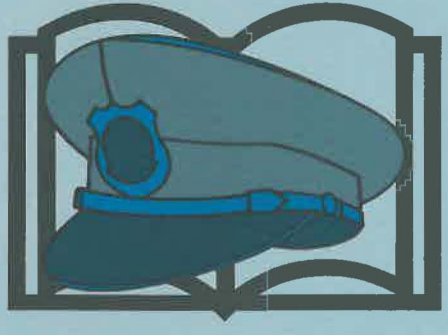
JUSTICE INSTITUTE OF B.C.

ISSUES OF INTEREST
VOLUME NO. 43



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

ISSUES OF INTEREST

VOLUME NO. 43

Written by John M. Post
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CORRECTION

On Page 52 of Volume 42 comment is made on the relevancy of the impact of crime on the victim, during the process to determine a verdict.

In the last paragraph it reads:

> ".....in our process to determine guilt or innocence the impact on the crime of the victim cannot and must not be irrelevant."

Needless to say, this is a typographical error. It was intended to read:

> ".....in our process to determine guilt or innocence, the impact of the crime on the victim cannot and must not be relevant."

POLICE OFFICERS SHOOTING AT A CAR - AGGRAVATED ASSAULT - UNAWARENESS ON THE PART OF THE COMPLAINANTS THAT HE WAS SUBJECT TO ATTACK.

REGINA v. MELARAGNI - 75 C.C.C. (3d) 546. General Division Ontario Court.

For reasons not mentioned in the reasons for judgement, Constable L. fired two shots at the driver's side of a moving car and Constable M. fired three shots at the passenger side. Miraculously the two occupants of the car were not hurt. The passengers did not even realize they were fired upon although one of the three bullets intended for him penetrated the back rest of his seat.

The officers were tried for aggravated assault by endangering the lives of the persons at whom they aimed their firearms. The defence was that although the officers may have endangered the lives of the persons they fired at, they had not assaulted the occupants of the car. It was argued that the endangering of life must result from the bodily harm inflicted by means of assault. This left the Court to decide if common assault is an essential element to aggravated assault and if bodily harm is a prerequisite to the endangerment of life.

Constable L.'s circumstances were different to those of his partner M. One of his bullets penetrated the car (although it was never found) and the driver of the car had a scratch on top of his left leg that could have been caused by the missing bullet. The argument in his case was of course, that the injury, if found to be a direct result of the shooting, had not endangered the life of the driver.

The Court held that common or simple assault is an essential element of aggravated assault. Causing wounds, maiming another person or endangering someone's life without assaulting the person, is simply not aggravated assault.

The Crown needs only to prove that the common or simple assault was intended. Then if such assault results in the harm to the victim the section summarizes, the assault is aggravated.

The Court sharply disagreed with a 1987 decision by the Quebec Court of Appeal[1] which held that the assault must result in bodily harm which is such that life is endangered. This Ontario Court held that someone can by means of an assault endanger another person's life without wounding or maiming that person. The Court gave an example of this: Two persons are on a balcony on the 20th floor of a building and the one pushes the other causing that person to go over the railing. The victim of this assault, however, grabs hold of some protruding part of the balcony or building which prevents falling any further. There is no bodily harm of any kind.

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[1] Regina v. Lucas - 34 C.C.C (3d) 28.

One can hardly say that Parliament did not intend this to amount to aggravated assault. There are numerous examples of this. It is blatantly obvious that where maiming, wounding, disfiguring or endangering the life of the complainant is the result of an assault, then that assault is aggravated assault. Conversely, it is hardly possible not to endanger life when one maims, wounds or disfigures someone else by means of an assault. Furthermore if "wounding", "disfiguring" or "maiming" are prerequisites to endangering life of the complainant, Parliament could so easily have included that in the assault section.

This left the question whether Constable L. assaulted the driver of the car and Constable M. the passenger.

Constable M. had fired shots at the passenger. One bullet lodged in the backrest of that passenger's seat, while this complainant was totally unaware that shots were fired at him. At common law, assault amounts to a physical contact or by means of a gesture giving the complainant on reasonable grounds belief that the assailant has the presenability to carry out physical contact. In the case of Constable M. there was no contact nor the expectation of such contact on the part of the person at whom he fired his gun. However, the definition of assault is the application of force to another person, directly or indirectly without that person's consent. In terms of consent it cannot be doubted that there is an absence of it where the victim is unaware of an attack. If someone comes up behind another person with the intent to hit the unaware victim, and a third party disrupts this from being carried out, there is an assault. In law there is no difference between the example and the circumstances in this case. By means of s. 265 of the Criminal Code, Parliament incorporated the common law of battery in the definition of assault.

The two accused constables had applied for a directed verdict. They claimed that their actions could, at law, not amount to what the Crown alleged. On this basis of what has been explained above, the Court held that there was evidence upon which a jury could find the officers guilty.

Applications dismissed.

EXPLORATORY QUESTIONING SUBSEQUENT TO COMPLETING AN INVESTIGATION OF A ROBBERY RESULTING IN CONFESSION TO BREAK AND ENTER - RIGHT TO COUNSEL - ADMISSIBILITY OF CONFESSION

REGINA v. CHARTRAND - 74 C.C.C. (3d) 409 - Manitoba Court of Appeal.

The accused appealed his conviction for "break and enter". It was common ground that if it was not for the accused's confession to police having been admitted in evidence, he would have been acquitted. In his appeal to the Court of Appeal for Manitoba the accused argued that due to violations of his Charter rights, his confession was inadmissible in evidence.

The accused was arrested for a robbery that had been recorded by a security video camera. He was told of his right to counsel and waived it. When shown the video recording, the accused said, "You got me good, a lawyer is not going to help". This was after he was told of his right to counsel for the second time after he had viewed himself on T.V. He then gave a written statement in which he confessed to the robbery.

On route to a remand centre the officers asked the accused about his involvement in break-ins. He said he had broken into one home and as he wanted to clear everything up he directed the officers to the address. He also gave a statement regarding this crime. After he had waived his right to counsel for the robbery he was not again made aware of this right in connection with the break and enter. It was the conviction for this break and enter the accused appealed.

The Court of Appeal stood divided on the issues raised by the accused but held by majority that the accused's right to counsel had been infringed. The robbery investigation was completed and the officers began an exploratory investigation totally distinct, in terms of offence and time, from the robbery. The earlier waiver was in relation to the robbery investigation only. The officers were obliged to have made the accused aware of his rights at the outset of their exploratory investigation. The evidence (the statement) that resulted was self-incriminating and not real evidence. Admission in evidence would bring the administration of justice into disrepute.

Statement disallowed,
Accused acquitted

The dissenting Justice was of the opinion that the Charter speaks of "informing" a detained person of his/her right to counsel. This means police must ensure the detainee is aware. This accused was clearly aware of his rights. How else could the Courts find he in fact waived that right in the robbery investigation. The statement was voluntary and was properly admitted into evidence by the trial judge, held the dissenting Justice.

The majority judgement by the Court of Appeal for Manitoba was based on the decision by the Supreme Court of Canada in *Regina v. Evans*[2]. The germain part of the reasons for judgement are as follows:

> "I should not be taken as suggesting that the police, in the course of an exploratory investigation, must reiterate the right to counsel every time that the investigation touches on a different offence. I do, however, affirm that in order to comply (with the duty to inform the detainee of his/her right to counsel) the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, and involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning."

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[2] (1991), 63 C.C.C. (3d) 289.

ARE POLICE OBLIGED TO DISCLOSE IDENTITY OF INFORMER TO COMMISSION OF INQUIRY?

RCMP v. SASKATCHEWAN COMMISSION OF INQUIRY - 75 C.C.C. (3d) 419 (1992)

In January of 1991 a Leo Lochance was shot and a Carney Nerland was consequently convicted of manslaughter. Apparently sufficient controversy arose, involving the Tribal Council, Prince Albert Police, and the community that the Saskatchewan government ordered a public inquiry to report on the propriety and adequacy of:

1. The police investigation of this shooting and whether appropriate charges were considered;
2. the prosecutorial process applied to determine what charges were to be preferred;
3. the processes applied by the Crown in prosecuting Nerland for manslaughter;
4. the licensing practices and consideration related to Nerland's operation of his pawn and gun shop.

In relation to the above the Commission was to decide if there was any organized racist activities and if such had affected the discretions of the police and the Crown.

On the first day of the hearing counsel for the provincial police force (RCMP) asked the commission to rule that no evidence would be adduced by anyone that would directly or indirectly identify police informers from which that force had gleaned information. The Commission declined to so rule.

A few days later the inevitable happened. A provincial police officer was asked to disclose the source of his information. As that source was an informer the question was to no avail, objected to by counsel representing the RCMP. The Commission held that the public interest in the subject it was to investigate outweighed the public interest in protecting the identity of an informer. The officer was ordered to answer the question. An adjournment was granted to permit counsel representing the RCMP to apply to the Saskatchewan Court of Appeal to review the Commission ruling in regard to the disclosure of the police informer's identity.

This "informer privilege" was tested when police in Quebec refused to disclose the identity of their informers to the *"Keable Commission"* which investigated matters surrounding police services. This dispute ended up in the Supreme Court of Canada[3] and it in strong terms ordered the Commission to stay any proceedings, or inquiry or examination compelling or tending to

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[3] Bissaillon v. Keable et al - 7 C.C.C (3d) 385 (1983). Also see Volume 15, page 3 of this publication.

compel police officers to disclose the identity of their informers or to produce documents the content of which could lead to establish the identity of informers.

The Saskatchewan Commission's counsel argued that the recent "disclosure" decision by the Supreme Court of Canada[4] had changed the "informer principle" sufficiently for the Saskatchewan Court of Appeal to uphold the Commission's ruling that police were to disclose the identity of their informer. The Court of Appeal disagreed and reminded Commission's counsel that they were not faced with a criminal trial where non disclosure could render the trial unfair to the defence.

Police application for non-disclosure was granted.

(This decision has been appealed and is under consideration by the Supreme Court of Canada)

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[4] Regina v. Stinchcombe (1991) 68 C.C.C. (3d) 1 & (1991) 3 S.C.R. 326

THE MEANING OF THE TWO HOUR TIME LIMIT
UNDER THE BREATH / BLOOD SAMPLE PROVISIONS

REGINA v. DERUELLE - Supreme Court of Canada, 75 C.C.C. (3d) 118.

Officer W. attended at a single car accident that had occurred at 3:30 am. The driver, the accused, was in the opinion of Constable W. impaired. Due to slight injuries the accused was taken to hospital and the investigating officer phoned the detachment at 5:20 am, and spoke to Constable S. Constable W. made Constable S. aware of his grounds for believing that the accused's ability to drive was impaired by alcohol and that he had been the driver of the car involved in the accident. At 5:26 am Constable S. arrived at the hospital and started a search for the accused who had wondered off. At 5:45 he found the accused in the hospital hallway. Nine minutes later, after some conversation with a hospital physician, Constable S. made a demand for a blood sample. The accused refused to comply and was charged accordingly. The demand was made two hours and twenty four minutes after the accused had driven his car. The trial judge as well as the Court of Appeal for Nova Scotia held that Constable S.'s "belief" expired at 5:30 am and therefore his demand for a blood sample was not binding on the accused. This acquittal was successfully appealed by the Crown to the Supreme Court of Canada (S.C.C.).

The S.C.C. reasoned that the question in issue is whether the section stipulates that the officer must make his demand within two hours from the drinking/driving offence or must the officer have formed his belief that the suspect had committed such an offence within those two hours. Said the Court:

> "In my view s. 254 (3) should be interpreted as requiring only that a peace officer form a belief that an impaired driving offence has been committed by the suspect within the past two hours. A demand made pursuant to that belief must follow forthwith or as soon as practicable, but this may fall outside the two hour limit".

Where the demand is made "forthwith" the two are concurrent. However, where it is not "practicable" to make the demand "forthwith" upon having formed the prerequisite belief, it can be made outside the two hour time limit, providing it was made as soon as practicable.

When upon such a demand, blood or breath is taken as soon as "practicable" the analysis of those substances are admissible in evidence. Where the breath or blood is taken within two hours from the time of driving then the analysis evidence is proof of the suspect's blood-alcohol content at the time of driving. Needless to say, when the blood or breath is taken outside the two hour time limit, the analysis evidence is proof of the suspect's blood-alcohol content at the time the samples were taken and the crown must adduce additional evidence to prove that content for the time of driving.

It should be noted, held the S.C.C. that "neither the demand nor the formation of a belief controls the timing of the sample". The legislation clearly creates a scheme that forces prompt police investigation to ensure the quality of evidence rather than its admissibility. The Court simply saw nothing in the legislation to suggest that the demand must be made within the two hour period.

Constable S. did in these circumstances have the belief prerequisite to the demand. The call by Constable W. the prompt actions on the part of Constable S. caused the demand to have been made "as soon as practicable".

Crown's appeal allowed
Conviction for refusing to give blood sample was entered.

SELF INDUCED INTOXICATION AND THE DEFENCE OF AUTOMATISM IN GENERAL-INTENT OFFENSES.

REGINA v. TOM - Court of Appeal for BC, Vancouver CA 013093, December 1992

The 18 year old accused was, at the time that he assaulted a peace officer with a rock to prevent his arrest, a confirmed alcoholic. According to the officers who attended at the accused's neighbourhood to a disturbance he had caused, the accused was very intoxicated.

After an arrest for intoxication was effected the accused fled and a considerable chase on foot followed. When told of his right to counsel and silence the accused did not seem to comprehend what was said. Before all of this took place the accused had been drinking with his father who had knocked him to the ground and "stomped" on his head with the heel of his boot. The accused held his head and cried, "It hurts, it hurts". He then fell and when he came to, ran round the house in a strange manner.

The defence had been "intoxication", but the trial judge had rejected the defence applying the theory that self induced intoxication is no excuse for offenses requiring "general intent". Only where "specific intent" is requisite this defence may be available.

In 1989, the Supreme Court of Canada upheld this common law[5] but one Justice opened the door slightly to alter it.

The decision by the Supreme Court of Canada rendered its opinion by means of seven reasons for judgments. By majority (but not all for the same reasons) the Court decided to reject the appeals by Quin and Bernard. However, one Justice with the concurrence of one of her colleagues wrote that the defence of intoxication should be put before a jury in general intent offenses only where the drunkenness is "akin to state of insanity or automatism".

> "Only in such cases is the evidence capable of raising a reasonable doubt as to the minimal intent required for the offence".

It is incredibly difficult in the labyrinth of seven reasons for judgement in regards to one issue applicable to two cases the Court dealt with simultaneously, to figure out what the "law" or the "middle ground" is. The BC Court of Appeal decided not to indulge in such a mammoth task and "assumed" that what the two Justices had to say is a correct statement of the law as it presently stands.

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[5] Quin and The Queen and Bernard and the Queen - See Volume 34, page 15 of this publication. 45 C.C.C. (3d) 1.

The trial judge had wrongly interpreted the evidence of the accused's state of intoxication and had erred in the application of the law in terms of the accused's defence.

Appeal was allowed
Acquittal was directed

CONSTITUTIONAL VALIDITY OF VAGRANCY PROVISIONS APPLICABLE TO CONVICTED SEX OFFENDERS

REGINA v. HEYWOOD[6] - Court of Appeal for BC, Vancouver CA05929, November 1992.

The accused who had a criminal record for sexually assaulting two female children refused to heed warnings to stay away from a playground in a public park. He persisted in loitering around the grounds taking pictures of little girls at play. The predominant features these pictures showed were the crotches of these children. The indelicate positions in which the girls were captured by the accused's lens were sheer coincidence according to the accused.

The accused was convicted in Provincial Court for loitering in a public park and lost an appeal to the BC Supreme Court. Attacking the constitutional validity of the section that places this restriction of movement on convicted sex offenders, the accused appealed to the Court of Appeal for BC.

This Court did considerable research into the background of this section, and also paid some attention to the evidence of a Ministry of Justice official who had "piloted" this provision through Parliament. He had said that the word "loiter" was used and the word "wander" was dropped as the latter did not include a malevolent or evil intent while the former does. It had not been envisioned to have persons previously convicted of sex offenses, abolished from parks but rather to prohibit them from "standing around and moving occasionally" to enhance or accommodate their evil intent.

Although the Court found this interesting it held that it cannot be guided by an official's version of what was intended by those who drafted the enactment. The ordinary meaning of loitering is to hang around. If Parliament had wanted criminal intent to be an essential element of the offence it should have clearly spelled it out.

This finding made the section very vulnerable to being inconsistent with the Charter and consequently be without force or effect.

Furthermore, the Court recognized that ignorance is no excuse for committing an offence. However, this section restricts the freedom of movement of people convicted of sex offenses. If these people are to be controlled there ought to have been evidence that notice to this effect was given to the accused.

The section prohibiting this loitering in a park for convicted sex offenders was in that aspect

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[6] Regina v. Heywood - BC Supreme Court, Victoria No. 52988-C, May 1991, Volume 39 of this publications, page 32.

found wanting and is inconsistent with the Charter. The section was declared to be without force or effect.

Accused's appeal allowed
Acquittal entered

RANDOM STOPPING OF MOTORISTS - ARBITRARY DETENTION

REGINA v. WILSON - BC Supreme Court - Fernie No. 01310, November 1992.

Police operated a road check to ferret out the drinking-driver. The accused had been stopped at random and did show symptoms of impairment due to consumption of alcohol. He was processed and charged with impaired driving as well as "over 80". When the Crown adduced the analyst's certificate the trial judge excluded this evidence of the accused's blood-alcohol content, as the police, by the random stop, had infringed the accused's Charter right not to be arbitrarily detained. Needless to say section 67 of the BC Motor Vehicle act, which provides for stopping motorists at random, was tested for validity. The trial judge found that this did not amount to a reasonable limit of a Charter Right in a "free and democratic society". This despite the Supreme Court of Canada decisions in 1985 and 1988.[7] The first regarding a pre-Charter incident, at the latter a post charger scene. In the pre-Charter case police had given a lot of publicity to a "R.I.D.E." program and informed the public that due to the inordinate incidence of impaired driving and the consequential injuries they could expect to be randomly stopped. At that time the Motor Vehicle Act of that province did not contain provisions for such activities on the part of the police. The Supreme Court of Canada held that as the circumstances were, the police had acted within the scope of their common law duties.

In the post-charter case of Hufsky police were acting pursuant to new provisions of the Ontario Highway Traffic Act. Needless to say the question in issue addressed arbitrary detention and the validity of provincial legislation that provides for such detention. In addition, Mr. Hufsky claimed that his right to counsel had been infringed as he had not been told of that right when the officer, to no avail, had demanded that he blow in a roadside screening device. The stopping of *Hufsky* and the demand had separately caused him to be detained. The former randomly and the latter as a consequence of it. Furthermore, the law that compels "forthwith" compliance with a roadside breath demand, is also in violation of the Charter Right to Counsel. This, as it is operationally not feasible to give someone in these circumstances an opportunity to contact counsel. It would simply defeat Parliament's objective for enacting this provision.

The Court had turned to Section 1 of the Charter which guarantees the rights and freedoms set out in it, but realistically points out that in a free and democratic society it may well be justified to have law that limits those rights and freedoms. When these limits are so justified and are reasonable, they are valid.

The S.C.C. had found that the roadside test in its present form is a reasonable and justified

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[7] Regina v. Dedman - 20 C.C.C. (3d) 47. Volume 22, page 17 of this publication. Regina v. Hufsky & Regina v. Thompson - Volume 31, page 10 of this publication.

limitation of the rights to counsel. Considering the mayhem we cause to each other with our driving while impaired, the Court had little trouble in reaching this unanimous conclusion.

With regard to the provincial "random stopping" provisions, the S.C.C. observed that these were not exclusively to apprehend drinking drivers. Driving is a licensed activity in registered vehicles. Of necessity and in the public's interest in terms of safety, this activity and the vehicle are the subject of myriad of regulatory law. Mechanical flaws or documentary shortcomings do not manifest themselves externally. Rigid enforcement is essential and to create an obstacle in this regard could be devastating in results. Hence the provincial law is a reasonable intrusion that does not only deter the use of unsafe vehicles by persons who may be unqualified or do not have the right to possess the vehicle, but more importantly it will reduce the peril of using the public roads. Consequently, the S.C.C. found the provisions of the provincial law also to be a reasonable limit to the right not to be arbitrarily detained.

One may believe that this would have been the end of this gnawing issue. However, it was predictably not so. A *Mr. LaDouceur*[8] was stopped totally at random and was found to be under suspension. He challenged the evidence and the validity of the law as had *Hufsky* and in addition claimed that his right to be secure against unreasonable search and seizure had been infringed. He claimed before the S.C.C. that his case was distinct from *Dedman and Hufsky* as their stop had been as part of a publicized law enforcement program. Therefore the randomness in his case was aggravated by total capriciousness. Again the Supreme Court of Canada was unanimous in dismissing LaDoucer's appeal - however there was a 5 to 4 split in the reasoning to reach this conclusion. Four of the Justices felt that the provincial legislation is not justified under s. 1 of the Charter, but they concluded that they would nonetheless admit the evidence as it would not bring the administration of justice into disrepute. Allowing these totally random stops would be the equivalent of negating the right to be free of arbitrary detention. They agreed with LaDouceur that there is a distinction between a random stop at a stationary check point and a roving capricious stopping of any car without an articuable reason. It is the difference between a random action and doing something on any whim. The latter may be discriminatory in nature such as selecting young persons, or those of a particular race. The dissenting Justices stopped short of saying that they would declare the provincial provisions without force or effect due to unconstitutionality. They would have interpreted them to say that only organized programs of stopping cars would be allowed.

The trial judge had erroneously held this Wilson case to be distinct from those that did set these precedents.

Crown's Appeal allowed.

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[8] Regina v. LaDouceur [1990] 1 RCS 1257. Also see Volume 37 of this publication.

ACCUSED ARRESTED FOR IMMIGRATION OFFENCE AND WHILE DETAINED QUESTIONED AS A WITNESS TO TWO MURDERS. ADMISSIBILITY OF EVIDENCE

REGINA v. YOUNG - 73 C.C.C. (3d) 289, Court of Appeal for Ontario, June 1992.

When a person is questioned by authorities while detained he/she must be aware of his/her right to counsel. When the interview alters focus by the questioning changing to other involvements in offenses, the suspect must again be made aware of his/her right to counsel. A blanket waiver for anything and everything the authorities may want to speak to a detained person about, is simply defeating the purpose of this Charter right.

Police wanted to speak to the accused as they had grounds for believing he was a witness to murders. The accused was also wanted by Immigration Canada for offenses under the Immigration Act. Police decided that if they encountered the accused they would arrest him for the immigration offenses. He was eventually spotted and the arrest was effected. In the same breath as the reasons for his arrest were given him, the accused was told, while being handcuffed, that the homicide investigators wanted to speak to him as he was believed to have witnessed two murders. The accused said he was aware of that and was quite prepared to speak to homicide investigators. After this he was told of his right to counsel and acknowledged that he understood the meaning of that right.

Approximately an hour after arrival at the police station, two detectives questioned the accused. They did not inform him of any of his rights. Nor did they when they interviewed him a few hours later or when he was questioned again in a week. At all material times he was detained by the immigration officials.

After all this, the police investigators interviewed two other persons who were on the scene of the murders and obtained "new and vital" information. Based on that information the officers arrested the accused for both murders. The accused was convicted and appealed the conviction to the Ontario Court of Appeal.

The grounds for appeal were that all the statements the accused made prior to his arrest for the murders were inadmissible due to a violation of his right to counsel. It was the defence's contention that the accused was detained when questioned and should have been made aware of his right to counsel. The Crown argued that the detention was for an offence under the Immigration Act and that police spoke to him as a person who was a potential witness to a crime. It was not until the "new information" reached police that the accused became a suspect. Defence counsel rebutted this argument by submitting that the detention was, as far as the police were concerned, in regard to the murders. The immigration breach was used as a means to detain the accused solely to have a captive audience when they talked to him. Therefore, there was a link between the immigration arrest and the detention to accommodate a murder investigation. The Crown claims the interrelation was a mere coincidence while the defence

argued that the immigration arrest was in reality a homicide detention. Had he been made aware of this, the accused may well have decided to seek legal advice.

Defence counsel reminded the Ontario Court of Appeal of their decision some 45 years ago[9]. A Mrs. Dick had been arrested under the then vagrancy laws. Police had no intentions to proceed with the vagrancy offence. Mrs. Dick was a suspect in her husband's murder. She gave statements to police that were adduced at her murder trial. The caution police gave her was at the time of and in relation to the vagrancy arrest. The Ontario Court of Appeal held in 1947 that this was an abuse of the criminal law.

The trial judge had held that the circumstances in this Young case were distinct from the one cited by the defence. The main distinction was found to be that Young was not a suspect but only a potential witness. Nor did the trail judge read in the precedents that a person could not be arrested for a *bona fide* reason and not be questioned for some other delict. The Ontario Court of Appeal agreed with this reasoning and added that the accused when Chartered, was told that the homicide investigators wanted to speak with him in regard to what he had witnessed. There was no violation of the accused's rights.

Accused's Appeal dismissed

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[9] Regina v. Dick (1947) 87 C.C.C. 101

DECLARATIONS BY THE VICTIM OF A STABBING - VICTIM DIES - ADMISSIBILITY OF DECLARATIONS.

REGINA v. KHARSEKIN - Newfoundland Supreme Court, 74 C.C.C. (3d) 163.

The ship's Chief Engineer was stabbed by the accused, a ship's electrician. The victim went to the ship's doctor who asked who had done this. The Chief Engineer identified the accused by name. Shortly after he slipped into a coma. The victim regained consciousness very briefly and again identified the accused as the perpetrator. He then died.

At his trial for murder the Crown attempted to have the statements by the victim admitted into evidence as an exception to the hearsay rule as:

1. a dying declaration;
2. part of *res gestae*; or
3. an exception as reasoned in the Khan[10] case

The Court held that the statements the deceased made were not dying declarations. The essential elements of such an exception to the hearsay rule did not exist. There was no evidence that the victim at the time he made the declarations had a hopeless expectation of death. The declarant must knowingly be at the point of death or at a point that all hope of this world is gone. The situation must, for the declarant, be so solemn and awesome that every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth.[11]

For the statements to be part of *res gestae* they must have been made while the declarant's conditions of involvement where such that the possibility of concoction or distortion are excluded. Those conditions must be in terms of time be approximate to the involvement so it can be considered as one or as part of it. In this case the Court would have to find that the declarations were utterances that occurred as a spontaneous and sincere response to the stabbing, where, due to uncontrollable senses, self interest could not have been considered.

The victim came to the doctor for medical treatment. The declarations were answers to questions the doctor put to him. This is hardly the spontaneity and sincerity required for an utterance to be part of *res gestae*.

In the *Khan* case a 3 1/2 year old girl told her mother immediately after leaving the doctor's office what sexual act a physician had performed on her. The girl was not a competent witness

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[10] Regina v. Khan - 59 C.C.C. (3d) 92. Volume 38, page 19 of this publication.

[11] Synopsis of reasons in Regina v. Woodcock, 1 Leach 500 at 502, 168 E.R. 352.

and the mother's hearsay evidence was essential. If this was not admissible no prosecution in these circumstances would be possible. The relaxation of the Supreme Court of Canada in regard to the hearsay rule was for cases where it is required of necessity due to there being no other sources for the evidence.

That was not the case here. The charge was murder and there are many other sources of evidence.

The declarations by the victim were not admitted in evidence.

UNDERCOVER OFFICER IN CELLS - VOLUNTARINESS AND ITS RECENT HISTORY - ADMISSIBILITY OF STATEMENTS

REGINA v. BROWN - ALBERTA COURT OF APPEAL, 73 C.C.C. (3d) 481

In the well known *Hebert*[12] decision of 1990, the Supreme Court of Canada decided that police had violated the accused's rights to remain silent when it by means of an agent provocateur elicited statements from him while in cells. He had previously refused to make any statements.

Three weeks prior to that decision, this accused Brown was convicted of first degree murder. He now appealed that conviction because the trial court had allowed in evidence, conversations the accused had with undercover police officers. He argued that these inculpatory statements by him were by the law established in *Hebert*, inadmissible. He sought to retroactively benefit from that decision and submitted that without that evidence he would not have been convicted.

The accused's wife had confessed to him to have an affair with one K. K. was described as a philanderer who was unemployed most of the time. He went missing and about three months later his body was found. The accused was arrested after an investigation but refused to say anything. A police officer was placed in his cell with the specific objective to elicit statements from the accused. The officer professed to be an experienced criminal and offered to assist the accused to destroy evidence such as a murder weapon and car, or silence witnesses. This had all been done after the accused had received advice from his lawyer to remain silent and had conveyed to police that he intended to follow that advice.

At the time police followed this procedure with the accused, it was permitted by judicial precedents. In 1981, the Supreme Court of Canada in *R. v. Rothman*[13] held that an agent provacteur is for the purpose of eliciting a statement from a suspect, not a person in authority, and therefore voluntariness is not requisite to the admissibility of statements so obtained. The test to determine if the agent is a person in authority is a subjective one. The suspect must know that the person he speaks to will affect the path of prosecution.

The Charter of Rights and Freedoms which came into effect the following year had no affect on the Rothman decision. The right to remain silent is not specifically mentioned in the Charter, Section 11 refers to persons charged with a criminal offence and is in regards to criminal proceedings. The right to remain silent in that section are incorporated in the presumption of innocence (the burden of proof being exclusively on the Crown and the right to remain silent during the proceedings) and not to be compelled to be a witness against one self.

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[12] Regina v. Hebert 57 C.C.C. (3d). See also Volume 37, page 16 of this publication.

[13] Regina v. Rothman 59 C.C.C (2d) 30.

It was not until the Supreme Court of Canada held in the Hebert case that the right to remain silent is incorporated in Section 7 of the Charter. It is now considered an infringement of that right for authorities to elicit statements by deceptive means particularly where the suspect has declined to make a statement and wishes to exercise that right to silence where liberty or security of the person is involved. We can only be deprived of liberty or that security in accordance with the principles of fundamental justice. The right to silence at investigatory stages is included in those principles, held the Supreme Court of Canada.

Needless to say if the accused Brown had been tried after the Hebert decision the statements made by him to the undercover officers would not have been admitted into evidence.

The Alberta Court of Appeal did nonetheless dismiss the accused's appeal. Two of the three justices felt that the accused was precluded from raising the issue of admissibility of the statements at his appeal. He had signed waivers and had at trial, perused a specific strategy of defence and did not raise Charter issues. He had not been unjustly accused and as the law then was, he had a fair trial.

The dissenting judgement strongly supported the accused's submissions and that Justice felt he should be tried again. Due to this split the accused has access as of right to the Supreme Court of Canada. If he does appeal further it seems predictable that Court will support the dissenting judgement.

PARENT'S DISCIPLINARY MEASURES - ASSAULT - DISCRETION OF AUTHORITIES - PROPRIETY OF ZERO TOLERANCE

REGINA v. M.K. - 74 C.C.C. (3d) 108 - Manitoba Court of Appeal

A city power engineer was called out during the weekend. Being tired he decided to take a Sunday afternoon nap while his wife and their three children were out to a school tea. His sleep was interrupted by a phone call from a co-worker who drew the accused's attention to a note in the newspaper that his house was up for mortgage sale. When his wife came home the accused discovered that she had used the last six mortgage payments for different purposes.

While the parents were discussing this, the eight year old son decided to open a package of sunflower seeds despite his parents' instructions not to do so as they may spill and get in the way of his two-year old brother. It all happened as feared and the young brother choked on some seeds. The parents' intervention saved the child from choking completely. The father (accused) then decided to discipline the eight year old boy and he used more force than was reasonably necessary for that purpose according to the trial judge. He was convicted of assault. The coup de grace was a kick by the accused's "stockinged" foot and this gesture had caused the disciplinary force to be excessive.

According to zero tolerance policies by the Manitoba Ministry of Justice no one had discretion on whether or not to prosecute. The accused's wife attended a hostel for abused families where she reported that her husband had abused her son. Police attended, statements were taken and the accused was arrested. The policy caused a prosecutorial process that could not be stopped and tore this family apart. The wife tried to reconcile quite voluntarily and free of any intimidation when she realized things had gone too far.

The accused appealed his conviction to the Manitoba Court of Appeal. It in essence said that zero tolerance policies for office holders the law has robed with original discretionary powers, is unfitting and unbecoming our system of law. A policy cannot remove the discretion the law describes for law enforcement officers.

An inappropriate exercise or a lack of exercising those discretionary powers may well cause the process of the Courts to be abused. When the executive function fails, the judicial system will be settled with allegations to adjudicate which should have been screened by those who must exercise discretion for that purpose.

The Justice who authored the judgement shuddered to think what would have happened to his father or mother if they had been caught in a law enforcement system which was ordered not to exercise discretion. The evidence showed that the discipline the boy in this case received was mild compared to the discipline the Justice's parents had doled out.

The Court emphasized that it did not mean to condone the kicking of children nor the excessive disciplinary measures someone may resort to. There simply is no "nice calculation" of the degree of force allowed in cases of this kind. All the Court seemed to emphasize is that the case should never have been proceeded with and that if the authorities had been left with their lawful discretions, this likely would not have come to the Court. Exercising its residual and inherent discretion, the Court stayed the proceedings.

COURT UPHOLDING CONVICTION
DESPITE "ASSUMED" CHARTER VIOLATIONS

REGINA v. LENG - Court of Appeal for BC, Vancouver CA015174, November, 1992

The accused was spotted at 9:10 pm walking along the street carrying unknown items in his arms and under his jacket. Cst. B. asked the accused to identify himself and ordered him to put everything in his possession on the police car's hood. When asked where he was going with the two containers with coins and a shaving kit, he indicated a destination which did not coincide with the direction in which he was walking. He explained he was in the process of moving and he had recovered the goods from his mother's apartment. The accused acted fidgety and was obviously nervous. The officer told the accused that he did not believe him and that he was possibly in possession of stolen goods and was being detained for investigation. The accused was then asked to empty out his pockets. Two watches and a mini mag flashlight were added to the collection on the police car. Also some British currency was found on the accused. The accused persisted in his version of having these items in his possession. A phone call to the accused's mother proved this version to be false.

At 9:27 pm, the accused, by now 17 minutes detained, was told to get in the back seat of another police car that had arrived on the scene, while the officer would check out the accused's story. Again he was informed of being detained for possession of stolen property and told that if his story checked out the items would be returned to him.

The officer attended at the "mother's" apartment and there was no way that the accused could have retrieved these items from there when he said he did.

The officer then directed the other officer who had the accused in his custody, to again tell the accused for what reason he was detained and that he would be taken to the detachment and booked. The accused was so advised at 9:35 and three minutes later read him his Charter right and police warning. The accused indicated he understand and said, "I'm not a rat".

In the car in which the accused had been transported two passports were found of a married couple who lived in a basement suite and were "house-sitting" for a friend. Police took the couple to their suite and they found the place broken into. The items found on the accused did belong to them.

At 12:20 am the accused was questioned after a secondary warning was given to him. He waived his right to counsel after being told that he was charged with Breaking and Entering as well as Possession of Stolen Property. The accused lamented that he did break in on account of his drug problem. He gave the officer a full statement about breaking into the basement suite.

The trial judge had found that the accused was not detained until he had been told not to be believed and that he would be held for investigation. The detention had not been arbitrary as, at that time, there had been sufficient grounds to hold the accused. The fact that the accused had not been told about his right to counsel until about 30 minutes after he was detained was perhaps an infringement of the accused's right but this, in terms of statements, had not adversely affected the trial as they had been exculpatory.

During this 30 minutes, there were three seizures. At the time of the first one, the trial judge held that the accused was not detained; at the second seizure the accused was detained but not arrested; at the time of the third seizure he was under arrest. The trial judge held that only the second seizure was unlawful but the evidence seized was "real" and did not affect the fairness of the trial. However, the violations were sufficiently serious to exclude that evidence, but doing so would not effect the outcome of the trial.

The accused was convicted and appealed to the BC Court of Appeal claiming pretty well, that the trial judge was wrong on all of these findings. He submitted that he was arbitrarily detained from the time he was accosted by the officer; that all three seizures were unreasonable; that his right to counsel had been infringed as the detention started when the officer stopped him and should have made him aware of his right to counsel at that time; and that the effects of these violations warranted exclusion of all statements and real evidence.

The BC Court of Appeal rendered an unusual one paragraph answer and judgment to all of these substantiated submissions. Substantiated in that the precedents seem to clearly support the accused's version of the law.

Said the BC Court of Appeal:

> "..... assuming there were previous violations of the Charter which would warrant exclusion of real evidence obtained in connection with those violations, the inculpatory statement made by the appellant which was tantamount to a confession ought not to be excluded from the evidence."

The Court reasoned that the accused was "no stranger to the law". There was no evidence that he was pressured or felt intimidated by the circumstances that gave rise to the Charter violations. There simply was no evidence that the accused's confession was not voluntary. The Court did not seem to want to apply the "poisonous tree principle" and,

Dismissed the appeal and upheld the conviction.

FIRST DEGREE MURDER - DEATH CAUSED "WHILE COMMITTING A SEXUAL ASSAULT"

REGINA v. GANTON - 77 C.C.C (3d) 259.

The accused murdered his girlfriend in her apartment by putting his fingers down her throat. He was not strong enough to dispose of the body as planned and left it in the apartment. He took the four year old son of the victim and his younger brother, 15 km into the Saskatchewan country side and left them on the side of the road in bitter winter weather. He had to physically abuse the four year old to get him out of the car. The children were found by a passer-by just in time to save them from freezing to death. They suffered severe frost bite.

Not knowing how to hide the body and escape detection the accused went to his parents after he had abandoned the children and allowed his mother to phone police. He was charged with first degree murder as he had allegedly caused death while he was assaulting the victim sexually. The body had been found with the clothing removed from the lower part of her body and with a beer bottle inserted in the vagina. The insertion had been done with such force that the bottle had penetrated the abdominal wall. The accused was convicted and appealed claiming that he was wrongly convicted of first degree murder as the Crown had failed to prove that the victim was alive before or during the sexual assault. After all, the section implies that death must have been caused "while committing" sexual assault.

The Saskatchewan Court of Appeal rejected the accused's argument. It held, consistent with a ruling by the Supreme Court of Canada on this point,[14] that the death must be concurrent with the sexual assault. "It is sufficient if the offence causing death was part of a continuous sequence of events" held the Saskatchewan Court of Appeal.

Quoting from the judgment by the Supreme Court of Canada the Court said:

> ".....where the act causing death and the acts constituting the sexual assault, all form part of one continuous sequence of events forming a single transaction the death was caused while committing an offence for the purpose of first degree murder."

Appeal dismissed.

Note: The evidence of abandoning the children was ruled to be inadmissible as its prejudicial affects would outweigh its evidentiary value.

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[14] Regina v. Pare (1987) 38 C.C.C. (3d) 97.

MEDIA COVERING A RIOT - POLICE OBTAIN A SEARCH WARRANT FOR TAPES AND PICTURES TO IDENTIFY PERPETRATORS - VALIDITY OF WARRANT

REGINA v. CANADA BROADCASTING CORP. - 77 C.C.C. (3d) 341

In the wake of the acquittal of LAPD police officers for an alleged assault on Rodney King, there was a riot in Toronto. Over 100 known criminal offenses were committed 78 of which remained unsolved.

Police asked the cooperation of the media (CBC - CTV and the Globe and Mail) in an attempt to identify the perpetrators. This was refused. Police then obtained search warrants and seized video tapes and photographs from the offices of these news outlets. The CBC challenged the validity of the warrants based on inadequacy of the application (information) for the warrants. If the issuing judge had acted judicially he could not have been satisfied from the content of the sworn application that the material to be searched for would afford evidence in relation to the 78 criminal offenses. At best it could be said that the warrant was a fishing licence. The material seized did identify persons actually committing crimes described in the warrants that were issued. None of this material had been broadcast or published by the media.

The CBC, by an extra ordinary remedy (certiorari) applied to a Court of superior jurisdiction to have the warrant quashed. The Court held, that considering all of the circumstances and the information available to the issuing judge, the material to be searched for could afford evidence in regard to any of the 78 criminal offenses.

Application to quash warrant
was dismissed

COMMITTING MURDER WHILE SLEEPWALKING.
DEFENCES OF INSANE AND NON-INSANE AUTOMATISM

REGINA v. PARKS - [1992] Supreme Court Reports 871. August 1992.

The accused came from a family of which several members suffered sleep disorders, such as sleepwalking, adult enuresis (bed wetting), nightmares and sleep talking.

The accused is a deep sleeper and has problems waking up. He also had a stressful personal life and was affected by it. He received support from his parents-in-law with whom he had an excellent relationship.

In the small hours of the morning the accused, in his sleep, drove 23 km to the home of his parents-in-law who were asleep in bed. He attacked them with a knife, killing his mother-in-law and seriously injuring his father-in-law. He then drove to the police station blurting in a distraught fashion how he with his own two hands, had just killed two people, "It's all my fault" he said. The accused claimed that he had committed these acts while he was sleepwalking and raised the defence of automatism. Consequently he was acquitted for not having the specific intent to commit the murder and the attempted murder alleged against him. The Court of Appeal for Ontario dismissed the Crown's appeal and upheld the acquittals. The Crown then appealed to the Supreme Court of Canada (S.C.C.).

There is "insane automatism" and "non-insane automatism". If the former is successfully raised as a defence the verdict must be "not guilty by reason of insanity". Only "non-insane automatism" can result in acquittal. The Ontario Court of Appeal classified sleepwalking as non-insane automatism. In other words, sleepwalking is not the result of "a disease of the mind".

No criminal act is punishable if done involuntarily, meaning something done by the muscles without control by the mind, such as a spasm, reflex or convulsion; or acts done while conscious of what he/she is doing due to concussion or sleepwalking (Lord Denning[15]).

The S.C.C. accepted from all of the evidence adduced on sleepwalking, in particular in relation to the accused's disorder, that

1. the accused was sleepwalking at the time of the incident;
2. sleepwalking is not a neurological, psychiatric or other illness;
3. there is no medical treatment available to remedy the disorder. (The Crown relied on a British case in which it was held that sleepwalking is a mental illness. It had not called any evidence in support of this ruling.)

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[15] Bratty v. Attorney General for Northern Ireland (1963) A.C. 386.

The S.C.C. held by majority that "insanity" requires the Crown to show that the sleepwalking was the cause of the accused's state of mind. The defence showed that the sleepwalking was caused by something which is not a mental disease. This meant the accused was properly acquitted.

This left the question in regards to protection of the public. Despite the medical evidence that sleepwalkers are very rarely violent, the Court was still concerned that the accused was set free "without any consideration of measures to protect the public, or indeed the accused himself" from similar occurrences. The Courts are there to settle criminal and civil disputes and have jurisdiction to be punitive, compensatory and order restoration. The preventative powers of the courts are minimal though inherent. This is usually done by an order binding over the acquitted accused to keep the peace on certain conditions. The S.C.C. recognized that such judicial preventative power exists, but was of the opinion that they had insufficient information to decide on the justification for such an order.

The S.C.C. dismissed the Crown's appeal and upheld the acquittals but referred the matter to the trial judge to determine whether the inherent preventative judicial powers should be exercised.

ADMISSIBILITY OF STATEMENTS MADE BY DECEASED PERSON[16] - HEARSAY RULE - EVIDENCE TO SUPPORT CROWN'S THEORY OF MOTIVE FOR MURDER

REGINA v. SMITH - [1992] 2 Supreme Court Reports 915.

The Crown's version of the murder it alleged against the accused is as follows:

The accused picked up a Ms. King from her mother's home in Detroit, and they went to a London (Ontario) hotel for a weekend stay. The accused was a drug smuggler and had come to Canada to pick up a quantity of cocaine. Ms. King was invited to come along to hide the cocaine in her body. She had refused and had been abandoned at the hotel for several hours. The accused had returned and taken the woman to a place where he strangled her and cut off her arms to make the identification of the body more difficult. He then dumped the body near a service station.

The Crown called a Ms. D. as a witness to relate how she also had been taken to Canada by the accused and was there expected to conceal in her body drugs for the purpose of smuggling it into the USA. When she refused she was abandoned in a restaurant in Windsor.

The deceased's mother testified to relate how she received four phone calls from her daughter. These calls came from the hotel where she and the accused were staying and a service station. The first was to tell that she was abandoned; the second was to ask for transportation home; the third one was from the lobby of the hotel to say the accused had returned and would take her home; the fourth was to say that she was on her way home. The last call was from a service station near where her body was found less than an hour after she made the call. There was also a witness who saw the accused with the deceased at the service station.

The accused's defence was one of alibi. Witnesses testified that he was in Windsor and Detroit at the time of the murder. He had conceded to have abandoned the deceased at the hotel. This defence was of no avail as the jury convicted the accused. No objection to the Crown's evidence was taken during the trial.

Appealing his conviction to the Court of Appeal for Ontario the accused argued that the testimony of the deceased's mother was inadmissible as it was hearsay. The first two calls were admissible, ruled the Court, but not as proof of the truth of its content but only for the purpose of determining the deceased state of mind, "I want to come home" but not, "I've been abandoned". The third call was adduced to prove the accused was with the deceased and the fourth that he was taking her home and was present at the service station. The last two calls

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[16] ALSO NOTE: Regina v. Lemky - BC Court of Appeal, Volume 42, Page 31

were clearly to show the accused's presence, the falsehood of his alibi and not the deceased's state of mind. The latter is an exception to the hearsay rule the former is not. These errors at trial were so prejudicial to the accused that the conviction was set aside and a new trial was ordered.

The Crown appealed this decision to the Supreme Court of Canada (S.C.C.) which dealt with the hearsay aspects of the evidence of the deceased's mother.

The S.C.C. held that the evidence of the mother, if admitted to show that 1. "Larry (the accused) has gone away" 2. "Larry has not come back and I need a ride home" 3. "Larry (who claimed to be somewhere else at the time) has come back and I no longer need a ride home" 4. "I'm on my way with Larry", is inadmissible as hearsay. The mother could only vouch for the state of mind of the deceased but not for the truth of the content of what her daughter told her. All she could confirm is that these statements were made to her.

Furthermore, with regard to the third and fourth call proving that the accused was with the deceased, there was no circumstantial guarantee of trust worthiness that would justify admission of those calls. The deceased travelled under an assumed name and used a credit card that she knew was forged or stolen. It was taken from her by the hotel staff. This shows she was capable of deceit and may have lied to her mother to cover some of her activities. The S.C.C. concluded that only the first two calls were admissible only to show that the deceased wanted to come home.

The S.C.C. also held that the evidence of Mrs. D. was irrelevant and inadmissible. It was adduced only to show the Crown's theory of what happened; that the deceased had been expected to hide cocaine in her body and smuggle it across the border. It was also evidence of the accused's character and predisposition to deal in drugs and import them. This was not relevant to murder.

The Crown's appeal was dismissed.

CONSTITUTIONAL VALIDITY OF "CAUSING BODILY HARM BY UNLAWFUL ACT" (S. 269 C.C.)

REGINA v. DESOUSA - [1992] 2 Supreme Court Reports 944.

At a new year's party a number of persons got into a fight that escalated into throwing bottles. The accused threw a bottle that hit a wall and shattered. A piece of glass struck the arm of Ms. S. causing a deep and serious laceration. After 8 months the movement and feeling in the arm were still restricted. The accused was charged with "unlawfully causing bodily harm" under S. 269 of the Criminal Code. This section simply provides that, "Everyone who unlawfully causes bodily harm to any person is guilty of an indictable offence" and liable to 10 years imprisonment. When the trial commenced the accused made a motion that the section was inconsistent with s. 7 of the Charter and therefore without any force or effect. The Court granted the motion as the section allows for a person to be convicted on the basis of any violation of a federal or provincial statute that may inadvertently result in someone being injured.

The Court of Appeal for Ontario held that the section could receive an interpretation so it would comply with the Charter and it could therefore not be struck down. The accused then appealed to the Supreme Court of Canada (S.C.C.).

The S.C.C. did give the impugned section an interpretation so it is consistent with the Charter. Unlawfully causing injury means that there must be an underlying offence by means of which the injury was inflicted. That underlying offence can be a provincially or federally enacted offence excluding those which are based on absolute liability (offenses not requiring proof of any mental state or where not even due diligence is a defence). The word "unlawfully" in this section requires a criminal or non criminal underlying offence that is objectively dangerous. This means that the underlying offence must be committed by an act that causes a reasonable person inevitably to realize that it subjects another person to the risk of bodily harm. In other words, the mental element the Crown must prove is that the accused, knowing that he placed another person or person at risk to bodily harm by committing the underlying offence. As there is no constitutional requirement that intention, on an objective or subjective basis, extend to the consequences of unlawful acts in general s. 269 C.C. does not violate either s. 7 or 11 (d) of the Charter. Parliament did obviously not intend to punish those who are morally innocent but only those who by means of "avoidable unlawful actions" cause injuries to others. Consequently s. 269 C.C. is valid law.

Accused's appeal dismissed.

APPLICATION OF S. 56 Y.O.A. WHEN AN ADULT PERSON IS INTERVIEWED REGARDING AN OFFENCE HE ALLEGEDLY COMMITTED BEFORE HE WAS 18 YEARS OF AGE.

REGINA v. Z. - [1992] 2 Supreme Court Reports 1025.

Z. committed a theft at the age of 17 years of age. He was interviewed by police when he was 18 years of age. Police had not complied with s. 56 of the Young Offenders Act (YOA) in that they had not notified Z's parents or made him aware he was entitled to have an adult person present while he spoke to police. Z. had made a confession which was voluntary.

The trial Court Judge did not allow the confession into evidence. He was guided by s. 5 YOA which state that a person who commits an offence while between the ages of 12 and 18 "shall be dealt with as provided in this Act". The Crown had to no avail, drawn the attention of the Court to the definition of a young person which stipulated that this includes "where the context requires" any person charged with an offence while a young person.

The confession was the only evidence against the accused and the acquittal was appealed to the Court of Appeal for Alberta. It allowed the Crown's appeal and held that the statement was admissible. In the circumstances s. 56 YOA did due to the words "where the context requires" not apply as Z. was an adult at the time of the interview.

The accused youth appealed to the Supreme Court of Canada (S.C.C.) which held that the words "where the context requires" must be seen as words of limitation and not as a "syntactical bridge", that is a way to put words together for the sole purpose to form a phrase or sentence. It also seemed not to be persuaded that section 5 clearly offers all protection of the YOA to transitional offenders.

The YOA provides that young persons are treated separate and distinct from the system in place for adults. However, this does not mean that all safeguards and protection the Acts provide for apply regardless of the age of the accused at the time he is questioned or investigated by the authorities. The S.C.C. concluded that there is nothing in the Act that requires the application of s. 56 YOA when the suspect is an adult. These provisions are to protect adolescents who may not fully understand their rights and the consequences of making statements.

Appeal dismissed.

DOES "GIVING" A SMALL QUANTITY OF LSD TO ANOTHER PERSON FOR THE PURPOSE OF CONSUMPTION AMOUNT TO TRAFFICKING?

REGINA v. SMITH - Supreme Court of BC, Victoria BC 59950, December 1992.

The accused was sitting next to a man and was seen to give him a white article. The man immediately consumed whatever was given him by putting it in his mouth.

The "article" was LSD. The accused was charged under the Food and Drug Act with possession as well as trafficking. The latter charge was challenged as giving another person a small quantity of a drug (for immediate consumption as in this case) does not amount to trafficking.

There is a difference between the definition of trafficking contained in the Food and Drug Act and the Narcotics Control Act. The latter includes "to give" while the former does not. The Crown Argued that "delivering", which is included in the definition of trafficking in the Food and Drug Act, encompasses the act of giving.

The Supreme Court trial judge disagreed with the Crown's position. He held that if Parliament had intended the acts akin to the one committed by the accused to amount to trafficking it would have included "to give" in the definition.

Accused convicted of possession but acquitted of trafficking.

DETAINING SUSPECT AFTER ANALYSIS OF BREATH IS COMPLETE, FOR THE PURPOSE OF SERVING DOCUMENTS, AMOUNT TO ARBITRARY DETENTION.

REGINA v. MADSEN - Supreme Court of BC, Victoria 00582Z, December, 1992.

The accused gave two samples of his breath on demand. He was not arrested. After having completed the breath tests the accused was instructed to wait in an interview room until the paperwork required to release him was completed. This administration consisted of completing: 1. Appearance Notice; 2. Certificate of Analysis; 3. Notice of Intention to tender the certificate in evidence; 4. a suspension notice under the Motor Vehicle Act; and 5. A police form regarding the accused's physical condition. This took 30 minutes. The accused was then served with the documents and released. When asked where the authority was to detain the accused for the administrative convenience of police, the officer answered, "I have no idea".

The trial judge had refused to allow the certificate of analysis in evidence as it had been procured (including the serving of it) in a manner that infringed the accused's right not to be arbitrarily detained. The accused was acquitted of "over 80 milligrams" and the Crown appealed this verdict to the Supreme Court.

The Supreme Court held that to determine the lawfulness of a detention the circumstances must be measured against the "power of arrest" enactments. Even though no formal arrest was effected in this case, the police officer required the same grounds for detention as he did for effecting an arrest. Said the Court,

> ".....detention by a police officer while not an arrest *de jure*[17] is an arrest *de facto*[18].

The officer had the reasonable and probable grounds to arrest the accused for impaired driving but "shall not arrest" for a hybrid offence unless he does so in the public interest for the well known condition outlined in the Criminal Code. None of these conditions existed in this case.

This means that the detention in this case was exclusively caused by the demand and for the purpose of analyzing the breath samples. Consequently, the detention the officer ordered

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[17] *de jure*: By right and just title - legitimately, lawfully

[18] In fact, indeed, actually.

subsequent to the analysis was unlawful and exclusively for his personal administrative convenience. Hence the detention was arbitrary, concluded the Supreme Court Justice.

The next question was whether the arbitrary detention was in any way linked to the excluded evidence, the certificate of analysis. That is to say, was the evidence of the service of the copy and the Notice of Intention, due to the arbitrary detention, obtained in a manner that infringed or denied the accused guaranteed right? The answer was "yes". To have the certificate admitted in evidence there must be evidence of service. That evidence was obtained by means of arbitrary detention. The certificate was properly excluded. The Crown could have proceeded by means of testimony by the analyst but declined to do so.

The final question was whether the detention such as in this case is a reasonable limitation of the right not to be arbitrarily detained, is demonstrably justified in a free and democratic society (s. 1 Charter).

The Crown relied on the *Bonin*[19] decision by the Court of Appeal for BC. It held that detention for a roadside sobriety test was demonstrably justified. It invited this Supreme Court Justice to hold similarly for the period of serving documents. The Court declined and reasoned that in *Bonin* the detention is for an essential aspect of the investigative process. In this case it is the administrative convenience of the police that would be accommodated if the Crown's view would prevail.

Crown's appeal dismissed,
Acquittal upheld

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[19] Regina v. Bonin - Volume 34, Page 1 of this Publication.

ADMISSIBILITY OF TRACKING DOG EVIDENCE DESPITE IT NOT TESTIFYING OR BE CROSS EXAMINED. CONTINUITY OF EVIDENCE WHERE EXHIBITS HAD BEEN STOLEN.

REGINA v. ALAIN - Court of Appeal for BC, Vancouver CA 014706, December 1992.

Custom Officers observed a bag being placed in a ditch along a road near the border. Police took samples from two bags inside the larger bag and put this cache of what was suspected to be cocaine back in the ditch. In the very early morning hours a person wearing a coat picks up the cache and runs when called, discarding the bag. Police lost their suspect as he ran across a field. A tracking dog located a discarded coat and took police to the accused who was soaking wet and apparently hiding in bushes. When searched a small quantity of cocaine was found on him. The accused was convicted of "possession" with regard to the cocaine on his person and possession for the purpose of trafficking in relation to the kilograms of cocaine contained in the bag. He appealed his conviction on two grounds to the Court of Appeal for BC.

One defence the accused relied on was that of identity. He claimed the Crown failed to prove that the person who got away from police and he were one and the same person. The only link between him and the person who picked up the cache was the behaviour of a tracking dog. The accused argued that the evidence of the tracking dog should not have been admitted as he had been "prohibited" from cross-examining the dog. In 1962,[20] the BC Court of Appeal decided on a similar argument and held that the evidence of a dog's actions while tracking are admissible despite the fact the dog is incapable to testify or be cross-examined.

The exhibit locker used to preserve continuity, had contained three envelopes containing respectively the cocaine found on the accused's person and two envelopes containing the samples taken from each bag. This locker had been broken into and the cache of cocaine had been stolen. It was later retrieved. The trial judge had declined to admit into evidence the large bag that had been stolen from the locker. He did admit into evidence the three envelopes which had not been taken by the thief. As the envelopes contained samples of the substance the accused picked up from the ditch he was convicted.

The Court of Appeal pointed out that continuity is a question of fact. On that fact the trial judge found that the accused possessed the cache of cocaine. Obviously, the trial judge was satisfied that the envelopes (the link) had not been tempered with.

Accused's appeal dismissed
Conviction upheld.

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[20] Regina v. Haas - 132 C.C.C. 362.

EXTENT OF POLICE AUTHORITY AT A "CHECK STOP" PROGRAM.

REGINA v. MELLENTHIN -[1993] 3 Supreme Court Reports 615

The accused was arbitrarily selected to be stopped in a "check stop" program to inspect vehicles, documents and the condition of drivers. It was dark. The accused produced all documents requested from him without any difficulty. The officer did shine his flashlight around the inside of the car for his safety as well as to see if any drugs were being transported. The only item in the car was an open gym bag next to the accused. The officer spotted a brown bag with a plastic sandwich bag inside. The accused told the officer there was food in the bag. Seeing a reflection of glass the officer became suspicious and asked what was in the brown bag. The accused pulled the plastic bag out and it contained empty glass vials, the type that is used to store cannabis resin. This, the officer felt, gave him the requisite grounds to conduct a search and he did search the bag and found it did contain cannabis resin. The accused was arrested and charged with possession. The statements he gave police were inculpatory.

The trial judge had held that the evidence was obtained by a means that violated the accused's right to be secure against unreasonable search or seizure and he excluded the evidence. The Court of Appeal for Alberta found that the shining of the light inside the car was justifiable for the officers protection and safety. However, the probing questions that resulted in the accused producing the bag did amount to an unreasonable search. The officer had not knowingly, deliberately or flagrantly violated the accused's rights. Furthermore the evidence was "real" and existed prior to the search. In the circumstances admitting the evidence would not bring the administration of justice into disrepute. This decision was not unanimous and the accused had access as of right to the Supreme Court of Canada to appeal the order to stand trial again.

He posed three questions to the Supreme Court of Canada:

1. Was I detained in the "check stop"?
2. Was the search by the officer unreasonable?
3. If the search was unreasonable is the evidence found admissible?

The law now clearly indicates that a road check program in which motorist are capriciously stopped constitutes arbitrary detention that violates s. 9 of the Charter. However, the random stops are justified under s. 1 of the Charter due to the incredible harm we do to each other when driving while impaired or with mechanically deficient cars. These cases[21] indicate that for this purpose it is deemed appropriate to check ownership, insurance, licences, sobriety and condition

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[21] Regina v. Dedman - 20 C.C.C. (3d) 47, Volume 22, Page 17 of this publication.
Regina v. Hufsky & Regina v. Thompson - Volume 31, Page 10 of this publication.

of the motor vehicle. It does not doubt, create an atmosphere of oppression when a driver is compelled to answer questions that are not relevant to any of the purposes for the road check. The answer to question 1 is "Yes". The accused was detained from the moment he was stopped and "could reasonably be expected to feel compelled to respond to questions from the officer".

In the circumstances the accused could have refused to answer the questions the officer put to him regarding the bag. In this case he consented to answer them truthfully. But was that consent derived from the mind that was fully aware of his rights? It cannot be said in law that the accused consented to the questions put to him or to the search.

The S.C.C. reviewed what had happened and held that shining the flashlight around in the car is not a search and is a necessary incidental to a check stop after dark for the safety of those on duty at the scene. In this case the officer did shine his light in the car after he inspected the documents and the accused argued that if the act was necessary for safety it should be carried out first. In this case it was for the purpose of searching he claimed. The S.C.C. could not place any significance on this fact. Although for a policeman's safety he/she might consider it preferable to right away inspect the interior, however, he/she may utilize this practice at any time during the stop.

Where things went off the "Charter" track was when the officer started to put questions to the accused about the gym bag. The accused did not show any signs of impairment and the officer did at that time not have any suspicion that there were either drugs or alcohol in the car. The S.C.C. remind the readers of this judgement why the arbitrary detention of motorists is allowed and justified, but warned that anything beyond that must be separately considered and is not included in what justified that arbitrary detention. Said the S.C.C.:

> "The Police use of check stops should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search".

In these circumstances the crown should have "adduced evidence" that the accused made an informed consent to the search. That is, that he knew he needed not to respond to the questions or consent to the search. There was no real evidence. The search was, in addition, without requisite grounds and therefore unreasonable.

In regard to the third question the S.C.C. reminded all courts of judicial review that they should minimally interfere with the judges where they have excluded evidence under s. 24 (2) of the Charter. In this case the findings of the trial judge were not unreasonable and yet the majority of the Alberta Court of Appeal reversed their decision to exclude the evidence. In this, that majority was wrong held the S.C.C.

In *Regina v. Collins*[22], the S.C.C. said that admitting real evidence that was obtained by a means that violated a Charter right, would rarely affect the fairness of a trial. In this case the narcotic found on the accused was real evidence. But it was evidence that could not have been obtained but for the cooperation of the accused and the illegal search. Reading this into other cases on this issue the Court held that surely they did not intend "to draw a hard and fast line between real evidence obtained in breach of the Charter and all other types of evidence obtained". What is meant is not that all real evidence admitted will rarely affect the fairness of a trial. The distinction is evidence that could have been discovered without assistance from the suspected perpetrator and evidence that would have been found without that assistance. In other words, evidence the accused was forced to create or evidence he or she has been forced to merely locate or identify. The trial judge's decision was reasonable and should not have been interfered with; there was no error in law.

When the S.C.C. in previous cases considered the justification of arbitrary detention caused by routine checks of motorists, it had expressed concern about the potential for abuse of power by law enforcement officials. The Court had concluded that there were sufficient safeguards in place to prevent this. It had emphasized that such checks are only justified if they relate to the driving of the car, inspecting ownership and insurance documents, the condition of the vehicle and/or the sobriety of the driver.

> "Once stopped the only questions that may justifiably be asked are those related to driving offenses. Any further intrusive procedures could only be undertaken based upon reasonable and probable grounds. Where the stop is found to be unlawful the evidence from the stop could well be excluded under s. 24(2) of the Charter."[23]

Accused's appeal allowed
Acquittal restored.

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[22] Regina v. Collins - (1987) 33 C.C.C. (3d) 1. Also see Volume 27, Page 1 of this publication.

[23] Regina v. Ladouceur - [1990] 1. S.C.R. 1257. Also see Volume 37, Page 23 of this publication.

SEARCH OF CAR FOR REGISTRATION DOCUMENTS - DRUGS FOUND - REASONABLE SEARCH OR SEIZURE

REGINA v. G.A.E. - Court of Appeal for Ontario, 77 C.C.C (3d) 60.

In early morning hours the accused was stopped as the car he drove did not have a validation sticker on its rear licence plate. The accused produced an interim driver's licence with the required picture missing. The accused was questioned in the police car regarding the documents for the car and the identity of the owner. A computer check verified the ownership issue; in regards to the documents the accused said they were in the car. The officer asked the passenger in the accused's car to open the glove compartment and search for the papers. He opened a small storage space on the console between the front seats and in general did procrastinate to open the locked compartment with the appropriate key on the ring that was hanging from the ignition. When he finally did, it was found that it contained $650.00 in cash and two plastic bags of crack cocaine.

The trial judge held that what occurred constituted a search that was in the circumstances, unreasonable and he had excluded the evidence found in the glove compartment. This resulted in an acquittal of possession for the purpose of trafficking which the Crown appealed to the Court of Appeal for Ontario.

The trial judge had reasoned that the police officer knew he could not open the glove compartment himself for want of authority to do so. So he had the passenger do it. This had not legitimized the search.

The Court of Appeal held (as has been held before) that opening the glove compartment, whether directly by the officer or by someone else, amounts to a search. Since the search was warrantless it was by its very nature "unreasonable" unless the Crown proved that it was not[24].

The Ontario Court of Appeal observed that the officer had authority to stop the car and demand the accused produce his driver's licence and the documentation related to the car. The driver (the accused) could not satisfactorily identify himself and informed the officer that the documents were in the car. There was nothing confidential about these public documents and having the glove compartment opened to locate them was minimally intrusive. The Court accepted that looking in the glove compartment amounted to a search but demanding that a driver's licence,

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[24] Hunter v. Southam Inc. (1984) 14 C.C.C. (3d) 97. Also see Volume 18, page 12 of this publication.

registration and insurance particulars be produced is not. In the circumstances the officer could have prevented the car from being driven away. Consequently the search as it occurred was not unreasonable. What the officer did was not "flagrant" as the trial judge thought but instead "reasonable and sensible".

Crown's appeal allowed and
a new trial was ordered.

ENTERING A DWELLING TO EFFECT AN ARREST - SEARCH WARRANT OBTAINED AFTER ARREST - SEARCH UNREASONABLE

REGINA v. ALFARO - Court of Appeal for BC, Vancouver CA014903, March 1993.

Two police officers received information from a very reliable source that the accused was selling cocaine from his apartment. The officers made their supervisor aware and were instructed to wait until the Justice of the Peace came on duty to get a search warrant. As this left them about 45 minutes to kill they went to the apartment building and did some surveillance. After they had determined the name of the occupant of the apartment to be search from the mailboxes, they walked down the hallway approaching the apartment. A person, the officers knew was very much addicted to drugs was about to knock on the apartment door. The officers stopped her and asked her to leave and not to contact the occupant (the accused) of the apartment. Not trusting that the addict would keep her word and being concerned that evidence would be destroyed, the officers got a key for the apartment from the building superintendent and entered. They found the accused and his girlfriend in bed and arrested them for trafficking. As the accused was led out of the room he whispered something to his girlfriend about a sock. One was seen laying on the floor. The open end was tied closed and it was obvious that something was stored in it. The officers did not touch the sock and did not search anything. One officer stayed behind and testified he filled the time with reading until his partner returned with the search warrant. The sock did contain a substantial amount of cocaine. It as well as drug paraphernalia were seized.

The accused appealed his conviction for possession for the purpose of trafficking to the Court of Appeal for BC, claiming that the sock was searched for and found prior to the warrant having been granted. This amounted to an unreasonable search that should have resulted in the exclusion of the evidence.

The Court accepted the ruling of the trial judge that the primary purpose for entering the apartment was to arrest the accused. The Court also held the officers, in the circumstances, had adopted the least offensive means to effect a legal arrest that could not be delayed lest evidence be destroyed.

The actions of the officers prior to executing the warrant had not amounted to or included a search. The search and the seizure of the cocaine was done by warrant and was reasonable. Consequently there was no consideration for exclusion possible.

Accused's appeal dismissed.

"LINE-UP" AND "SHOW-UP" - CHARTER CONSIDERATIONS
IN-COURT IDENTIFICATION AFTER LINE-UP EVIDENCE WAS EXCLUDED

REGINA v. FRASER - Court of Appeal for BC, Vancouver CA012881.

The accused was apprehended within a few minutes of and a short distance from a bank robbery scene. He had the bait money and the hold-up note shown to the teller, in his possession.

The accused was told by his lawyer that he needed not to participate in a physical line-up. However, he was told by police that he was going to be in one whether he liked it or not. He was given the alternative of a show-up, where he would be placed in a room by himself and be shown to identification witnesses. The accused was unsuccessful in contacting his lawyer about the choice between a line-up and a show-up. The officer in charge conceded that he informed the accused that there was going to be a line-up and he (the accused) was going to be in it. He also admitted to the alternative of a show-up having been put to the accused.

The trial judge ruled that in regards to the line-up the accused's Charter Right and been infringed and excluded all evidence of the line-up and all pre-trial identification. Nonetheless the jury returned a verdict of guilty. The accused appealed the conviction to the Court of Appeal for BC, which observed that even with the disputed evidence omitted an acquittal would have been perverse.

The accused's arguments in regards to the appeal was unique. The witnesses who saw the accused in the line-up did, of course, testify. Most were customers in the bank at the time of the robbery. They were asked if they saw in the courtroom the person who held up the teller. All identified the accused. Although the Crown could not lead evidence of the line-up, defence counsel was not so hampered. He asked these witnesses if having seen the accused in the line-up had assisted them in making the identification in the Courtroom. All conceded that that was so.

The accused argued that consequently the "in the courtroom" identification evidence had been obtained by means of a violation of his Charter right and should not have been admitted in evidence. The right particularly involved here, is the right to counsel.

The BC Court of Appeal declined to determine if a line-up where the suspect declines to participate, is a violation under s. 7 of the Charter. It also declined to rule whether the in-court identification was evidence obtained in a manner that violated the Charter. It simply held that there was a serious infringement of the accused's right to counsel. However, the question was whether the admission of that evidence rendered the trial unfair and could disrepute on the administration of justice.

The Court reviewed the address to the jury by the trial judge. The Judge had been so overly

solicitous to the accused in relation to the identification evidence that the jury must have had the impression that there was no such evidence. The burden of proving disrepute was on the accused. He failed to meet that burden.

Accused's appeal dismissed,
conviction upheld.

NEW RULE OF LEGAL RELATIONSHIP BETWEEN EVIDENCE OF INTOXICATION AND ESSENTIAL ELEMENTS REQUIRING PROOF OF INTENT.

REGINA v. CANUTE[25] - Court of Appeal for BC, Victoria V01231, April 1993.

The accused was in a state of intoxication when he took the life of a Mr. Samuel Wilson. He was charged and convicted of second degree murder. He raised drunkenness as a defence and the trial judge instructed the jury on the law related to this defence, as established in Britain in 1920[26] and adopted in Canada in 1931.[27]

This law affirms that voluntary intoxication is no defence except for offences requiring specific intent. Such defence does not lead to acquittal but is capable of conviction being in relation to a lesser offence. In the case of the murder a lack of forming specific intent reduces the act from murder to manslaughter. The constitutionality of this was questioned as this law violates s. 7 and 11 (d) of the Charter. (This challenge of our common law was not in relation to the distinction between offences requiring specific intent and those having general intent as an essential element).

In the 1920 *Beard* case the evidence was that the accused had placed his hand over the mouth of his rape victim while "sodden and mad with drink". He was charged with felony murder and convicted of manslaughter. The British Law Lords established that evidence of drunkenness that deprives a person of the capability to form a specific intent to murder must be taken in consideration when determining if the accused person did have the specific intent that is an essential element to the crime of murder. However, any intoxication that does not incapacitate the forming of a specific intent does not negate or take away from the reasonable inference that a person intends the natural consequences of his/her acts. Intoxication that merely lowers one's resistance to violence is not included in this common law rule. The intoxicated person must not know what he/she is doing for the rule to apply. In this *Canute* case the jury had been instructed on the issue of intoxication as it is explained above.

The Crown conceded that those instructions are now unconstitutional and that the conviction of canute of second degree murder should be substituted for one of manslaughter. In other words, there was no longer a dispute and the proceedings were no longer adversarial. However the BC Court of Appeal still wanted to settle the issue of what the instructions to a jury on intoxication should be where the offence alleged requires proof of specific intent and asked the assistance of

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[25] Regina v. Larose - Court of Appeal for BC, Vancouver CA013288, April 1993.

[26] D.P.P. V. Beard [1920] A.C. 479.

[27] Macaskill v. The King [1931] S.C.R. 330.

counsel on both sides to assist the Court. As the issue is one of considerable importance a division of five, instead of the usual three justice was appointed.

The argument is, that when the defence of intoxication is raised, where a specific intent offence is alleged all the Crown has to prove is that the accused had the capacity to form the required intent. If that is done the reasonable inference that the accused intended the natural consequences of his/her acts applies. The Crown seems then to be absolved of having to prove the actual or real intent of the accused.

This is limiting the burden of proof on the Crown to prove all essential elements of the alleged crime, beyond a reasonable doubt. In other words, the test applied is precisely what it is known as, "the capacity test". The appropriate test must determine if the accused had the requisite intent not whether or not he had the capacity to form such an intent.

The BC Court of Appeal concluded that the common law rule about the intoxication defence violates the presumption of innocence and is consequently contrary to the fundamental principles of justice. Like statute law, common law that is inconsistent with the Charter can be tested for justification under s. 1 of the Charter. This is done by means of a proportionality test that consists of three components:[28] (1) the law must be rationally connected to its objective; (2) the measure must impair as little as possible the right or freedom in question; and (3) there must be a proportionality between the effects of the impugned law and its objective.

Needless to say, the common law rule in question is for the protection of the public. The victimization by those who consume alcohol is staggering. Why should there be an excuse (defence) for those who voluntarily take in alcohol and then loose their self-control and hurt others? The Court held that this was a matter of public policy which was not within their ambit. The solution would be for Parliament to create "criminal intoxication". This would effectively address all concerns, reasoned the Court. Consequently the common law failed the s.1 Charter-test.

What instruction should be given to a jury where specific intent on the part of the accused is an essential element of the alleged crime and the defence of drunkenness has been raised. The Court adopted an address that would firstly warn the jury that intoxication that causes a person to cast off restraint and act in a way in which he would not have acted if sober gives no excuse for the commission of offences.

The offence alleged, which has specific intent as a requisite, is not committed if the accused lacked that intent. The burden to prove that intent beyond a reasonable doubt is exclusively on the Crown. In considering if the Crown has met that burden, the consumption of alcohol or drugs must be taken into account with all relevant facts that throw light on the issue of intent at the time the offence was committed. If the drunkenness causes a reasonable doubt that the

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[28] Regina v. Oakes [1986] 1. S.C.R. 103 - Volume 23, page 16 of this publication.

accused had the specific intent to commit the crime alleged an acquittal must follow. However, if despite the condition of the accused the jury is satisfied beyond a reasonable doubt that he/she had the required intent a conviction is justified.

It effectively removes the capacity test. It is the actual intent that must be proved, not whether there was a capacity to form such an intent and then infer that there was.

ALCOHOL FROM LAST DRINK NOT ABSORBED BY BLOOD AT THE TIME OF ANALYSIS. VALUE OF THE CERTIFICATE.

The accused drank his last beer at 9:50 and was stopped for speeding at 10:00. A demand was made and the breath analysis indicated a blood alcohol content of 100 ml. At his trial an expert testified that at 10:00 the alcohol from the last drink was not absorbed yet by the blood and the accused unsuccessfully argued that this was evidence to the contrary that the blood/alcohol level at the time of analysis was the same as at the time of driving. He appealed his conviction to the BC Supreme Court. It held that in this case, where the analysis showed a slightly higher alcohol content than the legal limit, the evidence recorded in the certificate cannot be proof of that content at the time of driving. In other words the certificate was evidence but fell short of being proof of what was alleged with regard to the accused's blood/alcohol level at the time of driving. Appeal was allowed and conviction vacated.

Regina v. Groves - Supreme Court of BC, No. X032173, New Westminster, December 1992.

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VALIDITY OF FIREARMS PROHIBITIONS

Section 100 of the Criminal Code of Canada provides for the Courts to order by sentence, that persons convicted of certain offenses that included certain circumstances may be prohibited to possess firearms. Sawyer et al. claimed that this was a violation of the Charter in that the provision amounted to cruel and unusual punishment or treatment. Without giving reasons, the Supreme Court of Canada rejected the arguments and dismissed the Appeal.

Regina v. Sawyer et al. - 78 C.C.C. (3d) 191.

WARRANTLESS PERIMETER SEARCH OF PREMISES NOT OWNED OR LEASED BY ACCUSED. REASONABLE SEARCH.

Police conducted an extensive warrantless perimeter search of a commercial building. They had received reliable information that marihuana was being cultivated in that building. Police attempted to look through mail slots and windows and climbed up on the roof. The two accused were later apprehended while they with proper keys entered the building. They did not own nor lease the building. They were tried and convicted of cultivating marihuana and based their appeal on the decision by the Supreme Court of Canada in the *Kokesch* case.[29] It had held that a warrantless perimeter search is unreasonable and the evidence found of cultivating marihuana in the Kokesch home had been excluded. The BC Court of Appeal held that these two accused Arason and Derosier had no standing for relief under the Charter. If anyone's rights were infringed by police it was the owner of the building or the person leasing it. The two accused had no privacy interests in the building that is constitutionally recognized. Their appeal was dismissed.

Regina v. Arason and Derosier - Court of Appeal for BC, 78 C.C.C. (3d) 1.

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DISHONESTY IN REGARDS TO A CONTRACT - FRAUD

The two accused persuaded an elderly lady to sign a contract with them for a sum of $7000.00 in return for approximately $1,000.00 worth of repairs to her home. They also convinced her to go to the bank and withdraw $6,000.00 in cash to be paid to them up front. The bank employees became suspicious and refused to give the "gullible and overly trusting depositor" the cash she requested. To overcome the suspicion of these employees one of the accused claimed to be the lady's grandson. Police were alerted and the accused questioned. They denied there was a contract or that any price had been agreed on. They said that the 76 year old lady was "crazy". The accused were convicted of attempted fraud and appealed to the Manitoba Court of Appeal. This Court held that there was no misrepresentation of the contract. An exhorbitant price is not, by itself, a misrepresentation. However, the accused had applied methods that were dishonest and amounted to "other fraudulent means". The facts showed conduct on the part of the accused that any ordinary person would recognize as dishonesty to such an extent that it is characterized as criminal. It was so blatant that the accused were subjectively aware of their dishonesty. The convictions were upheld.

Regina v. Wendel and Ballan - Court of Appeal for Manitoba, 78 C.C.C. (3d) 279.

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[29] (1989) 61 C.C.C. (3d) 207. Also see Volume 39, Page 6 of this publication.