashion or another", deal with the investigation. Due to the duty the law imposed on him he continued the investigation of theft of electricity from BC Hydro. Mr. Novak as well as the theft were his interest, he told the Court.

On the 10th of September the officer in the company of another drug section member again drove to the house. This time he was able to take a picture of two of the accused leaving the place.

On the 11th of September, according to the officer's testimony, he involved the BC Hydro Security Service and reported the theft investigation to them. On the 14th a Hydro Investigator, Mr. K., was assigned to assist the officer. On the 15th of September this investigator met the officer at the home and took a reading of the flow of electricity at the pole and it was found to be so abnormally high that there was a safety concern. In the sincere belief that Mr. K. had the right to enter the property without a warrant to examine the use of Corporation equipment and the use of

electricity, he did so to examine the meter. The use of electricity the meter indicated was far less than the electricity flow measured at the pole. Mr. K. while on the property found several other abnormalities indicating theft of electricity. The Municipal Officer testified that at this point he contacted the regional RCMP drug section. He was referred to a detachment, but he found there was no interest in the investigation. He then contacted his own department and proceeded to obtain a search warrant regarding the theft of electricity. When the officer arrived back at the scene nine police officers and two Hydro investigators were waiting for him. After a discussion, the police officers telling the Hydro people to stay on the road, attended at the home. As no one answered the door it was opened with a battering ram. A cursory look-around revealed the presence of a large quantity of marijuana. All officers immediately left the home and a warrant under the Narcotics Control Act was obtained. A plethora of exhibits were seized indicating extensive growing of marijuana for some time. The admissibility of these exhibits became the subject of a *voire dire* when the three accused were jointly tried for cultivating and possessing marijuana as well as theft of electricity from the BC Hydro Corporation.

What was on trial during the *voire dire* was the credibility of the authorities and particularly that of the municipal police officer. The Court held that the officer's testimony was "unacceptable". All through the reasons for judgement, criticism and cynicism of the officer's actions and veracity was blatantly obvious.

In terms of the officer's reason to continue an investigation into theft of electricity to grow tomatoes, miles away from his bailiwick, was not believed. He undoubtedly felt the accused Novak was involved in growing marijuana and he was determined to uncover his operation.

The officer's testimony about observing the Camero and noting the licence number was evidence of one of the accused living at the house. What he testified to have observed from the road, the Court did not believe. The officer was unable to see the licence number of the car or that the tires were flat from where he said he stood. The Court was "satisfied" that instead of a walk up the road, the informer walked up to the house and got the information the officer wanted, and actually became thereby an agent.

The Court also had "some problem" with the officer's testimony that he had notified the local RCMP. They told the Court that they knew nothing of the investigation until the day of the search. Furthermore, reasoned the Court, why notify the drug squad if you believe only tomatoes are being grown in the house?

The officer had also testified that he informed the BC Hydro Security Services supervisor on September 11. The testimony of this supervisor was somewhat perplexing, said the Court, as he testified to have been made aware of the

investigation and alleged theft of electricity on September 3rd by one of his own investigators. He (the supervisor) had then contacted the officer who had said that he did not have time to assist him. Also of interest was the supervisor's testimony that BC Hydro conducts its own investigations in regard to theft of electricity without assistance of police. The supervisor answered in cross-examination that if he had been in need of assistance he would have contacted the local RCMP detachment. Also perplexing was the fact that where the Court was to believe that only the theft of electricity was being investigated, police left the experts in this field, standing on the road. The personnel notified of the search were drug-section people; the amount of manpower (all drug investigators) that carried out the search; and the use of the battering ram, were not consistent with investigating a by-pass of a hydro meter to grow tomatoes miles away from main investigator's jurisdiction.

The Hydro investigator, Mr. K's evidence was not believed either. He maintained not to have had any indication that the investigation was regarding the cultivation of marijuana. He had worked with the officer quite frequently. He knew he was a drug-officer who was quite outside his territory. Furthermore, if as Mr. K. had testified the flow of electricity to the house was such that it was a safety problem he would undoubtedly shut it off as he is authorized to do in the circumstances. He is assumed to have left matters as they were as he did not want to jeopardize the officer's investigation of which "he was specifically unaware".

In regard to Mr. K's authority to conduct a warrantless search of private property, the Court held that in the circumstances he did not have that power. Firstly there was no need for him to make the search for the evidence he found. An alternative means of obtaining the grounds for the search warrant was to compare the flow at the pole with the recorded use of electricity over previous periods. The inconsistency should have sufficed to get a warrant.

When Mr. K. conducted his first search to compare the flow of electricity at the meter with that at the pole and to "observe other abnormalities" he did not have any grounds that a theft of power was taking place. However, the Crown contended he did not need this ground as he by virtue of the Tariff and s. 41 of the Hydro and Power Authority Act, has free access to private property and any equipment supplied with electricity, provided he attends at a reasonable time. This includes the power, meter and all wiring. In essence, the Court held that these provisions are not to serve the purposes for which they were used in this case. No private person who enters into a contract with BC Hydro expects these provisions to mean that BC Hydro employees can come on to his/her property and conduct random searches. Such a contract is not a waiver of one's rights under s. 8 of the Charter. The Court held that the investigator K. and BC Hydro had knowingly been part "of a scheme hatched" by the municipal officer for him to circumvent proper and legal procedures. They in fact did not act on behalf of Hydro but were agents for the police. The Court held that

had BC Hydro been in a legitimate exercise of their authority under the statute applicable to them, and encountered certain evidence that was then reported to the police the matter may have been different.

Expressing concern about a lack of credibility on the part of the authorities the Court ruled that the search was a violation of the accused's right under s. 8 of the Charter and admitting the evidence in these circumstances would bring the administration of justice into disrepute.

Crown's evidence excluded

MUST UNDER-AGED WITNESS WHO GAVE STATEMENT IN COMPLIANCE WITH S. 715.1 C.C. BE ABLE TO RECALL EVENTS OF OFFENCE WHEN TESTIFYING?

REGINA v. TOTEN - 83 C.C.C. (3d) 5 Ontario Court of Appeal

A seven year old girl told her mother how she had been sexually assaulted by the baby sitter, the accused. A police constable and a female social worker videotaped an interview of the girl by means of a camera that was in a fixed position on the other side of a one-way mirror, in such a way that all three parties were on camera all during the interview. There was a discussion that showed the girl knew the difference between a lie and the truth. She was asked what she had told her mom about the assault and was then asked to relate what had happened. Anatomically correct dolls were used to assist her in telling her version of events. At the end the girl confirmed that what she said was the truth. The interview took place 2 1/2 days after the event in question.

At trial the videotape was ruled admissible in evidence. It was played for the jury and in testimony the girl confirmed that what she told the officer and the social worker did in fact happen. This happened in the wake of the girl breaking down while questioned by Crown Counsel and being unable to respond to the questions due to emotional upset. The jury had been permitted to view the tape in the jury room during their deliberations. The accused appealed the conviction that followed, claiming that the tape was not admissible in evidence due to the unconstitutionality of s. 715.1 of the Criminal Code.

It is a principle of fundamental justice that an out-of-court statement by a witness offered as proof of the truth of its content, must be tested for reliability and its admission must be a matter of necessity. Section 715.1 of the Criminal Code which the Crown relied on to have the taped interview admitted in evidence, does not include a reliability or necessity test prerequisite to admissibility of out-of-court statements. The section simply says that a videotaped interview of an underaged witness that took place within a reasonable time after the events in question, in which that witness describes the offensive acts he/she complains of is admissible in evidence provided the witness testifies to adopt the content of the taped interview.

The exclusion of the tests mentioned above renders the section to be inconsistent with s. 7 of the Charter and consequently it is without force or effect argued defence counsel. He offered the opinion that this inconsistency was not salvageable by s. 1 of the Charter.

The Ontario Court of Appeal rejected the defence arguments regarding the constitutionality of the impugned section. It reminded the defence counsel that section 715.1 C.C. does not create an exception to the hearsay rule but an exception to the rule that evidence of prior consistent out-of-court statements are inadmissible. The tests of reliability and necessity apply to the former and not to the latter category of evidence.

The Court also held that the section does not inhibit an accused from making a full answer and defence in accordance to s. 11 (d) of the Charter. The adoption of the content of a tape must be done by means of testimony. This gives the defence an opportunity to cross examine the complainant in regard to the tape content or any other relevant issue.

There was also no fault found with the jury taking the tape into the jury room. The jury had been properly instructed about the probative value of the taped interview and the view of both counsel had been solicited and they had agreed that the jury should have it available to them during their deliberations.

The section leaves some questions unanswered. For instance it is totally silent on the purpose for which the taped statement is admissible. It could be admissible strictly to assess the credibility of the witness; to show that the statement was made; or for it being evidence of the truth of the statement's content. The Court had no trouble to hold that it is admissible as evidence of the truth of its content. Why else would the complainant have to refer to the statement in his/her testimony and adopt it as true and thereby incorporate that statement in his/her testimony.

The Court held that the word "adopt" in the section includes two aspects of the witness's testimony: he/she acknowledges to have made the statement and that his/her memory <u>while testifying</u> is in accord with the content of the statement. At this juncture of judicial reasoning there is conflict, over the meaning of "adoption".

Evidence is secured frequently by jotting down information while we still can remember details, events or witnesses. The police officer's notebook is a prime example as are a witness's scribbling of a licence number; the information the inspector writes on the inspection form, etc. At the time that person testifies he/she may not recall the details of his/her notes, but vouching that the notes were made at the time or when the recollection of things noted were still fresh in his or her mind and were accurately recorded will cause the evidence to be probative.

This doctrine of "the past recollection recorded" was created by the British Courts in the early part of this century. It made the testimony of a London tramcar inspector admissible and his safety-inspection form that he in his testimony adopted as an accurate and truthful notation of what he found during his inspection, evidence of the truth of its content. This despite the fact that he only had a vague memory of the

inspection. He testified that he routinely filled in these forms and always insured the form truly reflected the condition of the car.

Some of Courts have applied this doctrine to s. 715.1 C.C. when the child-witness could at the time of testifying, not recall all of the events contained in the statement recorded "within a reasonable time after the alleged offence". Those Courts held that if the child testified that they had told the truth when they made the statement then the witness had adopted the statement in terms of the truth of its content.

The Ontario Court of Appeal, like at least one of its counterparts, said:

> "In my opinion, it would be a rare case where the complainant could recall making the statement about the alleged assault, but not the actual assault which occurred shortly before the making of the statement. I say it would be a rare case because the events referred to in the statement are hardly of the routine sort which could be expected to pass from one's memory although a recollection of recording those events remained."

In essence recollection of the events amounting to the assault are an essential element of "adopt", as the verb is used in s. 715.1 C.C. Vouching for having been truthful as we do to meet the doctrine of past recollection recorded, is distinct from adopting a prior out-of-court statement. To adopt such a statement one must verify the accuracy of the statement from the memory of the events and be subject to cross-examination on the remembered events. To vouch for the accuracy of a previous statement is simply testifying to have been truthful in noting events one can now no longer remember. Where the doctrine of recorded resolution applies "vouching" is all that is required. However, where "adoption" is called for recollection is essential.

This reasoning caused the Crown representative to ponder what purpose this legislation serves if the complainant "must be able to recall the actual events and articulate them on the witness stand".

The Court responded that the provisions contained in s. 715.1 C.C. do not usurp other rules of evidence but "takes its place alongside those rules and procedures". The video taped statements are only admissible to the extent that it "describes the act complained of", provided the witness adopts the statement. This includes that he/she acknowledges the making of the statement and that the witness is able, "based on a present memory of the events referred to in the statement" to vouch for the accuracy of the content of the statement. Parts the witness cannot remember must be edited out if they are prejudicial to the accused. Furthermore, the content of the statements referred to in s. 715.1 C.C., must comply with the rules of evidence.

Only the acts complained of are made admissible by the section. All other things not directly "encompassed" by the indictment or hearsay or conversations which are not part of those acts, are simply not admissible. Nothing in a videotaped statement by an under-aged person is admissible in evidence unless it would also be admissible if adduced without the assistance of s. 715.1 C.C.

Furthermore, the Ontario Court of Appeal held that s. 715.1 C.C. does not usurp any judicial discretions to exclude evidence that is causing relevant evidence to have a negative effect on the fairness of a trial. Section 7 of the Charter would be violated if s. 715.1 C.C. is mechanically applied to admit such evidence. It is an exclusionary principle that relevant and otherwise admissible evidence is inadmissible where the prejudicial effect to the trial process outweighs its probative value.

With regard to cross-examination of the under-aged witness who made an out-of-Court video taped statement s. 715.1 C.C. refers to, the Court said that if it held that the witness need not recall the actual events, it would effectively cause the section to be inconsistent with an accused's right to make a full answer and defence. You cannot cross-examine a witness on something he/she cannot remember.

The Crown has a choice when it uses a videotaped out-of-court statement by an under-aged witness. It either uses the statement to refresh the witness's memory or it adduces the tape in evidence under s. 715.1 C.C. The Court held that either way, the cross-examination of the witness is the same (Of course, where it is used to refresh memory only the jury does not get to see the tape).

The Court held that s. 715.1 C.C., providing it is used as outlined above, is not unconstitutional.

Accused's conviction upheld

YOUTHS IN POSSESSION OF GOODS BELIEVED TO HAVE BEEN STOLEN - OBJECTIVE GROUNDS, AND SUBJECTIVE BELIEFS OF THOSE GROUNDS - LAWFULNESS OF ARREST - ADMISSIBILITY OF EVIDENCE

REGINA v. T.A.C. - H.J.E.S. - W.S.L. (Y.O.A.) - BC Court of Appeal, Vancouver CA017291, July, 1994.

A sheet metal worker, Mr. B., was working on a house when he heard three boys (the accused) talking about what they "got", such as a VCR, ghetto blaster, etc. All three carried back packs that appeared to be stuffed. He assumed from what he heard that they had just broken into a home. He phoned 911 on his cellular phone and continued to speak to the dispatcher until police, guided by the dispatcher, arrested the three accused. What was found on them matched what a home owner, reported missing from his home. When police attended to his call they had all the property that was taken from his home, with them.

The Provincial Court trial judge acquitted the accused trio because the arrest had been unlawful, the search and seizure unreasonable and admission of the evidence thereby obtained would bring the administration of justice into disrepute. The Crown appealed to the Court of Appeal for BC.

The search of the back packs had been warrantless and therefore unreasonable, unless the Grown showed that it was not.[1] One way of doing so is showing that the searches were incident to lawful arrests. However, at trial the arresting officer could not clearly remember if the search followed the arrest or vice versa. Nonetheless the trial judge had found as a fact that all three accused had been arrested prior to the search. Firstly, the trial judge had dealt with the objective test to determine if the arrest was lawful. She found as facts that the officers were unaware that a break-in had occurred in the neighbourhood when they arrested the accused. The informer (the sheet metal worker) was unknown to them. This informer had said that he saw three boys in the residential area and one of them had said, "I got a VCR" and the other, "I got a ghetto-blaster". When the trio saw they were being followed they had ran, jumped a fence and dropped a ghetto blaster. When they apparently thought to be free of their pursuers they had looked at the items in their back-packs. All of this would raise suspicion with anyone but is far short of reasonable and probable grounds required to effect a lawful arrest. Had the trial judge reasoned.

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[1] Hunter v. Southam Inc. - Volume 18, page 12 of this publication
Regina v. Klimchuk - Volume 40, page 19 of this publication

The Crown had not at any time adduced evidence that the officers subjectively believed they had reasonable and probable grounds to arrest the accused youths. If the officers would have had this belief "urgency" could have been relevant and have come into play. Apparently the trial judge did not draw the inference from the officer having effected the arrests that they also had the requisite subjective belief to be in a position to arrest.

Although there was merit in the Crown's argument that the objective test had been met and that the officers did have, in fact, the reasonable and probable grounds to effect the arrest, without the subjective belief, the arrests were unlawful held the BC Court of Appeal. This made the search of the back packs unreasonable under s. 8 of the Charter. In the circumstances the reasonableness of the searches hinged on the lawfulness of the arrests.

The BC Court of Appeal held however, that despite the unlawful arrest and unreasonable search the evidence found as a result should not necessarily have been excluded. The trial judge had erred in law as well as in fact. She should have considered if admitting the evidence would have affected the fairness of the trial. Also the seriousness of the offence alleged and the consequences of exclusion should have been considered.

In the well known and trendsetting *Collins*[2] case, the Supreme Court of Canada held, "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone". Real evidence that existed irrespective of the Charter violation, does not render a trial unfair.

The trial judge had held that the unlawful arrest had been used as a means of conducting an investigation. That, she had considered, was a serious breach of a Charter right of the evidence thereby obtained should be excluded to uphold the integrity of the administration of justice.

This reasoning by the trial judge was in error. The officers were not in error, held the BC Court of Appeal. The officers were not acting on suspicion alone. The accused had not been compelled to produce evidence against themselves and police had not used a camouflage manoeuvre to gain the evidence (like a random sobriety stop of a person to see what is in clear view in his/her car).

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[2] Regina v. Collins - Volume 27, page 1 of this publication 33 C.C.C. (3d) 1.

The objective grounds for the arrests were not mere suspicion, police had "compelling" evidence that the accused had stolen property in their possession. The BC Court of Appeal held that these matters and the admissibility of evidence should be reconsidered with attention being paid to their corrections about the law and facts.

Crown's appeal allowed,
new trial ordered.

SELF DEFENCE - IMMINENCE OF HARM - APPREHENSION OF FUTURE HARM - - EXCESSIVE FORCE - RETREAT

REGINA v. LAVALLEE[3] [1990] 1 S.C.R. 852 - Volume 38, page 9 of this publication; REGINA v. PETEL - [1994] 1 S.C.R. 3; REGINA v. IRWIN - Court of Appeal for BC, Victoria, V01720

The excuse of self defence, when one has caused injury or death to another person, is drastically being changed by the judiciary. The meaning and interpretation of s. 34 of the Criminal Code is amended without the involvement of Parliament. The common law and the application of that section has always been that one is excused in repelling an assault only after having retreated as far as is reasonably possible, that the repelling force may not be excessive and that the harm, subjectively, must be imminent. Future harm was not included in what excused a person from criminal liability, when he/she used force on the person who would inflict that harm. This changed in 1990 by means of a decision by the Supreme Court of Canada in *Regina v. Lavallee*.

Regina v. Lavallee

Ms. Lavallee and her common law husband entertained a number of guests at their home. The husband was very abusive and hospital records revealed at least eight emergency treatments of Ms. Lavallee due to injuries inflicted by the husband. On this occasion the husband did send Lavallee to her bedroom as she was impertinent to him in front of the guests. He followed her shortly afterwards and assaulted her and the guests could hear the screaming and thumping. He reminded her that she was his "old lady", and she was to do as she was told. He promised that she would "get it" as soon as all the guests were gone. He then gave her a loaded rifle and said, "....you either kill me now or I'll get you". He then turned around and walked towards the door. She shot him in the back of the head and was consequently tried for second degree murder. A jury acquitted Lavallee, the Court of Appeal for Manitoba ordered a new trial, and the Supreme Court of Canada restored the acquittal. The heart of the issue was the requirement of imminence, at the exclusion of prevention of future harm.

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[3] Regina v. Lavallee [1990] 1. S.C.R. 852 - Volume 38, page 9 of this publication.

In the Supreme Court of Canada reasons for judgment, the "battered wife syndrome" was predominant in the conclusion that no longer does the apprehended danger or harm have to be imminent. In fact, the emphasis was so focused on that syndrome that it is not an unreasonable inference that the precedent only applies to domestic scenes. Needless to say, such a notion is not likely to be correct, as similar fears from oppressive and intimidating interaction between persons in all kinds of settings can cause emotions similar to those of the "battered wife". This became quite apparent when the Supreme Court of Canada, four years later, was confronted with the same questions in relation to a murder committed by a person battered in a criminal setting and relationship.

Regina v. Petel

Mrs. Petel's[4] daughter lived common law with E., who was an active drug dealer. The couple was evicted from their apartment and moved in with "mom", Mrs. Petel. Mr. R., the partner of E. in his illegal trading and marketing, also frequented Mrs. Petel's home. E. was very abusive towards Mrs. Petel. She described her life as "a terrible existence". E. was always angry and beat her daughter frequently. E. threatened Petel with violence and made her accommodate his trafficking and the constant flow of customers. To put an end to this horrible lifestyle, she moved. This was to no avail as E., without her consent, continued his trafficking operation at Mrs. Petel's new location.

One day, E. came to Mrs. Petel's home and made her weigh cocaine and ordered her to hide a revolver for him. E. "suggested" that he would kill Mrs. Petel, her daughter and granddaughter. At this point her daughter came in with Mr. R. E's business partner. Mrs. Petel got the revolver E. gave her to hide for him and shot E. R. lunged at her and she shot him as well. E. recovered from his wound but R. died. Mrs. Petel was convicted of second degree murder, but the Quebec Court of Appeal ordered a new trial as it saw no distinction between the Lavallee case and the situation Mrs. Petel found herself in. The Crown appealed this decision to the Supreme Court of Canada (S.C.C.).

The S.C.C. said that there are three constituent elements to self defence contained in the wording of s. 34 C.C. - (1) the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm; and (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary. To determine if there was an unlawful assault we must not try the victim as it is the accused who is entitled to the benefit of the doubt. The question

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[4] Regina v. Petel [1994] 1 S.C.R. 3.

therefore, is not whether the accused was unlawfully assaulted, but "did the accused actually and reasonably believe, in the circumstances, that he was unlawfully assaulted". Beware, that this includes, according to the definition of assault, an act or threat that gives one reasonable grounds to believe that his/her adversary has the "present ability to effect his purpose". Consequently, the S.C.C. held that that belief must be reasonable, meaning that any ordinary person placed in the same circumstances may come to the same conclusion.

Referring to the Lavallee decision, to determine if it was a precedent regarding the defence of self-defence raised by Mrs. Petel the S.C.C. held that it clearly was. The Lavallee decision "rejected the rule requiring that the apprehended danger be imminent". It said that that rule had come from an assumption that the defender and adversary are of equal strength. This assumption can be rebutted by evidence, particularly expert evidence, that there was a reasonable apprehension of danger and a belief that it could not be extricated other than by killing the adversary. However, proof that the apprehended danger was imminent is not a formal requirement.

The S.C.C. in a five to four decision dismissed the Crown's appeal and upheld the Quebec Court of Appeal order for a new trial for Mrs. Petel.

Regina v. Irwin[5]

In the wake of these cases the BC Court of Appeal heard an appeal by James Irwin who had been convicted of manslaughter. He also raised the excuse of self defence while his apprehended harm was of the future.

A drug deal went sour and a party by the name of Hanson, the deceased, had felt "ripped off" by Irwin. Hanson came to the bus Irwin called home. Hanson was armed with a shotgun and allegedly said, "For a quarter you die". Irwin and Hanson struggled when Hanson tried to open the door of the bus and managed to put the barrel of his shotgun through the narrow opening. Hanson fired his shotgun twice during the entire episode but did not do any damage. Irwin, the appellant, fired his rifle three times, two times in rapid succession as he rushed out of the door and the third time as Hanson was trying to get up and had "growled" at Irwin.

Hanson apparently died instantly from the third shot. Irwin and a friend buried the body. The next day Irwin saw his lawyer and told him what happened.

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[5] Regina v. Irwin - BC Court of Appeal, July 1994, Victoria, BC V01720

The accused testified at his trial for manslaughter and swore that Hanson had come to kill him and that he had to take Hanson's life to preserve his own. However, friends of the appellant, including the lady friend who was with him that night, testified that the appellant had said that he had to kill Hanson (despite the fact he had incapacitated him) with that third and fatal shot. He had reasoned that Hanson would recover from his wounds (first and second shot) and be back in six months or so, to kill him.

The trial judge had instructed the jury that self defence does not include future harm; that the harm apprehended had to be imminent; that the force used to preserve oneself is not to be excessive; and that the person defending him/herself has to have retreated as far as is reasonably possible.

The jury had returned a verdict of guilty and Irwin appealed that conviction to the BC Court of Appeal relying on the Supreme Court of Canada decisions in Lavallee and Petel. Irwin claimed that the jury had received erroneous instructions particularly in relation to the apprehended harm having to be imminent.

The Court of Appeal for BC acknowledged that the Supreme Court of Canada in their Petel decision had treated Lavallee as:

> "rejecting any rule that requires the apprehended danger to be imminent"

However, in Lavallee the Supreme Court of Canada describes the apprehension and the actions of Mrs. Lavallee as follows:

> ".... a final desperate act by a woman who sincerely believed that she would be killed that night".

The significance of this, is that in Lavallee there was on the evidence a reasonable apprehension of death in the near or immediate future. The jury in this Irwin case was confronted with evidence that revealed an incapacitated adversary who received a deliberate additional bullet in the head, as Irwin speculated, based on knowing his adversary, that he would, be back to kill him after he recovered from the wounds that had incapacitated him. The Court of Appeal drew the inference that Irwin's fear that Hanson would be back to kill him in future, arose from the fact that he had shot Hanson twice and wounded him. The Lavallee case did therefore only apply to the third and fatal shot. Irwin's apprehension of death was neither near or immediate. Consequently this ground for appeal was rejected.

When a person is unlawfully assaulted the excuse of self defence is not one the defence has to establish. The burden is on the Crown to show, beyond a reasonable doubt, that an accused person was not acting in self defence. For self defence under subsection (2) of s. 34 C.C. excessive force is not an issue as it is in subsection (1) of that section. The issue in subsection (2) is whether an accused person has a reasonable apprehension of death or grievous bodily harm, and believed on reasonable and probable grounds that he could not otherwise preserve himself from such harm. This is in essence what the jury had been told. It had also been warned to remember that "detached reflection cannot be demanded in the presence of an uplifted knife", or as in this case, one looks down the barrel of a shotgun in the hands of an adversary. In view of the evidence these instructions were clear and correct held the Court of Appeal for BC.

The defence also attacked the instructions the jury had received regarding the obligation to retreat under the rubric of self defence. The Court of Appeal pointed out that this obligation is included in the wording of s. 34 (2) C.C.:____ "... he cannot otherwise preserve himself from death or grievous bodily harm". This, of course, refers to the required mind set or belief the accused had at the time of the unlawful assault. Hanson was approaching the bus Irwin lived in, with shotgun in hand. There was a door on the other end of the bus through which Irwin, the accused, could have escaped and could have concealed himself in the surrounding bushes. No one, implied the Crown, who only wanted to defend himself, would aggressively jump out of a door and expose himself to a person with a shotgun who was there for the sole purpose to kill him.

The defence claimed that this instruction to the jury was erroneously incomplete. It should also have been told that "a person need not retreat to the point of giving up his house to his adversary before a defence of self defence would excuse his actions."[6]

Although the trial judge had not specifically said that the accused, Irwin, could have preserved himself by going out the other door, he did only say that these facts in evidence were for them to consider. Although, technically, the instruction was incomplete, there was no substantial wrong or miscarriage of justice.

The accused's appeal was dismissed.
Conviction for manslaughter was upheld

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[6] Regina v. Deegan (1979) 49 C.C.C. (2d) 417.

APPLICATION AND LIMITATION OF RULE OF EVIDENCE KNOWN A "RECENT POSSESSION"

REGINA v. SAUNDERS - Court of Appeal for BC, Vancouver, CA017540, June 1994.

The accused and another person, were arrested in a car parked outside a home that had just been broken into. Stolen property from the home was found in the car. Although he did not own the car he seemed to have it with the owner's consent. By means of the application of the rule of evidence known as "recent possession"[7] the accused was convicted of breaking and entering and theft. Other than the above, there was no other evidence to support the convictions.

When police investigated the break-in they found two small fires burning in the home. The accused was as a result convicted of intentionally and recklessly causing damage by fire (s. 434 Criminal Code). Needless to say, the rule of evidence that led to his convictions of breaking, entering and theft, was questioned for application, and "overreach". What is reasonable for a jury to find that the accused did set those fires; that he aided or abetted his passenger in setting the fires or did he have an intent in common with his passenger to commit the break in knowing that the setting of the fires were a probable consequence of that crime? The accused asked these questions of the BC Court of Appeal appealing his conviction of causing damage by fire.

The BC Court of Appeal held the conviction of breaking and entering and theft is in the circumstances appropriate. The inference of that guilt, considering the evidence, is "unassailable" said the Court. However that same rule of evidence is of no assistance to meet the burden of proof on the Crown to prove that the accused by any of the three means mentioned above, was criminally liable for the fires.

Accused's appeal allowed, Conviction of causing damage by fire set aside.

Accused's Appeal re: Breaking, Entering and theft dismissed.

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[7] Regina v. Kowlyk - Supreme Court of Canada 1988 - Volume 33, page 15 of this publication, as well as Volume 25, page 28.

"THE DIARRHOEA DEFENCE"

REGINA v. POWELL - BC Provincial Court - Delta File #19853.

When "nature" calls, failure to attend to its urging, can have serious consequences. In this case responding to its call caused a Mr. P. to be charged with failure to comply with a demand for breath samples. He claimed to have an excuse for that failure as he was subject to a superior claim to shed another kind of bodily substance. To lay a basis for this innovative defence the investigating officer, Cst. Doug Merryman, was thoroughly cross examined. He was allowed to express his opinions and observations only experts are allowed to give. The officer is an expert because he is human and had five children.

No sooner had the officer arrived at the police station, of the accused asked to use the bathroom facilities. The officer, of course, escorted the accused not to lose continuity of observation. What he observed and became aware of by means of other senses while he shared the "facilities" with the accused was all brought out in cross-examination.

The officer was asked to concede, by the sounds he had heard and the odours he had smelled, that the accused had had a large, noisy and smelly voiding of the bowels. Considering his embedded memories of the event, he wholeheartedly agreed with defence counsel. So far so good for the defence. However, the officer disagreed that what he heard was "an episode of diarrhoea". When asked how he could have concluded this the officer testified that he went by the sounds he himself makes when he voids with a rush. Then he volunteered that he was also familiar with the sounds one makes when things don't flow that well.

By now it was clear the accused would claim that his urgent bodily functions had prevented him from attending to the breathalyzer obligations he had. This involuntary act, surely, amounted to a reasonable excuse.

Then the issue of expert testimony was raised and it was agreed that to diagnose someone else's methods of voiding the bowels by sound and smell, perhaps no one is or all of us are experts. The officer, at this stage, testified to have five children and had heard many times all the familiar sounds that accompany the various voiding processes. Hearing this the Court suggested, "You may be an expert". Defence counsel agreed.

No sooner had the officer and the accused been back in the booking area and the accused been supplied with a list of lawyers, he had to go back to the bathroom. According to the "expert" officer no attempt had been made that time to have a

bowel movement although the accused took the required position for six minutes. Here is where defence counsel pounced on our expert. How could he say no effort had been made by the accused? Did he not know that when you have the condition the accused claimed to have no effort needs to be made? The officer asserted that some exertion is required at all times which is noticeable by watching the person's eyebrows. "The eyebrows turn red as they gather up all their energies to ..... focusing on .... to one area". The officer now had to follow through. The judge assured him that he was doing all right and was within the perimeter of the law of evidence to elaborate. The officer went on to explain, "The red eyebrows and contortions in the face, a reddening as they're focusing their energies can be a normal display of an attempt to void one's bowels".

He distinguished this from diarrhoea. That comes, he attested "without effort, with very distinct sounds, a splashing interjected with bodily air". " It is almost like somebody turning on a tap at times and at other times it's sporadic, interspersed with bodily air". That, the officer said, was his own experience and that of his family, but that is not what he saw or heard from the accused. Upon further drilling by defence counsel the officer said he had vivid memories of the smell but there was no splashing. Then the cross-examination went on about another symptom the officer said was somewhat "vulgar and known as farting". "Air being passed?" inquired counsel. "Passing wind", responded the expert. The only thing agreed on was that the accused had the first time he used the bathroom, a very large bowel movement although the content of the toilet bowl had not been examined.

The second time the accused attended the bathroom the breathalyzer operator announced he was ready and the accused was asked to make himself available. "I have to take a shit", he responded. "Isn't it true officer, that he said 'I have the shits'?" "If that is what he said, that is what I would have in my notebook. I have a clear recollection that he said, "I have to take a shit". At this point the accused was pressed to come along and stop, what the expert believed, was a faking of inability to comply with the breathalyzer demand. It was conceded that the accused never did say he would not blow (breath that is) into the breathalyzer. The accused said, "I'm not getting off this shitter, I have the flu".

The trial judge apparently did not accept the accused's claims as she convicted him of failing to supply breath samples.

OFFICER CONDUCTING WARRANTLESS SEARCH - RELIANCE ON A PRECEDENT UNDER APPEAL - PRECEDENT REVERSED "GOOD FAITH" ON THE PART OF THE OFFICERS

REGINA v. SENEY - Court of Appeal for BC, Vancouver CA 013504

Police investigated a break-in in the accused's neighbourhood. The investigating officer canvassed the neighbours including the accused. As he walked up to the house the smell of marihuana was unmistakable. As the accused opened the door to talk to him the officer confirmed the smell came from the house. The officer notified the drug squad of his suspicions and that he had observed how the basement windows were boarded up which he knew to be a sign of cultivation of marihuana. He notified Detective T. of the Drug Squad who conducted a warrantless perimeter search under the search provisions of the Narcotic Control Act. He looked through the vent in the basement and could clearly see the marihuana plants. A search warrant was obtained and executed and consequently the accused was charged with cultivation and possession of marihuana.

What Officer T. did (the warrantless perimeter search) in March of 1990 had been found to be "reasonable" by the BC Court of Appeal in 1988[8] in terms of s. 8 of the Charter. The officer was very much aware of this decision but conceded also to know that this Court of Appeal decision was under appeal to the Supreme Court of Canada. In January of 1991, the S.C.C. reversed the BC decision[9]. (Since then the S.C.C.[10] reiterated their views at least in two other cases, not distinguishable from the Kokesch decision). The accused was tried after the Supreme Court of Canada decision and consequently Detective T's warrantless search was found to have infringed the accused's right to be secure of unreasonable search or seizure under s. 8 of the Charter.

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[8] Regina v. Kokesch - Volume 33, page 41 of this publication - 46 C.C.C. (3d) 194.

[9] Regina v. Kokesch - Volume 39, page 6 of this publication - 61 C.C.C. (3d) 191.

[10] Regina v. Grant - Volume 45, page 1 of this publication, 84 C.C.C. (3d) 161.
Regina v. Grant - Volume 45, page 7 of this publication, 84 C.C.C. (3d) 203.

Needless to say Detective T. had conducted the impugned search when it was by statute and precedent proper to do so. This, the Crown argued, meant the officer had acted, "in good faith". The trial judge held that the officer's awareness of the BC decision he was relying on, being under appeal to the S.C.C. precluded him from having acted in good faith. He excluded all of the evidence and the accused was acquitted. The Crown appealed the exclusion and the verdict of course, to the BC Court of Appeal.

When the officer investigating the break-in reported his suspicions to Detective T, the memorandum only said that he suspected, "there was marihuana at the above address". That officer was at the front door of the accused's home for a perfectly lawful purpose. What he saw and smelled was enough for a search warrant. Regrettably his report did not mention any of those details. However Detective T. did not have those details and therefore did not personally have the belief that an offence under the Narcotic Control Act was being committed. Consequently the defence argued that the officer's knowledge of and reliance on the first Kokesch decision was irrelevant. He simply had no grounds at all, even if a warrantless perimeter search under the N.C.A. was permitted. Hence the argument of good faith was superfluous. Good faith only applies where a searching officer does not only believe to be entitled, in law, to conduct the search, but also believes on reasonable grounds that an offence under the N.C.A. is being committed. In all the cases (Kokesch, Grant, Plant and Wiley[11]) the officers did have those beliefs when they conducted the warrantless searches.

The Court of Appeal for BC disagreed with the reasoning by defence counsel. The Court said that its decision in 1988 said,

> "that such searches may lawfully be conducted around a residential building without warrant, even when the officers involved are not satisfied they have reasonable grounds to believe that a narcotics offence is being committed within the residence, and are seeking evidence on which belief can be based so as to able to obtain a warrant to search the residence itself".

It was that decision Detective T. was aware of and relied on when he conducted the warrantless perimeter search of the accused's home. As the law was at that time, no statutory authority was needed to conduct such a search. S. 10 (1) (a) N.C.A. was consequently "inapplicable" in this context and Detective T. was acting in good faith.

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[11] Regina v. Wiley [1993] 3 S.C.R. 263.

With regard to Detective T. knowing that the law (case) he relied on was under appeal, the Court of Appeal, relying on the Wiley decision by the Supreme Court of Canada said,

> "the Supreme Court of Canada was of the view that the police officers acted in good faith....It held that allowing the appeal of Kokesch did not 'turn back the clock' so as to impeach the good faith of the officers who conducted investigations in the meantime in reliance on the decision of this Court". ".... police officers are not expected to predict the outcome of appeals".

Crown's appeal allowed. Acquittal set aside.

New trial ordered on all issues

OFFICERS LACKING BELIEF THAT THEY HAVE GROUNDS TO EFFECT AN ARREST. ACCUSED SEARCHED BEFORE ARREST - UNREASONABLE SEARCH - ADMISSIBILITY OF EVIDENCE

REGINA v. HARPAL SINGH THANDI - Court of Appeal for BC, Vancouver CA 017451

A Crime Stopper tip said that the accused would arrive in town on the 7:00 a.m. bus. The informer knew this from the person who put him on that bus. The accused would be carrying an ounce of pure heroin on his person. The informer was intoxicated and claimed to be East Indian like the accused.

Two police officers with very little drug work experience met the bus at 7:00 a.m. There were two East Indian men on board. One did not fit the detailed description given by the tipper at all, the other did fit it in every conceivable detail. Another peculiar aspect of the accused was that he wore a heavy leather jacket on this warm day in July.

The accused made a telephone call and left the bus station. The officers approached the accused, did not ask for his name (in spite of the fact police were given the suspect's name by the informer), but asked him to come over to the car for a discussion. He was asked if he had any drugs on him and what the large lump was in the front pocket of his jacket. The officers reached in and retrieved an object wrapped in tinfoil. The accused said it was "coke". He was arrested, warned and Chartered. The substance was found to be heroin. The accused also gave the officers an inculpatory statement. He said that the heroin and a small quantity of cocaine were for him to transport and deliver to another person. He was fully aware what he was carrying.

The officers testified that they had not thought to have enough grounds to effect an arrest until the accused had said the substance found on him was cocaine. This meant that the search was not incident to the arrest. A search without an arrest requires the same grounds as an arrest, to be lawful. The officers not having the subjective belief they could have lawfully arrested the accused, caused the search to be unreasonable under s. 8 of the Charter. Consequently the trial judge was urged to exclude all of the evidence including the statement the accused had made. He declined to do so as the evidence was real and the violation was not a serious one. However, the statements were excluded as they were the result of the unreasonable search and that admission would affect the fairness of the trial. The accused appealed the conviction to the Court of Appeal for BC.

Needless to say, objectively the officers had sufficient grounds to have arrested the accused before searching him. Counsel for the accused urged the Court of Appeal to hold that lack of subjective belief should be carried forward to a s. 24 Charter exclusion of evidence. The Court refused to do so and would not interfere with the trial judge's decisions. This would be a different matter had there objectively been a lack of grounds.

Accused's appeal dismissed

Note:

The reasons for judgment do not mention anywhere what the arrest was for or what the accused was convicted of. Imagination and the above facts have to fill in that omission.

DEFENCE OF POLICE HARASSMENT TO SPEEDING

REGINA v. LANGSTON - BC Court of Appeal, Vancouver CC 931699.

Ms. L. was tried for speeding by an Justice of the Peace and was found guilty. She appealed her conviction to the BC Supreme Court.

The evidence was that she was proceeding on a multi-laned freeway and was catching up rapidly to a police car, and overtaking it. The radar set registered her speed at 103 km per hour in a 80 km zone. The officer then paced the accused's car in a lane adjacent to the one she was travelling in. She increased her speed to 116 km per hour, but was then in a 90 km zone.

Ms. L. denied speeding but said that if she did it was in response to fear and insecurity "instilled by the officer's negligent and unprofessional handling of the situation." It was dark and the police car was unmarked. When the officer had started to drive along side of her for a distance of about 3 km, she had become alarmed and may have increased her speed to get away. She said the officer's method had amounted to intimidation and harassment. Speeding was her response and that should not have resulted in a conviction.

The Supreme Court Justice said that she might have reached a different conclusion had she presided over the trial. However, it was not this Court's function to retry this case. The Court said it was for the trial judge to weight the evidence and that evidence supported the charge.

Appeal dismissed.

DEFENCE APPLICATION FOR INFORMER'S CRIMINAL RECORD TO TEST VALIDITY OF NARCOTIC CONTROL ACT SEARCH WARRANT

REGINA v. KELLY - BC Supreme Court, Vancouver CC 930757.

Acting on confidential and reliable information from a human source a police sergeant was granted a search warrant under the Narcotic Control Act. The accused's home was searched and the narcotics on which the charge against him was based were found.

In cross-examination, the sergeant was asked to tell what he knew of the informer's criminal record and applied to the Court for disclosure of that record. The defence counsel requested that the trial judge edit that record so it would not reveal the identify of the informer. To the latter suggestion the Court responded that both objectives could not be met by editing the criminal record of the informer. It would indirectly reveal the identity of the informer the Court was obliged to protect.

Defence counsel argued that the credibility of the informer cannot be accepted by the Court or the defence simply on the opinion of a police witness. At the time of the application the applicant for the warrant must have such belief. His belief afterwards, because things have turned out the way the informer said it would, is not the belief that validates the warrant. The issuing Justice of the Peace should have been informed of the informers criminal record. For instance, convictions for perjury should have considerable weight when a Justice of the Peace grants the invasion of the privacy of a person based on the reliability of an informer so convicted. All such information must be disclosed to the Justice of the Peace to ensure true judicial discretion. In a case like this, the applicant's beliefs in regard to the reliability of an informer carry little weight as the validity of the search warrant is tested on the basis of the reasonable grounds the informer provided, argued the defence.

The Court responded by telling defence that a warrant to search is a judicial licence that is not invalid until the Crown proves its validity beyond a reasonable doubt. Issuance is the result of a judicial process and it must be presumed that it was valid. If an accused person wishes to attack any aspect of such a warrant the onus is on him to show it on a balance of probabilities and that as a consequence the issuance of the warrant was invalid.

In this case the defence applied for the Supreme Court trial judge to review the issuing judge's decision. This review is limited to determining "whether there was evidence upon which the Justice of the Peace acting judicially, could have determined whether a search warrant should be issued". If there was evidence before the issuing judge

that provides reasonable grounds 'to believe' then that ends the matters unless there is evidence before the reviewing judge of fraud, misleading evidence or non disclosure.

Where information of an informer is relied on for reasonable grounds, special requirements must be met. The applicant must not reveal the identity of the informer. To satisfy the Justice of the Peace that the informer is reliable the applying officer does dispose to that fact and should provide information to support his belief. The Justice of the Peace must then consider, based on all of the information deposed to if the applying officer has reasonable and probable grounds to believe that the accused "was committing the offence alleged". The information supporting the officer's belief that the informer is reliable, may consist of the details of the "tip"; the informer's knowledge: the indicia of the informer's reliability "based on past performance or confirmation from other investigative sources".

Needless to say, the accused has access to all information that was given to the Justice of the Peace. If the criminal record was not revealed by the applicant it was not done to deceive but to not identify the informer. Deliberate and deceptive withholding of evidence would cause a search warrant to be set aside at trial; inadvertent omissions will not result in setting the warrant aside unless the omission causes the application to be so incomplete in terms of its validity that the warrant cannot stand.

The Supreme Court trial judge examined the application for the search warrant and found that there was sufficient information to justify the issuance of the impugned warrant. That the informer has a criminal record would not have lessened the grounds the Justice of the Peace found there were. That informers have criminal records does not come as a shock to anyone in the criminal justice system. That gives them credibility in the underworld and that is why they can move around freely. Generally informers are not fine upstanding citizens. Even if what they tell police is a lie and it is later discovered to be a lie, the warrant need not fail unless the affiant knew or ought to have known that the informer lied. What is far more important than the informers criminal record is his record for reliability and if police have been able to confirm some aspects of the information he gave police. What is critical is not the motive of the informer but the reliability of the information supplied by him. Said the Court:

"In my opinion the interests of society in the administration of justice and the protection of the informer, far outweigh the interest of the accused's privacy and in the revelation of the identity of the informer."

Application for disclosure of informers criminal record dismissed

POLICE ARRESTING ACCUSED IN VAN REPORTED TO BE INVOLVED IN COCAINE TRAFFICKING - LAWFULNESS OF ARREST

REGINA v. RIMMER - Court of Appeal for BC, Vancouver CA 016819, April 22, 1994

Police received information from a reliable source that a van of certain description and licence number would be used by a Mr. H. to deliver cocaine. Police did spot the van and started to follow it. Surveillance was lost for a period of approximately two hours. Then it was seen parked in a private driveway, with the driver behind the wheel with the engine running. As two officers approached the van one male person came out of the house. When he saw the officers, that person very abruptly went inside again.

The accused was the driver of the van and he was asked for the usual documents. As he produced them the accused was then seen to surreptitiously move his hand and secret something in his pocket. One officer grabbed the accused's wrist and found a deck of cocaine in his hand. The accused was then arrested for possession of narcotic and subsequently convicted. He appealed this verdict to the Court of Appeal for BC.

The accused claimed that the evidence against him was discovered by means of an unlawful arrest. The accused was arrested when the officer grabbed the accused's wrist. At that time the officer did not have the grounds prerequisite to a lawful arrest. How could he have a true subjective belief that what the accused was placing in his pocket was a prohibited substance, the possession of which amounts to an indictable offence? The warrantless arrest would have been lawful if the accused had knowledge that the accused had a narcotic in his pocket.

The Court of Appeal responded that if there was actual knowledge on the part of the officer, belief is irrelevant. The crucial question is whether the officer had belief and reason to believe that the accused had a narcotic in his possession when he grabbed the accused's wrist. In other words did the officer have the reasonable and probable grounds for his belief, subjectively and objectively.

The Court of Appeal found that subjectively the officer believed that the accused possessed a narcotic. Considering the circumstances and what the officer knew, he also had, objectively, the reasonable and probable grounds to so believe. He knew the

source of the information to be reliable and was very much aware of the burgundy coloured van being used in the trafficking of narcotics. In addition the van showed up at the location the informer said it would. All this is adequate to meet the "Debolt test"[12] laid down by the Supreme Court of Canada in 1989.

Accused's appeal dismissed.

[12] Regina v. Debolt - Volume 36, page 27 of this publication. [1989] 2 S.C.R. 1140.

WILDLIFE OFFICER STOPPING VEHICLE AND QUESTIONING OCCUPANTS - CHARTER VIOLATIONS - ADMISSIBILITY OF EVIDENCE

REGINA v. MEISE - BC Supreme Court, Prince George Registry 25345, April 1994

The accused was the passenger in a pick up truck the driver of which carried a rifle. The driver was properly licensed to hunt and carry the firearm.

The accused also had a rifle in the cab of the truck. When a BC Conservation Officer asked the accused to produce his firearms licence the accused said he was not going to hunt but was headed for the bush to sight-in the rifle. He had assumed that his friend's hunting licence would cover both firearms.

The accused was acquitted of "Carrying a firearm without a licence" under the BC Wildlife Act. The officer had failed to warn the accused of his right to remain silent and inform him of his Charter Rights and the trial judge had found that the accused's answers to the Wildlife Officers questions were not proven to be voluntary. Consequently his admissions were inadmissible in evidence.

The Crown appealed the acquittal to the BC Supreme Court claiming that the test used by the trial judge, was erroneous. He had held that the Crown had failed to satisfy him that the accused "could reasonably have been expected to think that he had a choice whether or not to answer the question" put to him by a man "clothed literally....with authority". The trial judge had also refused to deal with the issue of "detention" that triggers the Charter warning. In terms of admitting the statements as proof of the truth of their content the issue of voluntariness on the part of the accused was also inadequately dealt with claimed the Crown.

The Supreme Court held that the stopping of the pick up truck does according to the Supreme Court of Canada[13] constitute detention. The Court also recognized that a detained person has a right to silence under s. 7 of the Charter[14] although he does not have a right to be so informed.[15]

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[13] Regina v. Thompson and Regina v. Hufsky - Volume 31, page 20 of this publication. [1989] 63 C.R. (3d) 14.

[14] Regina v. Hebert - Volume 37, page 16 of this publication, (1990) 57 C.C.C. (3d) 1.

[15] Regina v. Van Den Meerssche - Volume 36, page 35 of this publication also (1989) 53 C.C.C. (3d) 449.

All these cases show that no right of the accused had been infringed. However, the Crown is still required to show that the accused was aware of his right to remain silent and had an understanding of the consequences of making the statements (Hebert decision). Without the "silence" warning or the accused having spoken to his counsel, such awareness is very difficult to show.

The Wildlife Act of BC authorized the officers to stop motor vehicles to determine hunting, trapping or angling activities. The accused was "detained" and had a right to remain silent but not a right to be so informed. To prove voluntariness as well as the accused's rights under s. 7 of the Charter the Crown had to show the above mentioned awareness on the part of the accused. In this case the rights of the accused had been violated as he failed to appreciate the consequences of his utterings. At least there was nothing in the evidence to show such appreciation.

The Court held that this was not to be the end to the judicial consideration. The Wildlife Act creates an offence for failing to stop for a Conservation Officer, failing to identify oneself or refusing to give information respecting hunting or fishing. The precarious balance between the public interest in preserving society as a whole and the individual's liberties and rights is addressed in s. 1 of the Charter. If the individual's freedoms and rights are such that the preservation of society is jeopardized then one kind of tyranny is exchanged for another.[16]

S. 1 of the Charter stipulates that the law may prescribe reasonable limits to our guaranteed rights and freedom where that is "demonstrably justified" in our free and democratic society. The provisions of the Wildlife Act of BC does have a specific objective and prescribes measures that, on the surface, violate the Charter rights of the persons who are subjected to them (arbitrary detention - warrantless searches - having to supply information) and renders them criminally liable for non compliance.

Considering our current environmental concerns and the need to protect endangered and threatened species these measures are not disproportionate to the objectives of that law. Furthermore, enforcing these laws in the vast wilderness of this province these measures are minimally impairing the rights of innocent individuals. Consequently the Charter breach of this case was demonstrably justified.

Crown's appeal allowed
New trial ordered

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[16] Regina v. Bonin - Volume 34, page 1 of this publication, (1989), 47 C.C.C. (3d) 230.

ROADSIDE SCREENING DEVICE TEST - VALUE AND VALIDITY OF DEMAND IF NO DETERMINATION WAS MADE REGARDING ALCOHOL IN THE SUSPECT'S MOUTH

REGINA v. KEAN[17] - Supreme Court of BC, Vancouver CC 931164

A police officer demanded from the accused that he supply a sample of his breath forthwith for the purposes of analysis in a roadside screening device. The accused had obviously no intention of providing such a sample, although he made apparent attempts which seemed to have been intentionally ineffectual. He was charged with failure to provide such a sample and was acquitted. The police officer had not asked the accused when he had his last drink and had not waited 15 to 20 minutes for any possible residual alcohol in the accused's mouth to dissipate. This failure had invalidated the demand for the roadside breath sample, the trial judge held. Consequently the accused was acquitted and the Crown appealed this verdict to the BC Supreme Court.

The Court agreed that failure to ensure that there is no residual alcohol in a suspect's mouth may well affect the weight if any, of the evidence of a "fail" result of a screening device test. Where that "fail" result is the exclusive grounds for the breathalyzer demand, it may be found wanting for that purpose. However, the Court held that not determining the time of the last drink or that residual alcohol may for other reasons be in the suspect's mouth, does not invalidate the demand for roadside screening device test.

The officer's demand for a breath sample for the screening device was therefore valid and the accused had failed to comply.

Crown's appeal allowed.

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[17] See also, Regina v. Bernshaw - Regina v. Gartrell and Regina v. Elder in Volume 44, page 48 of this publication.

POLICE ATTENDING AT THE HOME OF THE REGISTERED OWNER OF CAR INVOLVED IN A SUSPECTED IMPAIRED DRIVING OFFENCE - NOT UNREASONABLE SEARCH -

REGINA v. JOHNSON[18] - Court of Appeal for BC, Vancouver CA016210, April 1994.

The accused's car was being driven erratically on a public highway. A citizen phoned police and reported the driving and gave a description of the car and its licence number as well as its direction of travel. The information given out by the police dispatcher included the name and address of the registered owner of the car. When police were unable to intercept the car they attended the accused's home and found the car bearing the reported licence number parked near a house at the end of a long driveway (3/4 of a kilometre). The house and car were not visible from the road.

The accused was found in the car drinking an alcoholic beverage in the company of another person. The car engine was running. The accused refused to comply with a demand for breath samples. She was issued an appearance notice and was convicted of care or control while impaired and refusing to blow. Her appeal having failed in the BC Supreme Court she now appealed her convictions to the BC Court of Appeal.

The defence challenged the authority of police to enter the private property and secure evidence leading to the accused's convictions. Based on the judgment by the Supreme Court of Canada in Kokesch[19] the accused claimed that the police action on her private property had amounted to an unreasonable search in violation of her rights under s. 8 of the Charter. Consequently none of the evidence police obtained while on the property was admissible.

The Court held that the Kokesch case was distinguishable from this one. In Kokesch police had, without prerequisite grounds in evidence, surreptitiously searched around a dwelling house to determine if marihuana was being cultivated inside the house. The evidence adduced at the trial of Kokesch could only support the finding of mere suspicion on the part of the officers who conducted the search.

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[18] Volume 44, page 27 of this publication - Appeal to BC Supreme Court.

[19] Regina v. Kokesch (1991) 61 C.C.C. (3d) 207 - Volume 39, page 6 of this publication.

That was not the case here, held the BC Court of Appeal. The driveway was an implied invitation for anyone to enter the property. Police did so to investigate the report of an apparent impaired driver and found the accused in a state of intoxication in care or control of her car. She was charged and convicted of that crime on her private property. In view of the information they had they attended to make inquiries about the erratic driving. The accused had no reasonable expectation of privacy in relation to that. The BC Court of Appeal found support for this view in s. 77 (1) of the BC Motor Vehicle Act which requires any person who has been involved in a violation of "this Act" is compelled to furnish all information a peace officer may need and require.

Appeal dismissed,
Convictions upheld.

IS A "FIREARM" ALWAYS INCLUDED IN THE DEFINITION OF WEAPON?

REGINA v. FELEWKA[20] - [1993] 4. S.C.R. 199.

The accused used the public transit system to go target shooting. He carried his rifle with him, wrapped in his jacket. On his way home he used the rapid transit system. Two passengers became quite alarmed and alerted transit personnel. When he was asked what he had in the jacket and for what purpose he carried a firearm on the train, he facetiously replied: "I'm going on a killing spree". He took a connecting bus and was shortly after arrested for carrying a concealed weapon. The firearm was a .22 calibre rifle and it contained one live round of ammunition. He was tried for carrying a concealed weapon as well as possession of a weapon dangerous to the public peace. He was acquitted of the latter charge but convicted of the former. He appealed to no avail to the BC Court of Appeal[21] and then turned to the Supreme Court of Canada (S.C.C.) challenging the propriety of the conviction.

The two main questions that arose from the appeal was whether a firearm is included in the definition of weapon and whether the Crown had proved the *mens rea* on the part of the accused, required for the offence of possession of a weapon dangerous to the public peace. The judgment was by majority - six justices upheld the conviction and three did dissent.

The definition of "weapon" in section 2 of the Criminal Code of Canada is "anything" used or intended for use in causing death or injury whether designed for that purpose or not or anything used or intended for use for the purpose of threatening or intimidating anyone and, without restricting the generality of this definition, includes any firearm. Needless to say this wording begs the question if a firearm is always a weapon. Its own definition does call it "any barrelled weapon". The accused argued that the definition of weapon should be interpreted to mean that a firearm is only a weapon when it is intended to be used as such. To hold that a firearm is always a weapon would render many innocent persons unacceptably vulnerable to criminal liability. Concealing a firearm requires no criminal intent other than the intent to conceal for whatever reason. Hence the offence ranges from concealing a gun from a curious child to concealment to bring a firearm on the scene of a crime unnoticed.

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[20] See Volume 42, page 26 of this publication.

[21] See Volume 42, page 26 of this publication.

The S.C.C. did recognize the broad spectrum this offence covers but seemed to say that this was for Parliament to remedy and hopefully discretion on the part of law enforcement personnel would prevent absurdities.

The Court summed up the variety of purposes for a firearm and how devastating its presence in public can be. Again a wide spectrum is covered and ranges from collectors, target shooters and hunters to those who use the same implement to create mayhem, panic and death or injuries for the sake of enforcing their will on others, to take vengeance or overcome resistance to their criminal objectives. Said the Court:

> "A firearm is quite different from an object such as a carving knife or an ice pick which will normally be used for legitimate purposes. A firearm, however, is always a weapon. No matter what the intention may be of the person carrying a gun the firearm itself presents the ultimate threat of death to those in its presence."

It was also an anomaly that had the accused lived in Nova Scotia and had carried his rifle the way he did he would have been in compliance with provincial laws. In that province no firearm may be transported openly. It must be encased or "completely wrapped in a blanket". Needless to say that the paramountcy doctrine will favour federal law and despite compliance with such a provincial statute, the person could nonetheless run afoul of the concealment prohibition in the Criminal Code.

The accused pointed out to the Court that his reason for wrapping his jacket around the rifle was not to alarm the public. He had absolutely no intention of breaking a law or injure others. The S.C.C. responded that no such intention was requisite to be convicted of carrying a concealed weapon. All the Crown is required to prove is:

> "(1) carrying, (2) an object which is a weapon and known to the accused person to be a weapon, (3) in such a way as to conceal it. That is that he or she intended to remove the weapon from the knowledge or observation of others, to keep it out of sight or hide it."

The Court reasoned that although there is something "extremely menacing" by someone carrying a "naked" weapon. It is intimidating as the intent and purpose of the person carrying the weapon is not known. However, the S.C.C. found that there is something more sinister to a concealed weapon.

The Court found that compliance with provincial regulations regarding the transportation of firearms do not necessarily mean non compliance with this concealment prohibition in the Criminal Code. Gun cases are due to their shape readily identified by the public as something containing a rifle. If a rifle or shotgun is tightly wrapped in canvas or other material so the shape of the weapon is readily identifiable is not concealment. Very expensive shotguns used for skeet or trap shooting are often carried in a briefcase resembling container. To comply with the concealment prohibition it should be marked clearly on the outside of the case what it contains. Locking rifles in baggage or trunk compartments of cars in compliance with regulations, is not concealment.

The majority of the Court rejected the accused's arguments that the absence of evil intent on his part to break the law or injure others should be an excuse for carrying the rifle the way he did. The concealment, after all, had been to prevent alarm on the part of the public. In rejecting that defence the Court reasoned that it would have been so easy for the accused to comply with the law if he had wrapped and tied the rifle so it clearly displayed to the public what he carried. Also the fact that the gun was loaded seemed to carry some weight as that fact was mentioned in one breath with "wrapped and tied".

Accused's appeal dismissed.
Conviction upheld.

Note: There was no reasoning that included s. 7 of the Charter and the constitutional propriety of an offence that can result in a jail sentence with such a minimal criminal intent is required for a conviction, this Court held. It seems the majority of the Court realized that and its judgment seemed to say that common sense should prevail in the exercise of discretion on the part of the police, the selection of cases for prosecution by the Crown and the innovativeness on the part of defence counsel.

INFORMATION AND SURVEILLANCE GIVING GROUNDS FOR BELIEVING PERSONS ATTENDING AN APARTMENT COME OUT POSSESSING MARIHUANA VALIDITY OF ARREST OF SUCH PERSON

REGINA v. ENNS - Court of Appeal for BC, Vancouver CA017082, April 1994.

A Crime Stopper's tip related how a party by the name of Dan was extremely active selling marihuana from his apartment. The informing party had purchased marihuana from Dan himself. An experienced police officer conducted surveillance on the apartment on many occasions and he observed many persons visiting for just a few minutes. This was consistent over a considerable length of time and the officer, coupling his experience with the information he had been given and his observations, came to believe Dan was trafficking in marihuana. On Friday afternoon, a day of the week when the traffic through Dan's apartment was the heaviest, the officer arrested two persons who had separately, about 15 minutes apart, been in Dan's apartment. Both were found to be in possession of small quantities of marihuana they bought from Dan. Shortly after this the accused paid Dan a short visit and he was also arrested with marihuana in his possession. He was convicted accordingly and now appealed that conviction claiming the officer did not have the grounds requisite to a lawful arrest.

The accused submitted no quarrel with the subjective test to determine if the officer had the grounds to effect the arrest. There was no doubt that the officer believed the accused had purchased marihuana while in Dan's apartment. However, it was the objective grounds he challenged. An hour before two other persons were arrested under similar circumstances and they were in possession of marihuana. However, this does not give rise of objective grounds for "criminal responsibility" on the part of the accused, argued the defence.

The Court of Appeal held that the circumstances in their entirety had provided the officer with subjective belief the accused was in possession of marihuana and objectively he had grounds for such beliefs.

Appeal dismissed
Conviction upheld

CORRECTIONAL OFFICER EFFECTING ARREST OF ????? AND THREATENING SEARCH LAWFULNESS OF ARREST - REASONABLENESS OF SEARCH

REGINA v. LEJEUNESSE - Vancouver Registry, CA 017452 - BC Court of Appeal, May 1994.

An informer who had previously provided reliable information to prison security officers phoned the duty officer at a correction institute where an "open house" was held. He told how he observed a man purchase balloons at a convenience store, less than a mile down the road from the institute. The man had taken the balloons into the bathroom and was now heading in the direction of the jail.

The accused in every detail fitting the description given to the officer, was promptly arrested for possession of a narcotic for the purpose of trafficking when he arrived at the correction institute within a few minutes from the call. He was given the choice of voluntarily handing over his contraband or be searched. He retrieved the balloon containing marihuana from his underwear and told who it was intended for.

The accused was convicted of possession for the purpose of trafficking and appealed that verdict to the Court of Appeal for BC. He argued that the security officer did not have the prerequisite grounds to effect the arrest. Hence the arrest was unlawful as was the threatened search incident to that arrest. Furthermore, in view of the threatened unlawful search there was no voluntariness on his part when he handed over the balloon. The entire procedure constituted an unreasonable search (s. 8 Charter) and the marihuana should not have been admitted in evidence.

The BC Court of Appeal held that in the circumstances, the arresting officer had a genuine belief based on grounds that the accused had a narcotic (or drug) on his person. This caused him to have grounds from a subjective point of view while from an objective viewpoint there were grounds for such beliefs as well. The threatened search would therefore have been incident to a lawful arrest. It was therefore lawful while there was no reason to even consider the reasonableness of the search.

However, should they be wrong with regard to the reasonableness of the search, exclusion rather than admission of the evidence would bring the administration of justice into disrepute, held the Court.

Appeal dismissed.

"DETENTION" AT BORDER CROSSINGS

REGINA v. HARDY - BC Supreme Court - Vancouver, C.C. 9331374, April 1994

The accused, a 27 year old woman who resides in Houston, Texas arrived at the Vancouver Airport from Manila where she had been for three days on a "shopping trip". She had no ticket for Houston. She was obviously nervous, seemed to deliberately avoid eye contact and gave abrupt answers. This, linked with Manila being a "source location", aroused suspicion on the part of the Custom's officer that the accused was a courier. The officer coded the accused's card for a secondary inspection and being a possible courier.

In the secondary inspection the answers the accused gave failed to remove the suspicion. As a matter of fact the replies intensified the possibility that the accused arrived for the purpose of importing drugs. She was then told that her baggage would be examined by Custom's officers, as it was the officer's opinion that she might be in possession of drugs. The accused did not object. Before the baggage was opened, she was again asked some questions about her trip. Also this officer considered at the end of all that, that the accused was a "good candidate" to be a drug courier.

The suitcase was x-rayed but the results were inconclusive. However, the inside measurements did not jibe with the contours of the suitcase. The drilling of a hole proved that the cavity contained while powder. The suitcase had also been considered too heavy for its contents. Two kilograms of white powder that was later analyzed to be pure heroin, were found.

At this stage the accused had been Chartered and warned. At her trial defence counsel argued that the right to counsel warning in particular, had come too late. Her rights should have followed detention immediately. As soon as she was a suspect and sent to secondary inspection she should have been made aware of that right as this amounted to a constitutional detention. After the white powder had been found, police had attended at the scene, an arrest had been effected and she had been Chartered and warned again.

In dealing with the admissibility of the evidence found on the accused the Court relied on the precedents regarding border searches.[22] These cases indicate that detention when it comes to protecting our interests at the borders, is not as quickly triggered as it is in other situations.

These cases, defence counsel argued, indicate that the routine questioning at the border or the random custom searches do not constitute detention in a constitutional sense. However, where this escalates by being taken out of the normal routine for a strip search, then there is a constitutional detention.

The Court disagreed and pointed out that these precedents indicate that even a strip or skin search may not constitute detention in a constitutional sense. Not only does every sovereign state have a inherent right to protect its borders but also the expectation of personal privacy is much lower in a "border crossing setting" than it is in any other situation in dealing with authorities. Said the Court:

> "There was no constitutional detention at least until the decision to carry out a search of her person."

After the white powder was found secreted in the suitcase and before a strip search was carried out the accused had been Chartered and warned.

The evidence was admitted

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[22] Regina v. Rodenbush and Rodenbush - Volume 22, page 20 of this publication.
Regina v. Simmons - Volume 34, page 20 of this publication
Regina v. Greffe - Volume 37, page 2 of this publication

ADEQUACY OF POLICE WARNING FOR DRINKING DRIVING

REGINA v. KOZAK - BC Supreme Court, Victoria, 73036-T, May 1994

The police were of the opinion that the accused's ability to drive was impaired by alcohol. He was thoroughly Chartered and warned. A demand for breath samples was made of him and he was given a list of lawyers he could call. He said he did not want to call anyone and gave the samples demanded from him. The analysis clearly supported the police opinion.

At his trial a *voire dire* was conducted to determine the admissibility of the certificate of analyses. The accused claimed that he had been inadequately informed about his right to counsel. He testified that he had not thought himself eligible for legal aid due to his income. From what he was told by the officer it had not been clear that despite his income duty counsel would have been available to him. All this happened at 3:00 a.m. and he had not realized counsel are available on a 24 hour basis.

The trial judge accepted the accused's testimony, disallowed the certificate in evidence and acquitted the accused. The Crown appealed this verdict to the BC Supreme Court.

The trial judge had held that the BC Police warning now used by all BC forces, is "no good". It inadequately distinguishes legal aid counsel from 24 hour duty counsel as a different option. The Supreme Court of BC held that there are four decisions by BC Courts of Superior Jurisdiction that have held that the current police warning is meeting the needs of an accused person as determined by the Supreme Court of Canada in 1990.[23] These decisions were binding on the Provincial Court trial judge.

Furthermore the defence claimed that the lengthy warnings epistle was all read in one breath, so to speak and this was undoubtedly confusing. The officer should have stopped at every stage and inquired if the accused understood.

The accused had indicated that he understood the content of the warning and did not in any way show that he was confused or that the information was deficient for his purposes.

Crown's appeal allowed,
New trial ordered.

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[23] Regina V. Brydges (1990) 53 C.C.C. (3d) 330 - Volume 37, page 27 of this publication.

FOREIGN POLICE ARRESTING AND INTERVIEWING ACCUSED ON BEHALF AND REQUEST OF CANADIAN POLICE - TRIAL IN CANADA - APPLICATION OF CHARTER - ADMISSIBILITY OF INCULPATORY STATEMENT -

REGINA v. TERRY - Court of Appeal for BC, Vancouver CA 013910, June 1994.

A police investigation resulted in a Canada-wide warrant for the accused on a charge of second degree murder and on extradition request to the US authorities. The accused was known to be at a given address in Santa Rosa, California.

The officer in charge of the investigation contacted the Santa Rosa Police and requested that they question the accused and search his baggage. The accused was arrested on an extradition warrant, questioned by a Santa Rosa detective and turned over to the Federal US Marshal Service for extradition proceedings.

The Santa Rosa detective testified in the BC Supreme Court during the accused's murder trial. By the US and California rules of admissibility of statements everything had been done properly. However, defence counsel argued that the "Miranda" warning given to the accused at the time he was about to be interviewed is inadequate in terms of timing and content. Right to Counsel is triggered by detention under the Charter but not under California rules.

Also, the Right to Counsel given the accused at the time of the interview referred to a local lawyer, while the rights of the accused, who was to be tried in Canada, was to be advised of his rights under the Canadian law. The US lawyers were not equipped to look after the accused's interest in these circumstances.

The accused appealed his conviction for second degree murder to the Court of Appeal for BC. One of the grounds of appeal was the admissibility of the inculpatory statement the accused gave to the Santa Rosa detective considering the defence position as outlined above.

This compelled the BC Court of Appeal to address the issue of the prerequisites of the admissibility of evidence obtained by foreign police for their own purposes and that is also sought to be admitted in evidence in a Canadian Court; or where foreign police have collected evidence on request and behalf of Canadian police. Charter violations seem inevitable due to technical distinctions in the way rights and freedoms are enforced and applied in other nations. This could adversely effect international police cooperation in criminal investigations. After all, our Charter does not have "extraterritorial application".

The Court rejected the Crown's suggestion that evidence obtained outside of Canada is immune from scrutiny under section 24(2) of the Charter. This constitutional exclusionary rule was included in our entrenched fundamental law to ensure the integrity of the administration of justice. Regardless where the evidence was obtained, if the methods used are such that accepting that evidence would bring the administration of justice into disrepute the discretionary rule applies. After all, if one closely examines the wording of s. 24 (2) Charter, its remedial component (exclusion of evidence) is not restricted to cases in which rights and freedoms guaranteed by the Charter have been violated.

The Court then addressed the application of the Charter and observed that foreign police cannot violate the Charter as it applies exclusively to Canadian Federal and Provincial governments and their agents. Section 24(2) does provide for this eventuality, held the Court, as it clearly includes denial of guaranteed Charter rights or freedoms. The Court seemed to draw a distinction between those two and did hypothesize further on in their reasons that had the accused asked to contact a lawyer in Canada and was denied that right then exclusion may have been justified under s. 24 (2) of the Charter.

As it was, the accused was offered US counsel without cost. He clearly waived that right while fully understanding his entitlement. Furthermore, reasoned the Court, a Canadian lawyer could only have spoken to the accused over the telephone while a US attorney would have been better informed to assess the local legalities regarding his rights and custody in California. That by the California law the rights and warnings were not given to the accused immediately upon his detention was not a matter of consequence considering how soon afterwards he received the "Miranda" warning. There had been no violation of California law and no one on either side of the border had tried to deliberately circumvent the Canadian Charter.

If no denial of any Charter rights did occur in the course of events leading to the giving of the statement, admitting it in evidence could not bring the administration of justice into disrepute.

Accused's appeal dismissed
Conviction upheld

DEFENCE OF THIRD PARTY HAVING INFLICTED INJURIES AND EVIDENCE OF PROPENSITY OF THE THIRD PARTY - EVIDENTIARY VALUE OF FLIGHT

REGINA v. ARCANGIOLI - [1994] 1 Supreme Court Reports 129.

The accused became involved in a fight and was charged with aggravated assault as he allegedly stabbed his opponent. At his trial the accused took the stand and conceded to the fight and punching the victim but denied stabbing him. He said he saw a party by the name of S. stab the victim. The defence then went on to call evidence that connected S. with a stabbing earlier the same day. Friends of the accused testified and corroborated the accused's version of the fight and stabbing. S... also took the stand, denied stabbing the victim or his propensity for violence the accused and his friends claimed he has.

The trial judge had instructed the jury that the criminal record of Mr. S., the defence had adduced in evidence, could only be considered by them to determine S's credibility as a witness. It could not be used to determine if the accused's testimony that S. had stabbed his (the accused's) opponent was true. Even if S. does have the propensity to stab his fellowman, that does not mean that the accused's testimony in relation to S. stabbing the victim was probably true.

The accused was convicted and the Ontario Court of Appeal confirmed that verdict. He then turned to the Supreme Court of Canada (S.C.C.) for a review of this dispute over the evidentiary value and relevance of S's criminal record. The S.C.C. held that the jury should have been told that they were entitled to use the evidence as proof of S's disposition and to consider if there was a reasonable doubt that the accused stabbed the victim. In other words to assess if S. possibly stabbed the victim rather than the accused.

The accused had fled from the crime scene. The instructions the jury had received was that an inference of consciousness of guilt on the part of the accused could be drawn by them. However, they were also to keep in mind that sometimes innocent people will flee from a crime scene. This was inadequate held the S.C.C. The jury must be told that no inference may be drawn where an explanation for it is available. In this case it could be inferred that the accused, who admitted to assaulting the victim, and took flight, had a consciousness of guilt of common assault only and not of aggravated assault.

Accused's appeal allowed
New trial ordered.

TID BITS

POSSESSION OF AN INSTRUMENT SUITABLE TO BREAK INTO AREAS

The accused was arrested very shortly after he had been seen breaking into a car. When searched a home-made device consisting of wire band in a particular shape was found in his pockets. Although he had not used the wire for the break-in, he was convicted of possessing a device "suitable for the purpose". An expert had testified that a wire of that size, shape and disposition is frequently used for breaking into cars. The accused appealed the conviction to no avail. The Supreme Court of BC said, that despite the accused's testimony that he used the wire in his job of installing awnings, it was reasonable in the circumstances to draw the irresistible inference that the accused used it, also to break into cars.

Regina v. Wilkinson - Vancouver CA 018174, June 1994.

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REMEDY TO LACK OF FULL DISCLOSURE

The defence requested from Crown Counsel the names of the authors of police reports relating to a charge of possession of a stolen vehicle and dangerous driving. Counsel also requested witness statements and the identity of anyone with useful information. All counsel received was police reports with no identification of the authors. Based on the Supreme Court of Canada decision in *Regina v. Stinchcombe*[24] the trial judge denied the Crown the right to call witnesses and consequently the accused was acquitted. On appeal the Alberta Court of Appeal agreed that the Crown had failed in its duty to make full disclosure and held that the accused's rights under s. 7 of the Charter had been infringed. However, this infringement did not occur during but long before the trial. The defence cannot allow an infringement to be perpetrated and then be silent to later reap benefit from it. The accused must exercise his/her right to judicial review so he can exercise his right to full answers and defence. Those options are available and must be used to remedy the shortcoming. Crown's appeal allowed, new trial ordered.

Regina v. J.S.H. - 83 C.C.C. (3d) 572, Alberta Court of Appeal

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[24] (1991) 68 C.C.C. (3d) 1.