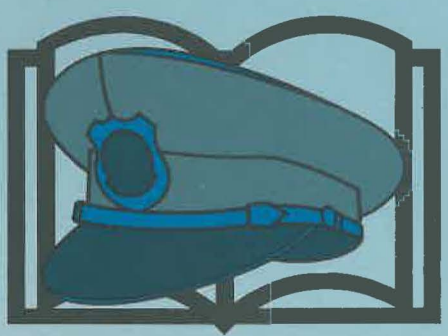
JUSTICE INSTITUTE OF B.C.

ISSUES OF INTEREST
VOLUME NO. 44



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

ISSUES OF INTEREST

VOLUME NO. 44

Written by John M. Post
January, 1994

TABLE OF CONTENTS

Page #

DANGEROUS DRIVING.
IS INTENT AN ESSENTIAL ELEMENT?

REGINA v. HUNDAL - Supreme Court of Canada, March 1993. 79 C.C.C. (3d) 97.

The accused drove an overloaded dump truck, slightly exceeding the speed limit, on the wet pavement of busy city streets. He clearly went through a red light, that had turned that colour several seconds before he entered the intersection. The truck collided broadside with a car the driver of which was killed instantly. The accused maintained that it was unsafe for him to stop his large truck, claimed that he entered the intersection on an amber light and had sounded his horn to warn the traffic. The evidence of witnesses was overwhelming and included a motorist who had followed the accused through 12 intersections and that this was the second intersection the accused entered as the light had just turned red. He was simply not believed and was convicted of dangerous driving causing death. He unsuccessfully appealed to the BC Court of Appeal and then took his plight to the Supreme Court of Canada, (S.C.C.).

Dangerous driving is actually a regulatory offence, like those created by provincial statutes. The offence was for some years, removed from the criminal code and later re-introduced. It is supposed to fit somewhere in between careless driving and criminal negligent driving. It's definition is the section itself and in terms of the *mens rea* requirement the law has always been somewhat vague.

In this case the defence lawyer argued that s. 7 of the Charter contains the fault requirement for criminal sanctions and that dangerous driving, if an objective standard must be satisfied and will suffice to convict, does not meet the s. 7 fault requirement. Since "dangerous driving causing death" has been added the issue of fault and intent have become more pressing.

In 1966[1] the S.C.C. held that careless driving and dangerous driving are distinct offenses and the former is not a provincial duplication of the latter. Dangerous driving requires more than "inadvertent negligence". However in 1968[2] the S.C.C. approved a trial judge telling a jury that, ".....if you find on the facts that the manner of driving was dangerous in your opinion you may disregard the matter of intent." A year later (1969[3]) the SCC held that a jury must be instructed on the difference between advertent and inadvertent negligence when deciding a dangerous driving allegation, implying that the former (heedful conduct) is a requirement.

---

[1] Mann v. The Queen [1966] 2 C.C.C. 273.

[2] Binus v. The Queen [1968] 1 C.C.C. 227.

[3] Peda v. The Queen [1969] 4 C.C.C. 245.

In 1973[4] the Court of Appeal for Ontario, apparently having found no guidance from these contradictory decisions, devised a much followed objective test to determine if certain driving amounts to dangerous driving. It in essence said, "The lives and/or safety of others must have been jeopardized by the defendant's driving that must have amounted to a departure from the standard of care a prudent driver would have exercised in the circumstances". The Ontario Court reasoned that an explanation by the defendant may well bring his driving into that of a prudent driver. In the absence of an explanation, reading the section to a jury is sufficient direction.

Defence counsel argued that the Charter does not allow this kind of objective test without any requirement of criminal intent for a person to become subject to be convicted of a criminal offence and be liable to a prison sentence. It was argued that there is, due to s. 7 of the Charter, a constitutional requirement for a criminal intent. In other words an objective test alone is unconstitutional. The S.C.C. held so in two decisions[5] where statutes provided that there was liability to imprisonment without an element of fault.

The S.C.C. held that the constitutional requirement of *mens rea* is broad and can be satisfied in different ways. This depends on the provisions of the enactment and its objective. Said the Court:

> "The offence can require proof of a positive state of mind such as intent, recklessness or wilful blindness. Alternatively, the *mens rea* or element of fault can be satisfied by proof of negligence whereby the conduct of the accused is measured on the basis of an objective standard without establishing the subjective mental state of the particular accused."

Negligence is subject to an objective test, held the SCC. All that is required for proof is a marked departure from the standard of care of a reasonable person. No intent is required. The nature of the "dangerous driving" offence suggests that a <u>modified objective test</u> is appropriate to determine fault.

With regard to intent, the SCC reasoned that driving is a licensed activity requiring requisite skills before one can engage in the "regulated activity of driving". The rules of the road are known to the licensee as he/she has met the fixed standards. Secondly, to an experienced driver, driving is routine like, "taking a shower or going to work". It is therefore nearly impossible to determine the state of mind of a driver at a given moment. It would consequently be a denial of common sense to have criminal intent as an essential ingredient to driving offenses. Our

---

[4] R. v. Beaudoin (1973) 12 C.C.C. (2d) 81.

[5] BC Reference re: s. 94 (2) Motor Vehicle Act (1985) 23 C.C.C. (3d) 289.
R. v. Vaillancourt (1987) 39 C.C.C. (3d) 118.

statistics are like an indictment as too how many of us are maimed or killed on our streets and highways by means of this one activity, driving. If that many among us died of one disease an epidemic would be declared. For all of those reasons, it is justified that a moderate objective test be applied to determine if one drove dangerously.

The word "moderate" is used to implement objective test considerations that lessen the harshness of it. Certain personal factors and "mistake of fact" must, where applicable, be considered:

> "Nevertheless, there should be a clear distinction in the law being one who was aware (pure subjective intent) and one who should have taken care irrespective of awareness (pure objective intent)."

The S.C.C. offers a number of examples, where despite the Crown having proved objective dangerous driving an accused should nonetheless be acquitted. These examples are not helpful as all are such, that the Crown would not likely prosecute in those circumstances. All include totally involuntary reactions that negate the wrongfulness of the act, e.g. unexpected heart attacks, detached retina, seizure or sudden onset of incapacitating diseases.

In this case the road was wet, the traffic was heavy, the truck was overloaded by about 1200 kg and the driving was a gross departure from the standard of reasonable care.

Accused's appeal dismissed.

NOTE:
A concurring judgement did give a better explanation of a "modified objective test" than the majority judgment. An objective test would mean that the Crown does not have to prove what the accused intended or what was in his/her mind. If the driving was dangerous the offence is complete. "Modified" means that an accused can despite the objective test, still raise a reasonable doubt as to what a reasonable person would have thought in the situation in which the accused found him or herself. In other words a "modified objective test" is an objective test that is "not applied in a vacuum, but rather in the context of the events surrounding the incident". It is no defence to say, "I was careful" or "I believed I could do what I did without undue risk". Only where a belief is reasonably held can it exonerate an accused person. An example of modified objective test was given by Mr. Justice McIntyre in 1989[6]. A welder, before lighting his torch in a confined space receives assurances from the owner that there are no combustible or explosive materials in that space or nearby. None are visible or detected by smell, yet an explosion occurs. A jury, in the circumstances, must be instructed to determine what a reasonable person would have thought and done. Was it reasonable for the welder to light his torch? The answer, on the modified objective test is, "Of course".

---

[6] Regina v. Tutton (1989) 48 C.C.C. (3d) 129.

DISCLOSURE OF CROWN LAWYER'S ADVISE TO POLICE. APPLICATION OF S. 37 CANADA EVIDENCE ACT. CONFIDENTIALITY AND PUBLIC INTEREST

REGINA v. GRAY et al - Court of Appeal for BC, Vancouver CA015664

Gray and four other persons were charged with conspiracy to traffic narcotics. Police had adopted a unique investigative approach that in essence amounted to a reversed sting-operation. Instead of approaching the group of known drug dealers to buy the forbidden substances from them, police offered to supply them with $750,000.00 worth of stock and supplied them with a sample of their wares. A deal was made and when the accused came with cash money to complete the transaction, arrests were effected and the funds were seized as proceeds of crime. No warrants or any judicial licences were involved. Needless to say this was a circumvention from the conventional strategies; an innovative means to seize proceeds of crime and, in essence, police committed an unlawful act.

At the preliminary stages of the criminal proceedings defence counsel included in his demands for disclosure the details of the communication between the officer in charge of this police action and the lawyer of the Justice Ministry who had rendered advice. The Crown objected and claimed there was a client-lawyer relationship involved and the communication was privileged. The BC Supreme Court disagreed[7] and held that no privilege exists in these circumstances.

The RCMP reacted by a Staff Officer applying to the BC Supreme Court for exclusion from the disclosure of the communications between the officer in charge and the federal government lawyer who advised him with regard to the operation. The officer in his application under s. 37 of the Canada Evidence Act made the following points:

1. Disclosure will be injurious to relations between police and Crown Counsel. No full and frank discussions can be expected if the content becomes part of disclosure.

2. Disclosure will impair the administration of justice. Prosecutors will become compellable witnesses in every significant trial to disclose what advice, if any, they gave to police. Crown Counsel will become very reluctant to render any advice.

3. The public is entitled to protection from crime. Police must have access to legal advice to combat criminal activities with increased sophistication to keep abreast of the criminal element. Also the legal system has become more complex and advice from legal experts will avoid the infringements of Charter rights and prevent expensive and unsuccessful police activities.

---

[7] Regina v. Gray et al - Volume 42, page 2 of this publication, Vancouver CC910548.

4. Disclosure will give guidance to the criminal element in our society on how to commit their nefarious offenses with impunity.

5. Disclosure of this kind will stifle internally and externally the exchange of information or assistance as information rendered will be compromised.

Defence counsel argued that without the details of the communication between the Crown lawyers and police, his clients will be deprived of giving full answers and defence to the allegations against them. He submitted that disclosure will establish that the circumvention of the legal system was an objective as was the seizure of $750,000.00; the police were given assurances that they would not be prosecuted; and the evidence will show that there is an abuse of the process of the court on account of entrapment. The accused's rights under section 7, 8 and 9 had been infringed and that should result in a judicial stay of proceedings under s. 24 (1) of the Charter or the evidence should be excluded under s. 24 (2) as admission would bring the administration of justice into disrepute.

The Supreme Court of BC rejected the RCMP application and the Crown explored with "His Lordship" how this disclosure should be handled. Did he want the lawyer in Chambers to describe the advice he gave police; did he want a written report that he could edit? The Justice held that the lawyer should be treated as an ordinary witness and testify and the Crown could raise objections if it saw fit to do so. Any kind of *in camera* proceedings was rejected.

The Crown then appealed the rejection of the application by the staff officer under s. 37 of the Canada Evidence Act, to the BC Court of Appeal.

Section 37 C.E.A. provides that anyone interested may object to disclosure of information on the grounds of a specific public interest. This objection may be raised by certifying orally or in writing to any body or person with jurisdiction to compel the production of information. Where the objection is made in a Court of superior jurisdiction as was the case here, it may hear the information and subject disclosure to restrictions or conditions so the public interest in disclosure outweighs the specific public interest raised in the objection.

The BC Court of Appeal assumed that section 37 C.E.A. is now in place of the government's common law right to "Crown Privilege". It assumed that there were misconceptions about the order issued by the Justice of the Supreme Court. The application by the staff officer indicates that no disclosure of the advice police received from the lawyer should be made. The Justice had rejected a blanket exclusion but did not in any way prevent the Crown or Police from lodging objections under s. 37 C.E.A. while the lawyer or investigating officers testified. Not

knowing what the Justice would allow or exclude there was nothing for the Court of Appeal to review. The process intended by the Justice was appropriate and the law does not provide for a "blanket" clamp on sensitive disclosures.

Objection to disclosure dismissed

Note: The decision that no lawyer - client relationship exists between Crown Counsel and Police was not included in this appeal.

ARMED ROBBERY AND THE USE OF A FIREARM IN THE COMMISSION OF AN INDICTABLE OFFENCE

REGINA v. FITZWILLIAMS - Quebec Court of Appeal, 79 C.C.C. (3d) 81.

The accused and four companions arrived at a shopping centre in two cars. They were arrested instantly "for about to commit an armed robbery". Police found a revolver and a machine gun with clip in one ear. The car in which the accused arrived was clean.

The accused was convicted of "using a firearm while attempting to commit an indictable offence" (s. 85 C.C.). He appealed this conviction to the Court of Appeal for Quebec, based on decisions by the Supreme Court of Canada.

A party by the name of McGuigan[8] had used a loaded shotgun to rob a shopkeeper. He had been convicted of armed robbery as well as using a firearm while committing that robbery. He argued before the Supreme Court of Canada that his use of the loaded shotgun was part of the armed robbery and that the dual conviction did violate the principle that no one should be convicted of more than one offence arising from one delict, particularly where the offenses overlap one another. [9] This pre-Charter response by the Supreme Court of Canada was that Parliament had enacted s. 85 C.C. to curb the menace of the use of firearms. Consequently when the weapon used in an armed robbery is a firearm the additional conviction and consecutive sentence are appropriate.

In October 1985, the Supreme Court of Canada gave reasons for judgement in *Regina v. Krug*.[10] He had, like McGuigan, questioned the validity of the additional conviction and sentence. The only difference was that Krug could argue that the provisions contained in s. 85 C.C. violated his right under s. 7 of the Charter. Krug's car had been repossessed by the Bank and had been stored in a secured compound. Aiming a rifle at the security guard, Krug had demanded that he be allowed to take his car. Police had disarmed him and Krug was, among others, convicted of attempted armed robbery and the use of a firearm while committing that offence.

---

[8] McGuigan v. The Queen (1982) 66 C.C.C. (2d) 97, Volume 5, page 25 of this publication.

[9] Kienapple v. The Queen (1974) 15 C.C.C. (2d) 524 - For Explanation of this principle see page ???? of this volume (Regina v. Crabe).

[10] Regina v. Krug 91985) 21 C.C.C. (3d) 193, Volume 22, page 2 of this publication.

The Supreme Court of Canada rejected the arguments and explained that if one commits theft while armed to overcome the real or anticipated resistance of the possessor of the property, then one commits robbery. The weapon, however, does not need to be a firearm. Therefore the offence created by s. 85 C.C. is separate and distinct from armed robbery as the use of a firearm is an additional essential element to what needs to be proved. The dual convictions for attempted robbery and using a firearm in the commission of that indictable offence were not violating either the Kienapple principle nor any charter right. (See footnote re: outcome of Krug's appeal).

The Supreme Court of Canada did in both cases emphasize that the Crown must show that the actual use of a firearm for a conviction under s. 85 C.C. The trial judge in this Fitzwilliams case had held that the word "use" includes: "to carry, to have at hand loaded firearms for the purpose of committing a robbery". Equipping oneself with a firearm and carrying it when committing robbery, ready to be used, is included in the "use" intended under s. 85 C.C. held the trial judge. "It is not necessary for the firearm to have been used, he had held.

The Quebec Court of Appeal held that in the circumstances as they were at the scene it could not be said that the accused had "used" a firearm. It rejected for technical reasons, to consider if the accused had "attempted to use a firearm while attempting to commit an indictable offence". The Court was not convinced "that all the factual conclusions necessary to justify the conviction were drawn by the trial judge".

Accused's appeal allowed
Conviction quashed

Note: Krug had also been convicted of pointing a firearm at the security guard. In view of the conviction under s. 85 C.C. for the"use" of a firearm, the conviction for "pointing" could not stand. With regard to that offence the "pointing" and the "use" were synonymous.

CHARTER CHALLENGE FOR UNREASONABLE SEARCH OR SEIZURE IN REGARD TO TAKING BREATH FOR THE PURPOSE OF ANALYSIS

REGINA v. BASSI - Supreme Court of BC, Vancouver CC920567

The accused was involved in a serious motor vehicle accident. The investigating officer observed the usual symptoms of impairment. In the rear seat of the police car he demanded a sample of breath for the roadside screening device. As the accused failed that test and after having observed him staggering as he escorted the accused to another police vehicle, he made the demand for a breathalyzer test. The accused was convicted of "over 80 milligrams" and appealed that conviction to the BC Supreme Court claiming, among other things, that the officer had lacked the requisite grounds to make the breathalyzer demand. Consequently the analysis amounted to an unreasonable search and the certificate should have been excluded from evidence.

This approach is unique as in most cases the certificate evidence is attacked on the basis that the demand was not made pursuant to s. 254 (3) C.C. and therefore the certificate is not evidence of the facts contained in that document and the certified results of the analysis is not proof of the accused's blood-alcohol content at the time of driving. This usually leaves it open for the crown to adduce the evidence of the analysis without the certificate or the presumption of equalization. However, claiming that a demand not based on reasonable and probable grounds causes compliance with that demand to be an infringement of the accused's right to be secure against unreasonable search or seizure may, if the claim is successful, cause the evidence to be inadmissible regardless how adduced.

The foundation to show that there was no reasonable and probable grounds for making the breathalyzer demand, was laid through cross-examination of the officer. The roadside device is vulnerable to interference causing false readings if used around electronic transmitters. The officer had not turned off his portable radio or the radio in the police car. Neither had he performed two procedures to test the accuracy the device.

The Supreme Court reminded defence counsel that since the evidence was attacked by means of a Charter route the burden was on the defence to prove on the balance of probabilities that the accused's rights were infringed and not on the Crown to show the absence of such infringements. The defence had failed to meet that burden of proof. The evidence showed that the officer had genuine belief (objectively and subjectively) that the accused's ability to drive was impaired by alcohol. That and his awareness of all circumstances had given him the grounds requisite to the demand.

Accused's appeal dismissed
Conviction Upheld

CONCEALMENT OF EVIDENCE. OBSTRUCTING A PEACE OFFICER IN THE LAWFUL PERFORMANCE OF DUTY

REGINA v. LAVIN - Quebec Court of Appeal, 76 C.C.C. (3d) 279, August 1992.

The Quebec Highway Safety Code provides that no one may operate a motor vehicle containing a radar warning device. A police officer who has reasonable grounds to believe that there is such a device in a motor vehicle may "inspect" the vehicle and confiscate the device. Contravention of any of these provisions constitutes an offence.

In this case a police officer saw a wire hanging from the accused's sun visor. He drove up behind him and activated equipment to stop the accused. The accused removed the detector from the sun-visor and placed it in his pocket. The officer clearly saw this and made the accused aware of his right to confiscate the device and demanded him to hand it over. The accused consulted his lawyer and then told the officer he did not have such a device and invited him to search the car. They debated the issue whether the officer had the authority to search the accused's person. The officer warned that failure to hand over the device amounted to obstructing him in the lawful performance of his duty. As this was to no avail an arrest for that criminal offence was effected. The accused apparently knowing that the officer now had a right to search his person, incident to the arrest, handed the device over. The accused was convicted and had appealed to no avail to the summary conviction appeal court. He then appealed to the Quebec Court of Appeal.

The Quebec Court of Appeal reviewed numerous "obstruction" cases and found none of great assistance. The Quebec traffic laws do not contain any provisions that caused the accused to be duty bound to hand over the device, nor was he at common law required to do so. In essence, the officer claimed to be obstructed as the accused failed to confess or deliver the evidence. Unless there is a legal duty to act, merely not doing something cannot amount to obstruction. For instance, one has a legal duty to identify him/herself for the purpose of commencing criminal proceedings against that person. [*Moore v. The Queen (1978) 43 C.C.C. (2d) 83].* However, here was no duty "to deliver" the device. Said the Court:

> "It seems to me that wilful obstruction requires either some positive act, such as concealment of evidence, or an omission to do something which one is legally obliged to do, and that neither requirement is fulfilled in this case".

Accused appeal allowed
Acquittal entered

Note: This judgement was not unanimous. One Justice dissented and felt the conviction should stand and the appeal should be dismissed. Originally the accused had assumed that the lights and siren were activated to stop a car ahead of him. Although he felt pretty secure, he had slipped the device in his pocket "just in case". When he discovered police were after him, the continuation of storing the device in his pocket became concealment of evidence held the dissenting Justice; evidence the officer had a right to confiscate. That continuation, after the accused knew the facts, to which he personally testified, "He knew I had it, and I knew that he knew I had it", did amount to concealment of evidence and obstruction.

ASSAULT MUST FACILITATE THEFT FOR THE ACT TO AMOUNT TO ROBBERY - AGGRAVATED ASSAULT AND INTENT REQUIRED - ROBBERY AND AGGRAVATED ASSAULT

REGINA v. CRABE - Court of Appeal for BC, Victoria V01302, February 1993.

Late in the evening a Mr. J. parked his car at the Victoria waterfront next to a motor vehicle occupied by two young men (one was the accused) and two young women. Mr. J. walked to the end of the "breakwater" and when he returned he met the two male occupants of the car he had parked next to. The accused "body-checked" Mr. J. so severely that he (Mr. J.) went over the edge of the break-water and fell to the concrete and rock at least 10 feet down. Mr. J. laid there unconscious for a while. He suffered multiple fractures, contusions and lacerations.

The accused, when he arrived back at the car, asked for the use of a metal coat hanger and opened Mr. J's car with it. He found an ignition key in the glove compartment and drove away in Mr. J's car. The next day the foursome drove the car some 500 km north of Victoria and disposed of it.

The accused was convicted of robbery and aggravated assault. He appealed the convictions to the Court of Appeal for BC on two grounds. He argued that the assault on Mr. J. was not done to accommodate the theft of his car. The time that had elapsed between the assault and the theft was proof of that, he claimed. Furthermore, assault is an essential element of robbery. If the robbery conviction is appropriate in the circumstances then a separate conviction of assault is inappropriate. He also argued that aggravated assault calls for an intent to wound, maim, disfigure or endanger the life of the complainant. The accused admitted the "body-check" and realized that it amounts to assault. That Mr. J. went over the edge of the breakwater was not an intended consequence. The assault therefore was at the most "common", not "aggravated" and as explained above, not part of the theft of the car. In essence the accused submitted that convictions of common assault and theft are the only ones supported by the evidence.

In terms of the required intent for aggravated assault the Courts of Appeal have different interpretations. One has held that for aggravated assault the Crown must show an intent on the part of the accused not simply to assault the complainant but also that maiming etc. was an intended consequence[11].

---

[11] Regina v. Parish (1990) 60 C.C.C. (3d) 350.

The Ontario[12] and Manitoba[13] Courts of Appeal disagreed and held that all three levels of assault require the same criminal intent. All parliament did was increase the penalties proportionate with the severity of the consequences of the assault by means of enacting common assault, causing bodily harm, and aggravated assault. The BC Court of Appeal agreed with their Ontario and Manitoba counterparts.

In *Kienapple*[14] *v. The Queen* the Supreme Court of Canada held that a person should not be convicted of multiple offenses arising from the one delict. If two offenses are alleged, arising from one delict and one is included in the other, then an accused person can only be convicted of one of the alleged offenses. To be convicted of both would be tantamount to double jeopardy. However, sometimes more than one offence is alleged arising from one criminal act. These offenses may well be distinct and separate from one another, but do overlap. In the Kienapple decision the Supreme Court of Canada decided that where the accused had raped (as the crime then was) a female person under the age of fourteen years he should not be convicted of sexual intercourse with an underage female person as well as rape as the offence arose from one delict (one act of illicit sexual intercourse). Although the two offenses are separate and distinct from one another in that the one is not included in the other, all the Crown had left to prove after proving rape, was the age of the victim to secure a conviction for the second offence. The two offenses did arise from one act of illicit sexual intercourse and would, despite their substantial overlap, result in multiple convictions.

In this case the defence argued that since the Court held that the assault on Mr. J. and the theft of his car were in time close enough that the former was committed to facilitate the latter, the assault was part of the robbery. Consequently the multiple convictions for robbery and aggravated assault are contrary to the dictum created by the Kienapple decision.

The Court of Appeal for BC held that a common assault will suffice to prove the required violence associated with robbery. Aggravated assault is an assault with certain consequences. The charge of aggravated assault in this case was in regards to the results of the kind of assault that was part of the robbery. In that sense the two were separated from one another and not "substantially" the same for the principle of "Kienapple overlap" to apply. The Court held therefore that the multiple convictions were not inappropriate.

Convictions were upheld
Accused's appeal was dismissed

---

[12] Regina v. Leclerc (1991) 67 C.C.C. (3d) 563.

[13] Regina v. Scharf (1988) 42 C.C.C. (3d) 378.

[14] Kienapple v. The Queen (1974) 15 C.C.C. (2d) 524.

NARCOTIC CONTROL ACT - WARRANTLESS SEARCH OF CAR ON PRIVATE PROPERTY - REASONABLENESS OF SEARCH AND SEIZURE

REGINA v. ZASTOWNY - Court of Appeal for BC, 76 C.C.C. (3d) 492.

Warrantless searches, particularly those conducted on private property, have not met with success in terms of having the results admitted into evidence. Many were, despite the statutory provisions authorizing the search, held to be "unreasonable" as meant by s. 8 of the Charter. A warrantless search or seizure is by its very nature unreasonable unless the Crown proves otherwise.

In this case, a police officer received information from a proven reliable source, that the accused sold narcotics and details on how he conducted his business. The former was not news to the officer while the latter was interesting and helpful. The accused was a known drug trafficker.

For the next couple of days the accused was placed under surveillance and he was seen to meet with individuals who were well known in the drug trade.

The accused was seen to place a brown paper bag in the trunk of a Lincoln parked in the driveway of a private residence. He shortly after left in another car. While other officers followed the accused, the investigating officer entered the private property and opened the trunk of the Lincoln by means of the trunk release button inside the unlocked car. There was only one brown paper bag in the trunk and it contained quantities of cocaine and marihuana. Despite the reasonable grounds the officers searched without a warrant.

Approximately an hour after this search the accused was stopped by the officers who shadowed him. He was arrested for what was found in the Lincoln. He had a considerable amount of cash on his person, and a key to the Lincoln and baggies of the same kind in which the cocaine was found.

The accused was convicted of possession for the purpose of trafficking under the Narcotics Control Act and appealed from the convictions to the Court of Appeal for BC. His grounds of appeal were:

1. The evidence found in the trunk of the Lincoln was the result of a warrantless search on private property. The search and seizure were unreasonable and contrary to s. 8 of the Charter;

2. That the observations of the investigating officer of the accused placing "a" brown paper bag in the trunk of the Lincoln was inconclusive to prove that what was found was the very bag the accused was seen to place in the trunk.

The latter ground was argued on the basis that there were also in the trunk two plastic bags containing household garbage. Police had not searched the content of these bags and the officer could therefore, in his evidence, not eliminate the possibility that the brown paper bag the accused carried, was not placed in the garbage bags. Also, there was no proof that the accused knew what the bag contained. The trial judge had found as a fact that the bag the accused carried and the one found in the trunk besides the garbage bags, were one and the same. There had also been evidence of a strong smell of marihuana coming from the bag. The trial judge had from this deduced that the accused was aware of the content. The BC Court of Appeal seemed to have accepted those facts as it hardly referred to these issues.

The main issue was the reasonableness of the search. In view of the fact that the search was warrantless the Crown had to show that the search did not infringe the accused's right to be secure against unreasonable search or seizure (s. 8 Charter).[15]

Due to one decision by the Supreme Court of Canada in 1990[16] and another by the Court of Appeal for BC in 1991[17] there seems to be a consensus that the threshold of the assumed unreasonableness where a search was warrantless is insurmountable where there was time to obtain a warrant, unless it is a search or seizure incident to an arrest. Even then, the search is limited to the detainee's person and immediate surroundings. Furthermore, lawfulness and reasonableness of a search or seizure are not necessarily synonymous.

The trial judge had held that the 1990 and 1991 decisions were not applicable to this case. In the 1990 decision police had searched to gain the reasonable grounds required to conduct a search under the Narcotic Control Act.

In 1991 decision the search was of a car in relation to stolen property. There simply was no provision for a warrantless search.

In this case the search was carried out in compliance with the provisions of the Narcotic Control Act. The car and the place where it was parked, were places where police are empowered to search without warrant provided they have the requisite reasonable and probable grounds.

---

[15] Hunter v. Southam Inc. [1984] 2 S.C.R. - Volume 18, page 12 of this publication.

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

[17] Regina v. Klimchuk - Volume 40, page 6 of this publication.

The BC Court of Appeal held that objectively as well as subjectively the investigating officer had those required grounds to search the trunk of the Lincoln car. The Crown need not demonstrate anything else. The search was therefore lawful and in the circumstances reasonable.

The accused's appeal was dismissed. Conviction upheld.

IS "SICKING" A DOG TO ATTACK A PERSON ASSAULT USING A WEAPON?

REGINA v. McLEOD - Court of Appeal for the Yukon Territories, Whitehorse, YU00214

The accused ordered her pit bull terrier to "sic" the complainant who, as a consequence, suffered injuries to her hand. She was acquitted of assault using a weapon. The sole question in the Crown's appeal was whether or not in the circumstances a dog can be a weapon.

The trial judged had held that an animate object is not included in the Criminal Code's definition of weapon. The Court of Appeal, however, read down the offence section as well as the definition of weapon and held that the operative words are:

> "Everyone who, in committing an assault.....uses....a weapon.... is guilty of an indictable offence", and "Weapon means anything used .....in causing injury or death to persons....." (emphasis is mine).

The Court held that "anything" in this context to include animate and inanimate bodies. Accordingly a dog can be used as a weapon.

Crown's appeal allowed
Accused convicted

CAN A RECANTED PRIOR INCONSISTENT STATEMENT FROM A WITNESS BE EVIDENCE OF THE TRUTH OF ITS CONTENT?

REGINA v. K.B.G. - Supreme Court of Canada, 70 (3d) 257, February 1993.

Four youths, including the accused, were involved in a fight with two brothers. One of the brothers was stabbed and died. Three of the youths gave statements to police to the effect that the accused had told them that he was the one who had done the stabbing.

At the accused's trial for second degree murder the three youths agreed that they had made the statement about the accused's admission to them but testified that they had lied. As provided for in the Canada Evidence Act the witnesses were cross-examined by the party that called them, but they did not vary from their version of things. This left the trial judge to apply the very rigid rule that an unadopted prior inconsistent statement can only be used with respect to the credibility of the witness but not to prove the truth of its content. Consequently the statements were not evidence to identify the accused as the one who had stabbed the deceased. An acquittal resulted and the Crown's appeal reached the Supreme Court of Canada (S.C.C.)

The S.C.C., in essence, held that the rule accurately applied by the trial judge, was overly rigid and technical and in need of reform. Needless to say, a reform with the Charter of Rights and Freedom in mind.

The statements the youths made to police, were not made under oath while their testimony recanting the statements was. The witnesses could not individually vouch for the truth of the content of what the accused had told them and hence the statements would have been hearsay evidence if the witnesses had followed through with their testimony. Furthermore, the jury only observed the witnesses in the witness box but did not have the benefit of having observed the witness' demeanour while they gave the recanted statements to police. This forced them to either believe the prior statement or the testimony. These are some of the reasons for the rule of evidence the trial judged had applied and which was labelled as "orthodox" by the S.C.C.

To overcome the difficulty in asking a jury to believe an unsworn statement over sworn testimony the S.C.C. held that this was best done by having the witness make the statement under oath, warn them about the criminal liability should they lie and videotape the giving of the statement. This could remove the reasons for the "orthodox" rule the trial judge had been bound to apply.

Apparently, to avoid unnecessary rigidity in the modified rule the S.C.C. hastened to add that the oath, warning and videotaping were the ideal means of showing reliability but not the only means. Witnesses who observed the taking and making of the statement, can in exceptional circumstances, provide the reliability factor required for the truth of its contents.

In other words a prior inconsistent statement can be admissible to show the truth of its content despite the fact that the person who gave the statement testifies that it was not the truth. A *voir dire* must be held to determine if the statement is reliable.

In this case the giving of the statement was video taped and it could be used to deal with the reliability of the statement. Furthermore, the application of the rigid rule had prevented an exploration if there was sufficient substitute for the "oath and warning" proposed as part of the modified rule.

Crown's appeal allowed
New trial ordered

CROSS-EXAMINATION ON SELECTIVE MEMORY
CRIMINAL LIABILITY FOR TRAFFICKING BY MEANS OF AIDING

REGINA v. MORGAN - Court of Appeal for Ontario, 80 C.C.C. (3d) 16

The accused aided in the sale of cocaine to an undercover police officer. A police agent involved in the transaction gave police statements as the investigation was ongoing. These video taped statements were used by police to prepare a "will say" statement for the agent. Prior to testifying at the preliminary hearing the agent refreshed his memory from that "will say" statement. For the purpose of the testimony at trial the agent refreshed his memory from the transcript of the preliminary hearing. Defence counsel sought to cross-examine the agent whether his memory had been selectively refreshed by police. As the agent had not personally prepared the document fundamental to his testimony, the trial judge had limited the cross-examination to issues of credibility.

The Ontario Court of Appeal held that whether or not a witness has personally prepared the document from which he/she refreshed his/her memory, the defence is permitted to cross-examine on the issue of selective memory.

The trial judge had instructed the jury on whether or not the accused was an "aider" as defined in the Criminal Code. This, the Court of Appeal held, was inadequate. The jury should have been given the specific direction that the accused was only criminally liable for his role in the transaction if they found he had aided the seller.

Accused's appeal allowed

CONSTITUTIONAL VALIDITY OF "DURESS"
PRISON WORKER SMUGGLING DRUGS INTO CORRECTIONAL INSTITUTE

REGINA v. LANGLOIS - Court of Appeal for Quebec, 80 C.C.C. (3d) 28, February, 1993.

A prison employee was found to smuggle drugs into the correctional institute. He was charged with conspiracy and trafficking in narcotics and drugs. At his trial the accused raised the defence of duress. He had brought the drugs into the institute as failure to do so would have jeopardized the safety of his wife and children. He received instructions where to collect the drugs and when to bring them, by means of anonymous phone calls. He had also received instructions directly from inmates.

The defence of duress, as it is defined in the Criminal Code, is only available where the offence is committed "under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed". This defence as defined was obviously not available to the accused. However, the trial judge held that there was a common law defence of duress that was more generous to the accused. An acquittal followed. The Crown appealed to the Court of Appeal for Quebec and reasoned that statute law supersedes common law.

The Court of Appeal in essence revived the common law defence of duress by ruling that the Criminal Code definition of the defence violates the fundamental principles of justice in that it deprives a person of a defence where he is morally blameless due to having committed the wrongful act "normatively involuntary".

The Court declined to alter the Criminal Code section by interpretation. Compulsion renders a person blameless in many circumstances. Yet the section deprives a person of that defence in the gravest crimes as it does not include death or bodily harm threatened to be inflicted on family members or other loved ones. In terms of the prerequisite mental state on the part of the person who commits the act, the Criminal Code definition is irreparable.

The defence the accused raised had with regard to some aspects of events an air of reality. Other circumstances however made the accused more than a person acting exclusively from fear. The defence (the common law version) was left with the jury and it returned a verdict of not guilty.

Considering the Quebec Court of Appeal opinion that the statutory definition of the defence of duress is unconstitutional,it declined to intervene.

Crown's appeal dismissed
Acquittal upheld

Facts:

When the accused was searched as well as his pick-up truck, over 3500 valium pills, 282.6 grams of hashish and cash money was found. In addition, letters, tapes and clothing for member's of Hell's Angels gang were seized from the accused. He, at the time, admitted to having smuggled approximately "5 pieces" of hashish into the jail about 10 days before.

There was also evidence that the accused had sold 3623 valium pills. Seven charges were preferred. A jury returned a verdict of not guilty when told by the trial judge that morally the accused had not committed any of the offenses if what he did was done involuntary due to duress. If the claim of duress created a reasonable doubt it had to be resolved in favour of the accused.

ARBITRARY DETENTION BY OFFICER STOPPING CAR SEEN BEFORE AT SUSPECTED "CRACK HOUSE"

REGINA v. SIMPSON - Ontario Court of Appeal, 79 C.C.C. (3d) 482.

A memo was circulated in the police department by an officer who had in a "street contact" been informed that at a certain address drugs were sold. Another officer noticed a car at this address and he pulled it over after it left the premises. He wanted to see what story the two occupants of the car would give him and if they would trip themselves up and give him grounds to arrest them. As the officer questioned them about their activities he noticed a bulge in the accused's pocket and made him take out the object that caused the bulge. It was a baggie containing cocaine. He was convicted of possession for the purpose of trafficking. He appealed this verdict on the basis that this evidence had been obtained by a means that violated his rights under the Charter. He said he was arbitrarily detained when the evidence was discovered.

The Court of Appeal for Ontario found that the reasons the officer gave for the stopping of the vehicle (in which the accused was a passenger) left him without authorization for it under the Narcotic Control Act or the Highway Traffic Act. Under the latter Act the random stopping is authorized for promoting safe use of motor vehicles. There was nothing included in the officer's reasons for the stop that was relevant to this objective. The Narcotic Control Act does not provide for random stopping either, although the search and seizure provisions do include the stopping of vehicles where there are reasonable and probable grounds to believe that narcotics are transported. The officer in this case was at best on a fishing expedition and did not have sufficient knowledge about the content of the memo or its validity factor to hold that he had "corporate knowledge".

As the statutes were of no assistance to the Crown's interest the Court turned to common law. Police have wide duties to prevent and ferret out crime. When criminal activities are suspected police have a duty to make efforts to substantiate police intelligence. If this was the officer's objective, he had been in the execution of his duty. However, the lawfulness of the conduct on the part of the police, depends on the justifiable use of power associated with that duty.

Police must have an articuable cause for detaining a person in circumstances like these. There simply must be a gathering of "objectively discernible facts "that give the police reasonable cause to suspect that a person is implicated in the criminal activity under investigation. In the absence of such articuable cause, police have no power to interfere with a person's "fundamental liberty to move about in society" to the extent as they did in this case. The Court recognized that experienced police personnel have hunches that are not too often wrong. However, if they act on a hunch and it proves to be accurate, that will not suffice to serve as grounds for interference or exercise of authority

When the officer pulled the car over he, by his own candid testimony, had no more than a hunch. The detention that followed was arbitrary and the cocaine had been searched for and seized while he was so detained. The cocaine was inadmissible as evidence.

Accused's appeal allowed, conviction set aside, acquittal substituted.

POLICE FAILING TO INQUIRE INTO RELIABILITY OF INFORMER'S TIP RESULTED IN WARRANTLESS SEARCH TO BE UNREASONABLE

REGINA v. LAMY - Manitoba Court of Appeal, 80 C.C.C. (3d) 558, April 1993.

Police received information from a source they considered reliable, that the accused was associated with his brother in trafficking narcotics, and that he was on his way home with a quantity of marihuana in his car. The brother was well known to police but the accused was not. Motor vehicle records were checked and the description of the accused's car was obtained. The brother's and the accused's home were kept under surveillance and the roads leading into the town were checked. The accused's car was spotted and a warrantless search of the vehicle produced sufficient results to charge the accused with possession (of a large quantity) of marihuana for the purpose of trafficking.

The trial judge had found that the search and seizure had been unreasonable under s. 8 of the Charter. The evidence was excluded and the accused was acquitted.

The Crown appealed claiming that the police had reasonable and probable grounds to believe the accused was in possession of marihuana. Furthermore, a warrantless search upon such grounds is authorized for any place except a dwelling house. (s. 10 Narcotic Control Act). Consequently the search was lawful and reasonable and the evidence should not have been excluded. Furthermore, even if the search was unreasonable, the evidence found was real and the administration of justice would not have been brought into disrepute had the evidence been admitted.

Some of the pertinent facts and law are that:

1. The accused had objected to the search.
2. Police had done nothing to determine the source of the informer's information to satisfy themselves that reasonable and probable grounds did exist for them believing that the accused transported narcotics.[18]
3. Police felt there were insufficient grounds for them to obtain a search warrant while the prerequisite ground for such a warrant are the same as those required to conduct a warrantless search of the accused's vehicle (s. 10 N.C.A.).

---

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

4. There is presumption in law[19] that a warrantless search is unreasonable unless the Crown proves otherwise.
5. Regardless of statutory provisions authorizing warrantless searches, judicial authorization must be obtained where feasible, as a pre-condition to a valid search under s. 8 of the Charter which does not protect proprietary rights but the rights to privacy where one has a reasonable expectation of privacy.

In regards to 2. above, police did apparently not even inquire where the informer got his information from. No attempt was made to corroborate the truth or reliability of the "tip".

In regards to 3. above, the Crown maintained there were no grounds for a search warrant but when police observed the accused's vehicle heading for town on the highway this changed. This confirmed the informer's tip sufficiently for police to have grounds for a warrantless search. The equalization with regard to the prerequisite grounds for a warrant and a warrantless search simply did not exist anymore. To obtain a warrant when the accused's vehicle was spotted was simply impractical. All cases indicate that where statute authorizes a warrantless search the failure to obtain a warrant due to urgency or impracticality removes the presumption of unreasonableness.

The Manitoba Court of Appeal was not persuaded. It in essence said, that the failure of police to inquire into the reliability of the tip they received deprived the accused from having the grounds for searching his vehicle judicially scrutinized beforehand. Police had interfered with his rights to privacy on the scantiest of grounds. They did perhaps have the grounds when the vehicle was spotted but that was in the circumstances due to that failure to verify, not sufficient to overcome the presumed unreasonableness.

Crown's appeal dismissed,
Acquittal upheld.

---

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

OFFICERS ENTERING PRIVATE PROPERTY TO INVESTIGATE REPORT OF IMPAIRED DRIVING - PROPRIETY OF ACTIONS - TRESPASS AND SEARCH

REGINA v. JOHNSON - BC Supreme Court, Nanaimo No. 263605.

A citizen observed a car being driven erratically and reported this to the police. A constable was given the details and was told to investigate. The officer and his partner attended at the address of the registered owner. To get to the house they had to drive up a 700 metre driveway from which the house was visible for the last 25 metres. The car they were looking for was parked near the house. The engine was running and the accused was behind the wheel. She was drinking beer and her female passengers were having some wine.

The accused showed obvious symptoms of impairment. She refused to comply with the demand for breath samples and consequently an Appearance Notice was issued for "refusal" and "impaired driving". She was convicted and appealed these verdicts to the BC Supreme Court claiming that the officers had trespassed and that they had gained the evidence of her impairment by means of a warrantless search. This search was consequently unreasonable not only because of the officers actions but by the very nature of such a search.

The BC Supreme Court rejected the arguments and held that the evidence had been obtained lawfully and without any infringement of the accused's Charter rights. The officers were clearly in the lawful execution of their duty. They received a complaint with respect to the commission of a criminal offence and were obliged to investigate to ascertain the author of that crime. This included approaching the known owner of the car to discover who was driving it at the time the offence was committed. Needless to say, one can only obtain a search warrant for "things" but not for persons.

It so happened, that the owner was found to have the care and control of the car while her ability was impaired by alcohol.

Appeal dismissed
Convictions upheld

EVIDENCE OF ROADSIDE SCREENING DEVICE TEST TO PROVE IMPAIRED DRIVING - RIGHT TO COUNSEL

REGINA v. ANDERSEN - BC Supreme Court, Nanaimo 258145, January 1993.

The accused was involved in a motor vehicle accident. He and his passenger were injured. At the scene the investigating officer detected a strong smell of an alcoholic beverage on the accused's breath. Due to the injuries no other symptoms of impairment were observed.

The hospital staff indicated that they also were of the opinion that the accused had been drinking excessively and agreed that a demand for a screening device test was justified. This resulted in a "fail" reading.

The trial judge held that the aggregate of the evidence was proof that the accused drove while his ability to do so was impaired by alcohol. This included: 1. the circumstances of the accident; 2. the accused's drinking pattern of that day; 3. his speeding; and failing the screening device test nearly one hour after the accident.

Needless to say, the breath test was a major portion of the evidence. The accused appealing his conviction, argued that the results of the screening device test were inadmissible in evidence. He submitted that his right to counsel had been infringed.[20] The Supreme Court of Canada held in 1988 that the right to counsel warning need not to be given when a roadside screening device test is demanded. However this demand must be made upon finding a person operating a motor vehicle and it then must be complied with forthwith. For instance, where a device is not available at the scene and needs to be delivered makes "forthwith" compliance with that law impossible for the suspect. If the demand is delayed to deliver a device to the scene, the suspect is detained beyond the operational intent of the legislation and he must be made aware of his/her right to counsel.

In this case the accused was not informed of his right to counsel. This the Court held, was within the precedent set by the Supreme Court of Canada. The demand was made as soon as practicable. It could not have been made any earlier due to circumstances at the scene of the accident. The compliance was forthwith and consequently the right to counsel warning needed not to be given.

---

[20] Regina v. Davidson - See Volume 41 page 19 of this publication.

The screening device is designed to ascertain the presence of alcohol in the blood of a person, and no more than that. Yet the trial judge had attached considerable weight to the "fail" reading to conclude that the accused's ability to operate a motor vehicle was impaired by alcohol, argued the accused.

The Supreme Court Justice disagreed and found that the "fail" result was no more than the noting of facts in the trial judge's decision. He had not erred and there was no excessive weight attached to that evidence.

Appeal dismissed
Conviction upheld

CREATING A DISTURBANCE AS A CRIMINAL OFFENCE: THE MEANING OF "SHOUTING"

REGINA v. REED - Court of Appeal for BC, Victoria V01398

The accused was once a Jehovah Witness and had been expelled from the Assembly. He does, however, attend the movement's conventions and usually annoys those in attendance with views quite contrary to the doctrines of their beliefs. He professes these views by means of an electric megaphone with considerable volume. Often his means of communication come to the attention of the Courts[21] as they result in the Crown alleging violations of by-laws or offences under the Criminal Code of Canada. The accused, by representing himself most of the time, has a remarkable track-record of acquittal.

This time the accused had attended a convention of Jehovah Witnesses and annoyed any persons within 200 yards of him as he reached them via amplified sounds with insulting comments about their religious convictions. The sound volume was such that a normal conversation within the 200 yards was nearly impossible. The accused was convicted of creating a disturbance in a public place by shouting. When his appeal to the BC Supreme Court failed he appealed further to the Court of Appeal for BC.

Two questions were directed to this Court:

1. Does the meaning of "shouting" include a electronically magnified voice, and
2. Do sections 171 and 172 of the Criminal Code violate the freedom of religion and expression? In other words was the accused's freedom inhibited by him having to comply with sections 171 and 172 in these circumstances?

The reasons for judgment by each of the three justices do little to shed a clear light on these issues for those who must enforce the sections of the Criminal Code required to maintain public peace.

The Chief Justice held that for the purpose of defining "shouting" under the Criminal Code (not necessarily for the purposes in anti-noise by-laws) it does not include speaking with the aid of an electric amplification device. As the accused spoke in his ordinary speaking voice into his bull horn, he was not "shouting" regardless of the volume at which that voice was broadcast.

---

[21] See (1) Volume 16, Page 1 of this publication, (2) (1984) 10 C.C.C. (3d) 537 (3) (1983) 8 C.C.C. (3d) 153.

The concurring justice (in terms of final conclusion only) felt that she was bound by the answer this Court gave when the accused asked the very same question about the meaning of "shouting" when he appealed a conviction of disturbing a religious worship by "shouting" in 1984. This Court then held that amplifying one's voice to a level equal to or greater than that of a shouting human voice is shouting. Consequently she held that the accused had been shouting.

The dissenting justice also found that the amplified voice of the accused was "amplified shouting".

The Chief Justice already having held that a normal speaking voice amplified by a bull horn is not "shouting", also found that no disturbance had been caused. The people may not have liked the noise; may have been annoyed that normal conversation was inhibited; and may have felt insulted or offended by what was said. Loudspeakers in public places often inhibit or interrupt conversations and what is said may well be met with disapproval by many recipients of the message. However, this does not present the element of disorder that underlies the crime of creating a disturbance. Consequently the Chief Justice would allow the appeal. He did not address the issues the accused raised in question #2.

The concurring justice, already having held that the accused was shouting quite reluctantly found that no public disturbance had been caused by that shouting. She, considering the standards of Criminal law, found that the Courts cannot convict a person of creating a disturbance if he sang or shouted language that inherently would disturb reasonable persons. Inherent disturbance is not a crime unless the Crown shows that people were in fact disturbed. However, she did not believe that if those who are insulted, offended and disturbed, merely take it and walk away, that there is then no disturbance. She did hold, that the precedent[22] clearly states that a criminal disturbance must be present and manifest itself externally. As there was no evidence that the conduct of the accused actually did affect or disturb anyone she also allowed the appeal. Question #2 was not answered in her reasons for judgment.

The dissenting justice already having held that the accused had been shouting, also found that a disturbance had been caused. The shouting had infringed upon "that particular crowd of citizens" who had a right to peace and tranquillity and had obviously disturbed them considering all the evidence.

With regard to Question #2, the dissenting justice held that the impugned sections of the Criminal Code do not inhibit the accused from freely expressing or holding his beliefs. The section only restricts the manner in which he could exercise those freedoms. Freedoms, as opposed to rights, are more restricted and regulated for the sake of public order rather than to interfere with exercising them. There is simply nothing in the section that is an indirect attempt

---

[22] Regina v. Lohnes [1992] 1 S.C.R. 167

to inhibit anyone from freely expressing his religious beliefs and relevant opinions. The dissenting justice would have dismissed the accused's appeal.

Consequently it was the majority decision that,

The Appeal is allowed, and the conviction set aside

POWERS OF ARREST - SPATIAL JURISDICTION. POLICE IN HOT PURSUIT EFFECT ARREST IN ACCUSED'S BEDROOM FOR PROVINCIAL TRAFFIC OFFENCE - EXCEPTIONS TO "CASTLE" PRINCIPLE

REGINA v. MACOOH - [1993] 2 S.C.R. 802 - February

In early morning hours the officer saw the accused driving through a stop sign. Activation of the lights on the police car resulted in the accused speeding up and driving through another two stop signs. He parked his car at the apartment building he lived in and ran to the entrance.

The officer who knew the accused by name, called out to him to stop, as he, the "police", wanted to talk to him. This was to no avail. The accused entered the building as did the officer, constantly calling out and identifying himself. The accused went into his apartment and the officer called out in front of the door, to anyone inside, that he was "police" and was going to enter the dwelling. As he did, the officer heard a male voice whisper in the bedroom, saying, "Tell him I was here all night with you". A female voice answered, "No Doug". The officer entered the bedroom and arrested the accused for the arrestable offence under the Alberta Highway Traffic Act of failing to stop for a uniformed police officer. The accused refused to accompany the officer and a scuffle ensued during which the officer discovered that the accused was intoxicated. He then arrested the accused for impaired driving and demanded he accompany him for the purpose of breath analysis.

The trial judge held that although there are binding precedents rendering it lawful for officers to enter private homes to effect a lawful arrest, it was not lawful in these circumstances. The precedents in essence established that a home is not a haven to shield those who are subject to lawful arrest. Lawful arrests with or without warrant, know no barriers of privacy. All these cases, however, involved arrests for criminal offences while this was a violation of a regulatory type of law enacted by a provincial government and as such, an offence punishable on summary conviction only. Needless to say, the lawfulness of this arrest was a kernel issue during the accused's trial for (1) impaired driving; (2) refusing to give samples of breath; (3) failing to stop for an uniformed police officer; and (4) assaulting a peace officer with the intent to resist arrest.

The trial judge had found that the officer had reasonable and probable grounds to effect the arrest. However, his uninvited presence in the accused's home, in these circumstances, rendered the arrest for impaired driving unlawful. The reasonable and probable grounds for that offence were discovered when the officer was in hot pursuit of the accused in relation to a provincial summary conviction offence, albeit an arrestable offence. The precedents binding on this Court, were related to indictable offences only. Consequently the "Castle" or "principle of sanctity of home" applied.

The Crown successfully appealed the acquittal of the accused and he in turn, appealed to the Supreme Court of Canada (S.C.C.).

1. *Eccles v. Bourque (1974) 19 C.C.C. (2d) 129.*

   Police in BC forcibly trespassed by entering a home upon reasonable and probable grounds that a person for whom a Quebec warrant was outstanding was in the dwelling. Despite the fact that the person sought was not there and that police did not have the warrant in their possession, the forcible trespass was lawful at common law. The grounds had been reasonable and probable and the officer had announced his presence and purpose before entry.

2. *Regina v. Landry - [1986] 1. S.C.R. 145 - Volume 8, page 22 and Volume 23, page 7 of this publication*

   A witness to an attempted car theft had followed the culprits to their home. He alerted police and pointed out where they were. Police entered the home and effected arrests. Landry, one of the arrested persons, resisted and fought the officer. The Crown's case hinged on the officer having been in the lawful performance of his duty. The S.C.C. reiterated the exception to "the principle of sanctity of home":

   > "....there should be no place which gives an offender sanctuary from arrest...." and "....there are occasions when the interest of a private individual in the private security of his house must yield to the public interest, when the public at large has an interest in the process to be executed. The criminal is not immune from arrest in his own home nor in the home of his friends".

In these and other cases, it has been suggested to the S.C.C. that where police must enter by force to effect an arrest a warrant to arrest ought to be prerequisite to the lawfulness of the trespass and the arrest. The S.C.C. rejected this suggestion. The ability of police to apprehend an offender should not be "foiled" by the offender grabbing the horns of the alter, so to speak, by ducking into an apartment building or house. The Court reviewed a number of possible scenarios and concluded that setting the precedent as suggested by defence counsel would create a legal barrier where non should exist.

The defence also argued that the precedent established in *Landry* applied only where police have authority to arrest without warrant for the commission of an indictable offence. Consequently there was at the time the officer arrested the accused in his own bedroom no authority for him to enter a home in fresh pursuit of a person he had the power to arrest for a provincial offence.

The S.C.C. responded that the issue in this case was not the applicability of the *Landry* precedent to a provincial offence. In *Landry* police were not in fresh pursuit. It has always

been common law that when in fresh pursuit, an exception to the principle of the sanctity of the home is triggered and police have a right to enter and effect an arrest. Consequently the only question the S.C.C. had to answer does this include cases of fresh pursuit where an "arrestable" provincial offence is involved.

When "hot pursuit" is involved one cannot say that the offender's domestic tranquillity is disturbed. He went to his or a friend's home solely to escape arrest.

> "In such circumstances, the police could not be obliged to end the pursuit on the offender's doorstep, without making the (his) residence a real sanctuary...."

The S.C.C. reasoned that they had a responsibility in terms of public interest, not to encourage flight. Significant danger is involved as was demonstrated in this very case. The accused unnecessarily threatened the safety of those who might have been in his way. Also, flight is frequently undertaken not so much for escaping liability for the minor offence found committing but to prevent a more serious offence from being discovered. It seems in this case reasonable to infer that the accused was not fleeing to escape a traffic ticket but did so to avoid prosecution for the criminal offence of impaired driving. The results of law that would accommodate such flight would not in any way be in the public interest, reasoned the Court.

The S.C.C. said that answering this question as they did, was not sufficient. Most if not all arrestable provincial offences have "Finding Committing" as a prerequisite to lawfulness of an arrest. The strictest form of finding committing, of course, is personally witnessing the commission of the offence. The Court found that if they applied that strict definition of finding committing where a provincial offence had been committed, it would fall short of the remedy it intended to create. Said the Court:

> "Police who arrive shortly after the offence is committed and see the offender fleeing should be able to follow him into private premises, for a provincial offence as well as for an indictable offence. This power of entry should also be enjoyed by police continuing a pursuit already begun. The requirement that there is really hot pursuit is.....sufficient and is an answer to the concerns.....This assumes real continuity between the commission of the offence and the pursuit undertaken by the police".

Needless to say, in all of these, police must find themselves in circumstances where they are authorized to effect an arrest without warrant.

Accused's appeal dismissed.

Comment:

In these types of cases the famous *"Semayne's Case"* of 1604, (5Co, Rep. 91) is always quoted as a foundation for the "a man's home is his castle" concept. The Semayne case seems to be the seed of "the principle of the sanctity of home". The well known passage of this case is:

> "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors....."

In 1604 the Sheriff was indeed the King's agent. He was the executor and enforcer of anything within the jurisdiction of the executive branch of government and/or the Courts. The parish constable of that day was not an agent of the State or Crown, but a surrogate citizen. His business was not that of the State, although both had mutual interest in the maintenance of the Crown's peace and a normal state of society. Nothing has changed in regard to the distinction between "The Crown's Agents" and the surrogate citizen who is in charge of keeping the peace. We have neighbours to the south of us where the police officer is indeed the agent of the State. The equation of State and Police has gradually crept across the 49th parallel and has even infested our Courts who frequently refer to police as the State, particularly since the Charter of Rights and Freedoms came into effect in 1982. The Charter stipulates that it applies to our senior levels of government and its agents and the Courts have, without consideration to the inherent status of police in Canada, included police in that category. Police seemed to have accepted this new label and may even consider it to be an elevation of status. However, this is a complex issue and one that hopefully will be addressed in the current inquiry into policing issues in British Columbia. In my view this matter is kernel to the functions of the executive branch's Police Services Branch and those of the Police Commission. It seems that the historical development of police clearly reflects the distinction between these entities. Particularly the function and status of the Commission was clearly envisioned at its inception in the mid seventies and designed to be that buffer zone between the State and the police.

All that is intended to be said by these comments is that the Semayne case is to a certain degree distinct from *Eccles v. Bourque* and the *Landry* cases. In the former the King's process was executed in the latter the community was represented by its surrogate citizens by effecting an arrest of an alleged perpetrator the State may or may not, want to prosecute.

BLOOD SAMPLE SEIZED BY SEARCH WARRANT
ADEQUACY OF GROUNDS

REGINA v. STOLZ - Court of Appeal for BC, Vancouver CA015111, September 1993.

The accused had been driving outrageously and was in several entanglements before he caused a major accident in which a woman and her child lost their lives. The accused was also injured and according to everyone who encountered him before or after the accident his ability to drive was impaired by alcohol. A hospital technician offered the investigating officer the accused's blood that had been taken for medical purposes. He refused to accept it without a search warrant. He applied for one and it was granted and executed. The accused was convicted of impaired driving and appealing this verdict to the Court of Appeal for BC, he argued that the blood sample obtained by means of the warrant was inadmissible in evidence due to the document being flawed on account of a non-disclosure to the Justice of the Peace.

The accused had first been taken to the L.M. Hospital where the blood sample was taken for medical purposes. It was that sample the officer seized by means of the warrant. However, the accused was transferred to the R.C. Hospital where, at the time the officer applied for the warrant, a colleague was attempting to get the accused's permission for a sample of blood to be taken for the purpose of blood/alcohol analysis. This colleague was successful (the trial judge had admitted both samples into evidence). The defence argued that this fact should have been disclosed to the Justice of the Peace as well as the fact that it was feared that the blood sample subject to the warrant was contaminated and had been taken for medical purposes.

The Court of Appeal rejected the argument of non-disclosure. It found the officer had acted in good faith all the way through. He had quite appropriately not accepted the blood sample when it was offered to him and had followed the process as it is provided by statute and binding precedents; he had no idea if his colleague would be successful; the fact that the blood was taken for medicinal purposes could easily be inferred by the Justice of the Peace from the information; and the evidence obtained was real and existed prior to the search warrant being obtained. The BC Court of Appeal held that there was no non-disclosure and it did not accede to the defence's argument.

In view of evidence of the blood sample obtained by means of the search warrant being sufficient to uphold the conviction, the Court did not consider the admissibility of the blood sample taken in the R.C. Hospital.

Appeal dismissed, conviction upheld

POLYGRAPH TEST USED AT INVESTIGATION LEVEL. WHEN ACCUSED WAS MADE AWARE OF FAILURE HE MADE AN INCULPATORY STATEMENT - ADMISSIBILITY OF THE STATEMENT

REGINA v. BARTON - 81 C.C.C. (3d) 574, Court of Appeal for Ontario

The accused was a suspect for numerous fires largely involving homes. When there was a fire at his own home police accused him of having set that fire as well as 23 other fires in the district over a period of six years. He denied that allegation and agreed to a polygraph test. He waived his right to counsel. In the post-test interview the accused was informed that he had failed. The officer who had conducted the test and did the interview said to the accused, "Now two of us know the truth". The accused had hung his head and made an inculpatory statement. The investigators were made aware and over the following 24 hours the accused signed statements confessing to incidents of arson. He was constantly reminded of his right to counsel and informed for what purposes the statements may be used.

Defence counsel argued that the post-test interview amounted to a psychological intrusion that induced an inculpatory statement. All subsequent statements were consequently similarly tainted, defence counsel argued. The whole procedure had gained the accused's confidence and this inducement rendered the statements involuntary and inadmissible.

The Court recognized that to enhance the accuracy of the test a good relationship should exist between the interviewer and the person tested. This appearance of intimacy amounts to intrusion and does undoubtedly carry over to subsequent interviews. However, the Court also recognized that anyone of these features are encountered in any police interrogation. The polygraph test is not unique in that regard. Whether it is this, a polygraph test or any other method of interviewing that was involved, the Courts must scrutinize the evidence to determine the issue of voluntariness.

Defence Counsel had relied on a case decided by the Quebec Court of Appeal in 1990[23] and argued that no statement in the wake of a failed polygraph test could be voluntary for the purpose of admitting it in evidence to prove the truth of its content.

The Ontario Court of Appeal in this Barton case, held that their Quebec counterpart had not decided that no voluntary statement was possible incident to a polygraph test. It had held that in that particular case the inducement had been such that the statement could not be admitted into evidence. Each case must be decided on its own facts. The officers had not held out any hope

---

[23] Regina v. Amyot - 58 C.C.C. (3d) 312.

of advancement or in any way threatened the accused. With regard to his right to counsel the accused, of his own free will, did not avail himself of legal advice while he was made aware of his rights over and over again and was offered assistance in that regard.

Appeal from conviction dismissed

OFFICER SEARCHING ACCUSED IN HOTEL TOILET STALL - EXPECTATION OF PRIVACY WAS SEARCH REASONABLE?

REGINA v. SEED - BC Supreme Court, Vancouver CC 920060, May 1993.

Outside the washrooms of a hotel that was notorious for drugs changing hands, was a sign warning the public that the facilities were subject to random searches by police.

During a routine "walk-through" the officer could clearly hear a snapping noise when he walked by the doorless ladies washroom. The officer entered and found the accused standing and fully clothed in the first stall. The snapping sound came form that only occupied stall. The accused stood with her back toward the officer fumbling with something at waist level. The officer pushed the door further open and grabbed the accused by the shoulder. She threw a package and a balloon in the toilet bowl. These contained heroin. The accused appealed her conviction for possession claiming that:

1. The officer did not have the requisite grounds to search under s. 10 of the Narcotic Control Act.
2. The search by means of which the heroin evidence was obtained was unreasonable and in contravention to section 8 of the Charter.
3. The evidence was inadmissible and should have been excluded in compliance with s. 24 (2) of the Charter.

The trial judge had held that the officer's awareness of the activities at the hotel and his experience had formed the required grounds to search as he did under the Narcotic Control Act. The Supreme Court of BC responded to the grounds for appeal, that the trial judge had adequately addressed this issue and had sufficient evidence presented to hold as he did.

To determine whether the officer contravened the accused's right to be secure against unreasonable search or seizure the trial judge had apparently found that the reasonable and probable grounds the officer had to search under the Narcotic Control Act coupled with the circumstances, left the accused without any reasonable expectation of privacy. Hence there was no such contravention.

The search had been warrantless. This means that it was *ipso facto* unreasonable unless the Crown shows that it was not. For all other allegations of Charter infringements the onus of proving them is on the one who alleges the infringement. Warrantless search and seizure is the only exception.[24]

---

[24] Hunter v. Southam Inc. (1984) - Volume 18, page 12 of this publication.

The test to determine if the accused's right under section 8 was infringed is whether the officer had objectively and subjectively reasonable and probable grounds to make the search and if a reasonable person in the place of the officer would also have similar beliefs.

In another case[25] that originated in the same hotel and the same washroom, an officer suspected that someone in a toilet stall was either injecting heroin or retrieving some capsules to supply a customer. The officer had stood on the toilet bowl in the adjacent stall and caught the suspect in contravention of a narcotic's offence. In that case the evidence was excluded as the lack of grounds to search had caused the exercise to be unreasonable.

The accused did rely on that decision and that a person has a reasonable expectation of privacy in a washroom stall.

The Supreme Court rejected the defence arguments and held that the cases were distinguishable.

In the Pottle case the suspect had the stall door closed; the officer saw under the door that she was sitting with her clothing around the ankles; he had no more than suspicion that happened to be correct. The circumstances in this case were different - the accused was dressed - the stall door was open and sounds that were associated with retrieving drugs from rubber containers was heard. He had grounds and the search was reasonable.

Accused's appeal dismissed
Conviction upheld

---

[25] Regina v. Pottle - Vancouver CC910714 (B.C.S.C.)

DEFENCE SEEKING DISCLOSURE THAT INCLUDED POLICE INFORMER DEBRIEFING NOTES IN AN EFFORT TO SHOW INADEQUATE GROUNDS FOR AUTHORIZATION TO INTERCEPT PRIVATE COMMUNICATION

REGINA v. BARZAL et al - Court of Appeal for BC, CA015833, CA015834, CA015835, CA015836 AND CA015837. Vancouver Registry, September 1993.

In this case the validity of the authorization to intercept private communication was questioned by the defence. The lack of complete disclosure by the Crown deprived the 5 accused from a full answer and defence, it was claimed. The defence demanded not only the affidavits but also the debriefing notes made by police regarding the informers. This would undoubtedly identify the informers to the defence. The Crown objected.

After all arguments were heard, the positions by the parties to the proceedings and that of the trial judge had not changed. The judge held that the defences of the accused were paramount and superseded the public interest in the protection of the informers. The Crown agreed to participate in *Garofoli*[26] procedures to test the authorization but asked a blunt question from the trial judge. In essence the Crown asked if at the conclusion of the editing hearing "it would be your Honour's ruling that all of the edited material, if any, should be disclosed to the defence. In those circumstances it is my submission that that would be a futile and pointless exercise to embark upon". The court responded that that would be the ruling. The Crown then, to protect the identity of the informers, decided not to call any evidence and acquittals for drug charges followed.

The Crown appealed the acquittal to the Court of Appeal for BC posing one simple question: Did the trial judge err in law in ordering the Crown to disclose the informer debriefing notes?

Everyone involved in the trial recognized the existing informer privileges.[27] An informer's identity may not be revealed and he or she cannot be called as a witness or be cross-examined unless:

---

[26] Regina v. Garofoli [1990] 9 S.C.R. 1421. Also see Volume 40, page 8 of this publication.

[27] Bisaillon v. Keable et al - 7 C.C.C. (3d) 385. See also Volume 15, page 3 of this publication.

1. the informer is a material witness to the crime;
2. the informer acted as an *agent provocateur*; or
3. where the accused seeks to establish that a search was not undertaken on prerequisite grounds and consequently was unreasonable (s. 8 Charter).

With regard to 3. above, the Supreme Court of Canada had held in 1990,[28]

1. A court must strive to provide the defence with as much evidence as possible, by means of editing the information on which a search warrant was based without disclosing the identity of the informer.

2. The trial judge had been asked whether the material before the judge who issued the authorization disclosed reasonable grounds to believe that an offence was or had been committed and if interception of private communication would afford evidence of that offence. He simply never answered the question.

3. The trial judge should have decided whether all or an edited part of the information relied upon by the issuing judge should be disclosed to the accused for them to make a full answer and defence.

4. A lot of that information came from informers and the trial judge was obliged to edit that material to avoid disclosing the identity of the informers.

5. The trial judge should also have familiarized himself with the entire content of the information placed before the authorizing judge to determine if he or she could conclude there were the prerequisite reasonable and probable grounds to issue the authorization. This includes a determination if the informers were sufficiently reliable to support those grounds.

In this case, the defence demanded all informer debriefing notes, made by police, to determine for themselves if the informers were reliable. Said the BC Court of Appeal:

> "The right to make a full answer and defence is a right to the disclosure of material which had been before the authorizing judge. It is not a right to embark on a fishing expedition of all the material in the possession of police. Such an inquiry could be endless"

---

[28] Regina v. Scott [119] 3. S.C.R. 979 Also see Volume 42, page 12 of this publication.

The trial judge should have examined and, if necessary, edited the material and disclosed to the defence its content, with effect being given to the "police informer privilege".

Crown's appeal allowed. Acquittals set aside and new trial ordered

STANDING TO OBJECT TO THE ADMISSION OF EVIDENCE ON ACCOUNT OF BREACH OF CHARTER RIGHT: POLICE LISTENING WITH UNAIDED EARS AT APARTMENT DOOR FOR GROUND TO OBTAIN WARRANT

REGINA v. SANDHU - Court of Appeal for BC, Vancouver CA015539, June 1993

Due to the suspicion on the part of air-freight personnel police became aware of large amounts of cash being shipped to Montreal from Vancouver and quantities of cocaine being shipped the other way. Police allowed the shipments to be delivered. One shipment of cocaine was delivered to the addressee who transported it to another person who in turn took it to an apartment occupied by the accused.

Police made a forced and warrantless entry into the apartment to arrest the accused. They then obtained a search warrant and seized the bag containing the cocaine. The accused was convicted of possession for the purpose of trafficking. He appealed this conviction claiming unreasonable search and seizure in relation to the grey bag that had been sent back and forward between two parties who later became co-accused. In other words the accused was not the addresser nor the addressee of the bag. When police opened the bag each time it was shipped, the accused had no standing to claim a reasonable expectation of privacy in relation to the bag. If there was a breach of the right to be secure against unreasonable search or seizure in these circumstances it was that of the shipper and receiver of the bag. No person must become the beneficiary of the infringement of another person's rights or freedoms. This was the Crown's rebuttal to the accused's grounds of appeal.

The Court addressed this broad question specifically as it applies to search and seizure. It is clear that the precedents emphasize that the s. 8 Right is not a property but a privacy right. Consequently, there must be on the part of the person who claims that this right was infringed, a reasonable expectation of privacy. In the case[29] where a landlord asked if his tenants would keep a quantity of drugs for him and to depose of them as he would direct, the police searched the apartment seized the cache and charged the landlord accordingly. He claimed to have standing to have the evidence excluded as the search and seizure were unreasonable. This as he had a proprietary interest in the apartment block and consequently a reasonable expectation of privacy. The Court rejected this argument and held that only the tenant in these circumstances had such expectation.

The Court observed how also with regard to other Charter rights an accused person cannot successfully object to the admissibility of evidence unless it was his/her right to freedom that was infringed. The language of s. 24(1) of the Charter makes this very clear. Only the person

---

[29] Regina v. Pugliese (1992) 71 C.C.C. (3d) 295. (Ontario Court of Appeal)

who's rights were allegedly violated can apply for remedy. Only where in proceedings under subsection (1), the Court finds that evidence was obtained by that breach can inadmissibility of that evidence be considered under subsection (2).

The Court held that the accused had no standing to object to the admissibility of evidence obtained by police when they searched the grey bag at the airports in Vancouver or Montreal.

The accused then objected to the admissibility of the cocaine contained in the bag after police arrested him in his apartment. He argued that police were acting unjustifiable and unlawfully when they entered his apartment by force and without warrant to arrest him. He also claimed that what was seized with the subsequent warrant was inadmissible in evidence as it was all part of an unreasonable search. The circumstances were as follows: the surveillance team had followed the accused's partners in this scheme to the apartment building. Once inside they lost him. They showed the manager of the building photographs of the suspects but he could not be of any assistance except that he had complaints from tenants about the people in apartment 406. The officer looked under the door into the room and saw two pairs of men's shoes. Then they put their ears to the door and listened to the conversation concerning to shipments to Montreal to a value of $18,000.00. This and other utterances convinced the officers they had found the right place. The door was kicked in as the officers yelled: "police".

The Crown argued that police were justified to effect an arrest under s. 495 C.C. They were in "hot pursuit" of their suspect. Not so, rebutted defence counsel. The only thing that led them to the apartment was some flimsy information the building manager gave them; the person living there was East Indian; and the neighbours had noted suspicious activities. That information was not sufficiently reasonable to make it probable that their suspects were in the apartment.

What police did when they got to the apartment amounted to a perimeter search to get the grounds they required to justify what they did. Entry of the building and entry of the accused's dwelling within that building are distinct from one another. (Regarding entering a dwelling under similar circumstances, to effect an arrest, see page 42 of Volume 43 of this publication).[30] Should the Court find that the police presence in the building was justified then they still had no lawful justification to conduct the "perimeter search" of the accused's dwelling (the apartment) by looking under the door and eavesdropping, argued the defence.

The Court of Appeal for BC found that in the circumstances the police had grounds and rights to be in the apartment building. There was no evidence the building was secured or that the officers entered surreptitiously. The manager gave tacit permission for them to be there and even supplied a key for the accused's apartment. There simply was no trespass solely by the police presence outside the apartment.

---

[30] Regina v. Alfaro - Court of Appeal for BC, Vancouver CA014903, March 1993.

If police gained reasonable and probable grounds to conclude that an indictable offence was being committed, by listening at the door, then the justification existed. Was the eavesdropping an unreasonable search? Needless to say, since no electronic device was used to intercept the private communication among the three parties in the apartment, including the accused, it was not an unlawful interception under the privacy provisions in the Criminal Code. The legal question to be answered was whether the accused and his partners, had a reasonable expectation of privacy in regard to their conversation, when they spoke in a normal tone of voice inside the apartment.

In the US, cases of this kind have made a distinction between hotel facilities and permanent dwellings, granting more right to privacy to the latter. However, the Courts there held that when one speaks, regardless at what location, we are at risk of the being overheard by the unaided ear. In Canada, the Courts have specifically held that there is no distinction between a hotel or like facility and a private home. "All are enclaves where we can conduct our activities free of uninvited scrutiny". Consequently, society will not tolerate police gathering evidence by looking through keyholes or under doors in such private places; nor can it tolerate authorities who press their ears up against doors, walls or windows for that purpose. The police did thereby conduct a search that was unreasonable under s. 8 of the Charter. The warrant obtained subsequent to all this was based on that unreasonable search and was unable to validate the seizure of the cocaine.

The Court said that it was significant, however, that the seized evidence (cocaine) was "real" evidence. Admission of real evidence rarely causes the fairness of a trial to be affected and in this case the accused's trial was fair despite the admission of the cocaine in evidence.

Police had found themselves in circumstances of urgency and justified fear that the evidence would disappear and could not be obtained by alternative investigative techniques. Considering they had been in hot pursuit and lost sight of the couriers, police had acted in good faith in pressing their ears to the accused's door. Although they were short of having reasonable and probable grounds that the persons they had followed were in the apartment they were not without some basis to believe that they were. In the circumstances the officers had acted in good faith.

In addition, the Court of Appeal for BC was not persuaded that the admission of the cocaine in evidence would bring the administration of justice into disrepute.

Accused's appeal dismissed.

ROADSIDE DEMAND - RESIDUAL ALCOHOL - GROUNDS TO MAKE DEMAND FOR SAMPLES TO DETERMINE BLOOD / ALCOHOL LEVEL

REGINA v. BERNSHAW - Court of Appeal for BC, Vancouver CA016381, June 1993

The accused was stopped as he was weaving within his lane. The usual symptoms gave the officer reason to believe the accused had alcohol in his system and a demand for a roadside breath sample resulted in a "fail" reading. A demand was then made for breath samples and this resulted in a conviction for "over 80". The accused appealed the conviction to the Court of Appeal for BC claiming that the officer had not ascertained when the accused had his last drink and had not waited for at least 15 minutes before he took the accused's roadside breath sample. Consequently the Crown failed to show the officer had the requisite reasonable and probable grounds to make the demand for breath samples.

The Court of Appeal concluded that the officer must have known that the result of the screening device test was possibly inaccurate. The Court drew this inference from the curriculum of the training program officers attend to become qualified. This knowledge caused the officer's belief that the accused's ability to operate a motor vehicle was impaired by alcohol, not to be grounds that were reasonable and probable.

Accused's appeal allowed,
Conviction set aside

Note:

This decision may cause somewhat a "a damned if you do and a damned if you don't" dilemma. had the officer asked the accused when he had his last drink, then, depending on the answer, this defence issue may not have arisen. Mind you, a question in cross-examination whether the officer could vouch that no belch or other bodily function akin thereto had caused residual alcohol to be present in the suspect's mouth, may have resurfaced the problem that a "forthwith" compliance with the roadside demand may, to the officer's knowledge have caused the test to be inaccurate.

The Court of Appeal for BC did consider the decisions by the BC Supreme Court in *Regina v. Gartrell and Regina v. Elder*,[31] but found them irrelevant to the issue raised in this Bernshaw case. The defence position in Cartrell and Elder had been exclusively on the right to counsel when a "roadside" demand is made. Any delay would trigger that right. It's suspension only applies when the demand is made as soon as practicable and can be complied with immediately.

---

[31] See Volume 41, page 21 of this publication (Penticton Registry 18314).

In other words, the issue was whether the exclusionary rule under s. 24 (2) Charter should be involved.

This Bernshaw decision seems to establish that without certainty on the part of police that there is no residual alcohol in the suspect's mouth a "fail" reading on the screening device does not give the officer the reasonable and probable grounds prerequisite to a valid demand for breath samples to determine blood / alcohol content. This means a 15 minute wait which triggers the right to counsel. (See BC Supreme Court decision in *Regina v. Davidson*).[32]

[32] See Volume 41, page 19 of this publication.

DRIVING WHILE KNOWN TO BE SUBJECT TO EPILEPTIC SEIZURES - CRIMINAL NEGLIGENCE

REGINA v. GRANT - Court of Appeal for BC, Vancouver CA014768, May 1993.

With the gas pedal jammed down to the floorboards, the accused drove his car into an intersection and collided with another vehicle. Three persons were seriously injured as a result. The accused was convicted of three counts of criminal negligence causing bodily harm. He appealed these convictions.

The flooring of the accelerator pedal had been involuntary as the accused had an epileptic seizure at the time. His passenger's, attempts to free the pedal from underneath the accused's foot, had been to no avail.

The trial judge had reasoned that the accused knew that he was subject to these seizures. There had not been a suspension of the accused's licence to drive but he had been advised by at least three physicians that he should not drive. Two of these specialists described the accused as a defiant person in the extreme. In spite of extensive discussions with him about the risks involved, the accused refused to give up driving. Having received this professional advice the accused showed a wanton and reckless disregard for the lives and safety of the persons he injured when he chose to continue to drive.

The Court of Appeal for BC held that the evidence had supported the allegations.

Appeal dismissed,
Convictions upheld

TRUCK SEIZED FROM ROADSIDE UNDER ASSUMPTION R.O. WOULD NOT OBJECT. UNREASONABLE SEIZURE: ADMISSIBILITY OF EVIDENCE. "GOOD FAITH"

REGINA v. MACKAY - Court of Appeal for BC, Victoria V100947, September 1992.

A black woman left her home for a morning jog on urban streets. She was never seen again, dead or alive. Patches of blood were found on the roadway not far from where she was last seen by a paperboy. Broken earmuffs and a shotgun shell were found. Persons living close by had heard one or more shots being fired.

One month after this disappearance the accused was arrested in an adjacent police jurisdiction for a serious sexual attack on a black woman. His pick-up truck was seized as it was believed to have been involved in the offence. This truck was the property of the accused although it was registered in the accused's girlfriend's name and was in her possession while the accused was in pre-trial custody. After the truck had been searched it was released to the accused's girlfriend.

Shortly after this, the police department investigating the disappearance and apparent murder of the jogger received information that the accused had been making statements that he was involved in this disappearance. He specifically told how he was trying to sell his truck as it likely contained evidence that would link him to the murder of this black woman. He had told other inmates that he had killed her and that the crabs had eaten her by now".

Investigators of both departments got together. Everyone was of the opinion that there were insufficient grounds for a search warrant. If one was refused by a Justice of the Peace it could weaken or jeopardize the case against the accused. Furthermore seizing the truck by the department investigating the jogger's murder could endanger the safety of the informer who related the accused's anxiety about getting rid of the truck. It was decided that the department's investigators who had arrested the accused for the sexual assault would re-seize the truck so it could be thoroughly examined by their colleagues from the adjacent jurisdiction.

The investigator who had released the truck to the accused's girlfriend went to her apartment to request possession of the truck for the purpose of further examination. She was not home, and the truck was parked at the curbside. The officer had in the past received nothing but cooperation from the accused's girlfriend. His interviews with her had all been friendly. The Court saw them as "lengthy and harmonious" and found that he did get along well with her. It had therefore been reasonable for the officer to believe that he would receive her consent to re-seize the truck. The officer had received compliments from defence counsel at the

conclusion of his cross-examination and the Court had found him "entirely credible". Hence the Court did accept that when the officer had the truck towed away without consent of the accused's girlfriend he did believe she would have given it.

By examining the outside of the truck, an identification officer of the department investigating the murder of the black jogger found, in the undercarriage of the truck a pompom similar to the one that was part of the tuque belonging to the black jogger. The pompom had a negroid hair embedded in it. This became weighty evidence at trial.

The accused was convicted of first degree murder. The Crown had presented evidence from which it wanted the jury to infer that the accused had deliberately run over the jogger, got out of the truck and finished her off with a pry bar and shotgun. Needless to say, the pompom was important to support this theory.

The defence appealed the conviction to the Court of Appeal for BC. One of the main issues was the admissibility of the "pompom evidence". The defence claimed that the warrantless re-seizure of the truck was in essence a theft and had violated the accused's right to be secure against such seizures. This caused the discovery of the pompom that linked the accused by means of real evidence to the murder of the woman. Even Crown Counsel at trial had admitted that the seizure of the truck had been unreasonable and needless to say, the defence was not prepared to disagree with the Crown's sympathetic position. This caused the BC Court of Appeal to hold that it was not necessary for them to decide on this "interesting question" (see comments below). All the Court would deal with in relation to the conceded unreasonable seizure, was whether the evidence was nevertheless admissible.

The trial judge had held that the intrusion on the privacy of the accused had been minimal; the evidence was real and found without any assistance of the accused; the breach had been of a technical nature only; there was an urgency in view of the accused wanting to get rid of the truck; the actions of the seizing officer had been deliberate but not flagrant or wilful; and the officer had acted in good faith.

The BC Court of Appeal disagreed that police had acted in good faith. The officers knew and admitted that they had no grounds for a search warrant and yet they proceeded. However, although there was "bad faith" in the seizure of the truck, there was no bad faith in the examination of the exterior of the vehicle and the taking of the pompom. As a matter of fact that examination could have been done at the curb where the truck was parked.

In the circumstances, said the Court:

> ".....the admission of the evidence so obtained would not bring the administration of justice into disrepute to anything like the extent of its exclusion would do."

If there was an infringement of the accused's Charter right under s. 8, it was by means of a

minor intrusion. The defence apparently had relied heavily on the *Kokesch and Klimchuk*[33] cases. The BC Court of Appeal held that those cases were distinguishable. In Kokesch there was a trespass on private property on the part of the police and in Klimchuk there had been no urgency; the search involved the interior of the vehicle; the charge was far less serious; and no informer needed protection.

The appeal was dismissed in regard to the admissibility of the evidence.

Comment:

It was quite clear that the Crown had, at trial, prematurely conceded that the re-seizure of the truck was unreasonable under s. 8 of the Charter. If it was unreasonable, then whose right to be secure against unreasonable seizure was violated? The accused's or his girlfriend's? It was clearly the girlfriend who was the registered owner and possessor of the truck despite the fact that the accused had property interest in the vehicle. The Courts would likely have held that the privacy interest with regard to the truck was that of the girlfriend. If that privacy right had been violated the accused is not entitled to a remedy or have the exclusion of evidence rule applied in his favour. Only the person whose rights are violated has standing under s. 24 of the Charter.

---

[33] Regina v. Kokesch - Volume 39, page 6 of this publication, Supreme Court of Canada
Regina v. Klimchuk - Volume 40, page 19 of this publication, BC Court of Appeal

THREAT TO KILL ANY POLICE OFFICER WHO WILL CAUSE THE DEATH OF A BLACK PERSON

REGINA v. REMY - Quebec Court of Appeal, 82 C.C.C. (3d) 176, April 1993.

The accused requested an interview with a reporter in the wake of police killing of two black persons. He told the reporter that any police officer who would kill a black person in circumstance as nebulous as those surrounding the death of those two black men, would be killed. He claimed that a number of terrorists were on stand by and waiting for police to slip-up. The reporter wrote the article and read out the text to the accused over the telephone. He seemed to agree with the article's content. Consequently the accused was convicted of "uttering, conveying or causing anyone to receive a threat to cause death or serious bodily harm to any person". The accused appealed this conviction to the Court of Appeal for Quebec.

The law with regard to this offence is quite clear. The wrongful act is the uttering, conveying or causing anyone to receive a threat. Whether or not an accused person had any intention to carry out the threat is irrelevant. The intent the Crown is required to show is a subjective one - was there on the part of the accused an intent to threaten another person. The remedial objective of the section is to protect against fear and intimidation by means of uttering threats.

In this case, via the media, death threats were conveyed to the police or police officers. This the defence argued was not to anyone specific. The accused made it clear that he only threatened officers who, in future, would kill a black person. The Court responded that considering the objective of the section "it is sufficient that the identity of the police officer will become known when the condition set out in the threat is eventually met".

Finally the defence submitted that if the remedial aspect of the section is to protect citizens from fear and intimidation there is no victim in this case. Not only, as mentioned above, was it sufficient that the victim of this threat would become known when the condition spelled out in the threat is met, but the Court also found that "a threat to cause the death of a member of an ascertained group of citizens contravenes this section".

Accused's appeal dismissed
Conviction upheld

Note: Remy has filed notice of appeal to the Supreme Court of Canada.

IS A SUBMACHINE GUN THAT CAN BE CONVERTED TO AN AUTOMATIC STATUS A PROHIBITED WEAPON?

REGINA v. HASSELWANDER - Supreme Court of Canada [1993] 2 S.C.R. 398.

Mr. Hasselwander owned a mini-uzi submachine gun and attempted to get it registered. The local registrar seized the weapon as he considered it to be a prohibited weapon. Although the gun was manufactured as a semi-automatic weapon and was such when presented for registration, a rather simple adjustment (one of three) would convert the gun to a fully automatic firearm.

The lower Courts of Ontario agreed with the registrar while the Court of Appeal held that the words "capable of firing bullets in rapid succession during one pressure of the trigger" in the definition of prohibited weapon mean and refer to the "present firing ability of the weapon" and not to conversion possibilities. The Crown appealed this decision to the Supreme Court of Canada (S.C.C.).

By majority (two justices dissented) the S.C.C. held that the firearm was a prohibited weapon and not merely restricted. It reasoned that the word "capable" includes an aspect of potential capability for conversion to a fully automatic firearm in a relatively short period of time with reasonable ease. The section was created to protect the public from dangerous weapons that kill and maim people. To hold otherwise would undermine the purpose of the legislation. Consequently, prohibited weapon includes a firearm that can quickly and readily be converted to an automatic status.

Crown's appeal allowed

FATHER TAPING RANSOM DEMANDS REGARDING KIDNAPPED SON - ADMISSIBILITY OF TAPES

REGINA v. TAM et al - BC Supreme Court, CC920382, Vancouver, April 1993.

A business man was kidnapped in BC's lower mainland. His father received ransom calls at his home in Taiwan from public BC telephones and later from Hong Kong. The father, totally upon his own initiative, without advise from police, taped all of the ransom calls. Ransom money was delivered to persons in Hong Kong and the son was released in BC. Five persons were arrested and tried in BC Supreme Court for kidnapping and extortion.

The ransom calls were adduced in evidence and a *voir dire* was held to determine the admissibility of the tapes. Defence counsel argued that the tapes were the result of unlawful interceptions of private communications. He claimed that police were aware that calls were intercepted and consequently the father was an agent of the police and that rendered the tapes inadmissible in evidence regardless of the father's consent to use them as evidence.[34] He also submitted that the interceptions had amounted to an unreasonable search and seizure under s. 8 of the Charter.

The Court held that the father as the victim of the crime of extortion was not an agent of the State. He had already started taping before police were involved and would have continued to do so. His sole concern was the safety of his son and he acted as a father rather than a police agent. Consequently the Charter did not apply.

In terms of the privacy provisions in the Criminal Code of Canada, the Court held that the accused had made their calls from numerous locations to prevent detection and had made other moves that clearly indicated that they had no reasonable expectation of privacy. Therefore their communications were not made "under the circumstances in which it is reasonable ..... to expect" that they will not be intercepted.

Taped communication allowed in evidence

---

[34] Regina v. Duarte - Volume 36, page 1 of this publication. Also 53 C.C.C. (3d) 1. Supreme Court of Canada.

TID BITS

SKATEBOARDS IN SHOPPING MALL - OWNER USING FORCE TO REMOVE SKATER - ASSAULT - THREATENING

The accused owned a shopping mall where young skateboard artists had become a real problem. Signs were placed everywhere clearly indicating that skateboarding was not allowed. A young man came into the mall to purchase something in one of the stores. When he left he used his skateboard and a planter as a skateboard wall. The accused grabbed the young man by the throat, shook him and said, "If I see you around, I'll kill you". He was consequently convicted of assault and uttering a death threat. The accused appealed arguing that the Court had failed to consider that the youth, who originally was an invitee became a trespasser when he used his skateboard. The accused has a right to use force to remove trespassers from the property. The Nova Scotia Court of Appeal held that the judge had erred when he refused to consider the applicability of the trespass provisions of the Criminal Code. Appeal was allowed and a new trial was ordered.

Regina v. Keating - 76 C.C.C. (3d) 570. November 1992.

* * * * * * *

IMPLIED CONSENT TO SEARCH - REASONABLE SEARCH

The accused had two stolen commercial semi-trailers in his farm yard. Police entered the yard and approached the accused to talk to him about the presence of the trailers. One officer asked the accused for permission to look inside the trailers. The accused raised no objection and the officer assumed consent. One trailer contained a large quantity of pork - which was also stolen property. The accused was convicted of possession of stolen property and appealed this conviction to the BC Court of Appeal claiming that the search was unreasonable. Part of the argument was that the search was warrantless while police searched the trailers with the implied rather than the explicit consent of the accused. The Court of Appeal rejected both grounds for appeal. Police had every right to enter the property to speak to the accused. He did not ask them to leave but instead invited them in for coffee. In regard to the consent to search the trailer the Court held that it can, "effectively be given without particular formality, even in a cursory fashion". Considering all of the circumstances permission had been given and the search was reasonable. The accused's appeal was dismissed.

Regina v. Duncan - Court of Appeal for BC, Vancouver CA015384, March 1993.

OBSCENE MESSAGE DICTATED INTO ANSWERING MACHINE AMOUNTS TO OBSCENE PHONE CALL

The accused put an indecent message on the complainants answering machine with the intent to alarm or annoy the complainant. He appealed his conviction for the offence as he had not directly conveyed his message to "that person". The delay in the message reaching the person the accused intended it for did not take away from the fact the call was made to "that person". The words spoken do not have to be contemporaneously heard.

Regina v. Manicke - Court of Appeal for Saskatchewan, 81 C.C.C. (3d) 255.

* * * * * * *

IS OFFERING TO GIVE A SAMPLE OF BLOOD A REASONABLE EXCUSE TO REFUSE TO GIVE SAMPLES OF BREATH?

The accused failed to comply with a breath-sample demand and was charged accordingly. The trial judge had found that the accused had had a reasonable excuse as he had offered to give a sample of blood instead. He had done so in a sincere belief that a blood analysis is more accurate than that of breath. The Crown appealed the acquittal to the Court of Appeal for BC. It held that, as a matter of law, the offer by and the opinion of the accused could not amount to a reasonable excuse. When the demand is made the accused is obligated to comply. The preference for an alternative means to establish the blood/alcohol content cannot negate the lawful demand and excuse a suspect from complying.

Crown's appeal allowed
Conviction registered

Regina v. Taylor - Court of Appeal for BC, Vancouver CA015716, February, 1993.

ACCUSED NOT IDENTIFIED IN COURT - IDENTIFICATION BY CONTINUITY

At his trial for "Over 80" the accused and a "look-a-like" were sitting in the Court's gallery. When the investigating officer in his testimony was asked to identify the accused he identified the look-a-like. The defence moved for dismissal but the trial judge declined. He said that the accused had identified himself with a driver's licence that had a picture of him on its surface. That person the officer arrested, processed and issued an Appearance Notice to was on the Court file and its number appears on the Information. The person who appeared before the Court in compliance to that notice had the same name as the person who identified himself by means of the pictured driver's licence. That person pleaded not guilty through his counsel. It was therefore obvious that the person who was passed out behind the wheel of his car at the scene and who, by means of the driver's licence identified himself and the person who pleaded not guilty and was now in Court to stand trial were one and the same person. On appeal by the accused the BC Supreme Court agreed with the trial judge and the ..... appeal was dismissed.

Regina v. Walters - BC Supreme Court, New Westminster X03355, October 1992.

* * * * * * *

MULTIPLE CONVICTIONS FOR ARMED ASSAULT AND POSSESSION OF A WEAPON DANGEROUS TO THE PUBLIC PEACE

The accused had gone to the apartment of a man she had a fierce dispute with for some time. She held a replica of .45 calibre pistol a few inches from his forehead and said that he was going to pay for all the trouble he had caused. The man got away from her and phoned police. The accused was arrested two hours later and a BB gun, that was the replica, was found in her car. She was convicted of carrying a weapon while committing assault and having possession of a weapon dangerous to the public peace. The accused argued before the Court of Appeal for BC that the conviction of armed assault precluded a conviction for possession of a weapon dangerous to the public peace. Both counts of the indictment arose from the same delict and incident, hence the charges overlapped despite the fact that neither is included in the other.[35] The BC Court of Appeal agreed that when a conviction was entered for the armed assault the possession of a weapon charge should have been stayed. Appeal allowed.

Regina v. Briscoe - Vancouver CA013553, September 1992.

* * * * * * *

DISCHARGE IS NOT THE EQUIVALENT OF CONVICTION FOR PURPOSE OF CROSS-EXAMINATION TO DETERMINE CREDIBILITY

The accused testified in his own defence. Crown Counsel cross-examined him regarding credibility and asked him if it was true that he had been found guilty and received a conditional discharge for fraud. The trial judge had obviously been influenced by this when he considered the accused's credibility. This sort of cross-examination is allowed under s. 12 (1) of the Canada Evidence Act where a witness has been convicted of any offence. Holding that a discharge is not a conviction the Quebec Court of Appeal found that the provision in s. 12 C.E.A. did not apply. Conviction for assault set aside; new trial ordered.

Regina v. Dodge - 81 C.C.C. (3d) 433

---

[35] Kienapple v. The Queen [1975] 1 S.C.R. 729.

POLICE HAVING TO RE-ENACT STATEMENT TAKING TO ENHANCE CREDIBILITY

A police officer testified how he had taken a statement from the accused in eight minutes. During the *voir dire* the defence claimed that the officer was not credible with regard to events ancillary to the statement. Defence counsel sought leave to have the officer perform in the courtroom the "form and substance" of the statement taking - a sort of re-enactment of that scene. Despite the Crown's objections claiming impossible duplication that would not shed any more light on the situation than the officer's detailed testimony, the Court granted the application.

Regina v. Brooks - 81 C.C.C. (3d), Ontario Gen. Div. Court

* * * * * * *

CAN THE CROWN COMPEL A PERSON CHARGED SEPARATELY WITH THE SAME OFFENCE TO TESTIFY?

The accused youth was tried for a Break and Enter offence. Another youth was separately charged with the very same break and enter. This youth was subpoenaed to testify at the accused's trial. The trial judge found that this violated the accused youth's rights under s. 7 of the Charter. He quashed the subpoena and the Crown found itself with inadequate evidence to convict the accused. The resulting acquittal was appealed. The Court of Appeal for Ontario held that the testimony of the youth separately charged with the same offence, does not violate the fundamental principles of justice. The accused's right to silence is not absolute and exist side by side with the compellability of a witness charged separately with the same offence arising from the same delict. That witness, of course, is protected by s. 13 of the Charter with regard to that testimony being used at his own trial. Acquittal set aside, new trial ordered.

Regina v. R.J.S. - 80 C.C.C. (3d) 397, Court of Appeal for Ontario

ADMISSIBILITY OF EVIDENCE ORIGINATING FROM DIGITAL RECORDER INSTALLED BY TELEPHONE COMPANY

The accused made for four years threatening and obscene phone calls, identifying himself as an employee of a radio station. The telephone company received information that made the accused a suspect. The company installed a digital number recorder on the circuits of the accused's phone and the case against the accused was based entirely on what the recorder had revealed. The accused argued that the "recorder" evidence was inadmissible due to various Charter violations the installation and monitoring of his calls had caused. The Court of Appeal for Ontario held that the company was not an Agent of the State when it recorded the accused's calls. Furthermore the gadget only records what numbers are dialled from the accused's phone and does not intercept any private oral communication. The evidence was admissible.

Regina v. Fegan - 80 C.C.C. (3d) 356, April 1993.

* * * * * * *

ROADSIDE REFUSAL, OFFENCE COMPLETE UPON FIRST REFUSAL

The accused was stopped for having made a U-turn. Due to lack of sobriety the officer made a demand for a breath sample for the screening device. The accused instantly refused. The officer then prepared a traffic ticket for a U-turn, a 24-hour Suspension Notice and an Appearance Notice for the refusal. After a 15-minute period he again made a demand for breath samples and again it was refused. No Charter rights were given to the accused. The trial judge held that the precedents regarding a 15 minute wait amounting to a detention that does require a "right to counsel" warning, were distinguishable from what happened here. In this case the demand was made right away and instantly refused. The preparing of the documents took some time at the end of which the officer gave the accused another opportunity to comply. She refused again. The offence was complete before the 15 minute wait. The accused appealed the conviction to the BC Supreme Court, to no avail. That Court held that the trial judge had not misconstrued the evidence in finding that the offence had been completed before the detention began where the accused should have been told of her right to counsel. Appeal dismissed.

Regina v. Hunter - BC Supreme Court, Prince George 22974, September 1992

PERSON WHO POSSESSED MONEY AND CHEQUES, HE ADMITTED WERE STOLEN, CLAIMING TO HAVE RIGHT TO RETAIN POSSESSION UNLESS SUPERIOR CLAIM IS SHOWN

Mr. Baird raised the suspicion of hotel staff when he requested that a very large amount of cash and travellers cheques be placed in the safe. They notified police. The next day the Toronto Police requested assistance in the apprehension of Mr. Baird as he was suspected of having been involved in the robbery of an armoured car. The suspect was arrested and questioned. In essence he confessed that the money and cheques were stolen but as he did not trust "cops" he was not prepared to say anymore. His lawyer advised him to demand the money and cheques back. For reasons not revealed Mr. Baird was released and not charged with anything. He took action against the police for the return of the valuables. He took the position that unless either the person he stole the valuables from or another person who has superior title would show up, he was entitled to retain possession of the valuables.

Considering the admission by Mr. Baird that the money and the cheques were stolen, the Court of Appeal for BC said,

> "..... people would regard that result (the Crown retaining possession) as more consistent with the imperatives of justice and equity than the return of the funds to the pocket book of Mr. Baird....."

Application denial was upheld, Baird's appeal was dismissed.

Martin Baird v The Queen - Court of Appeal for BC, Vancouver CA012254, September 1993.

THE CANADIAN CONCEPT OF POLICE INDEPENDENCE - POLICE SEPARATION FROM POLITICS

Due to an apparent unawareness of these concepts at political, judicial and police levels, principles are being eroded by an evolutionary process that ought to concern us.

Recent attempts by entities within the police community to influence the preferences of the electorate in municipal elections are clear symptoms of that erosion and prompted these observations.

The following is a synopsis of "The Concept of Police Independence" in the "Legal Status of the Police" published by the Law Reform Commission of Canada:

1. Operational police decisions are matters reserved to the force itself.

2. The authority of the individual constable to investigate crime, to arrest suspects, and to lay informations before justice of the peace comes from the common law, constitutional conventions and statutes consistent with these fundamental principles. This concept and authority must not be interfered with by any political or administrative person or body. Only overall policies, objectives and goals are matters that properly belong to civilian authority and police boards have the duty to see to it that the force operates within these policies and has the right to hold the Chief Constable accountable for these matters. That civilian board is the employer and management of the force. The Chief Constable is its Chief Executive Officer and has the general supervision of the force.

This is a concise and accurate summation of what the paper claims to be the common law and generally the statutory structures created in the nations belonging to the British Commonwealth.

This separation from administrative and political bodies or persons is reciprocal and in terms of involvement, a two-way street. It is unthinkable in our system of government for police to be subject to political whims or biases. It is equally unthinkable for police to be involved in politics. The purpose for the independence would become an illusion; an unrealistic and unnecessary element of the principles upon which "policing" is based. It also would erode and reduce the credibility and impartial image of police at all levels and eventually be seen as a politically controlled entity and office. Actions or involvement of police in politics will be the equivalent of kicking a door open from the inside that was kept locked to keep the unwanted out.

The preamble to our constitution has since 1867 included a phrase that has married us to centuries of customs, conventions and traditions, many of which have been judicially crystallized into law. It simply states that we desire a constitution similar in principle to that of the United Kingdom. Due to the uniqueness of that unwritten constitution we are totally distinct from our neighbour to the south, who wrote in the wake of their revolt against British rule, a constitution

that democratized all public offices, including many key positions in their justice system, with ultimate power and control conferred on elected officials. These well intended provisions created a greater vulnerability to corruption than we have. Corruption is a malignancy.

When the current BC Police Act was drafted some 20 years ago, ultimate care was taken to comply with our desired principles. Many submissions and suggestions were rejected for inclusion. Some had obvious hidden agendas others considered only administrative convenience. Most of these would have breached conventions and jeopardized police independence. Particularly from politically oriented sources it was reasoned that as the police costs then on average, approached 20% of the municipal budgets, police should be employed and managed by an elected body; or for the civilian board to oversee police, to be a committee of the municipal council. These and many other proposals were intensely debated and rejected on the basis that the length of the proverbial arm that is to keep politics away from policing would simply be too short. The two essential elements of democratic government are representation and responsibility. Under our system, the former is not always direct or original where it would infringe a doctrinal separation. of powers.

Sometimes the executive branch of government as well as subordinate governments (municipal councils) have the responsibility "to see to it" that services are adequate without having operational control or ability to interfere with original discretionary powers or duties of officials to which independence or separation applies. "Original", refers here to the statutes or common law speaking directly to persons holding these offices when conferring these powers.

This causes them to be free agents, consequently the constructive vicarious liability provisions in our statutes. In other democracies, police are "agents" and even known by that title. In those systems the minister who has the police service included in his/her portfolio usually has considerable power and political prestige because of it. It is also remarkable to note that in places where being the political head of police means power, how this brings out the herding instincts resulting in massive centralizations and consolidations under the predictable guise of efficiency.

Our only check and balance system is with our independent judiciary. However, since the Charter of Rights and Freedoms came into effect, the Courts are frequently referring to the police as "the State" at stages of this function where they have not joined the State or Crown in its prosecutorial interest. One of our Justices at a superior court level surprisingly reasoned recently that the Attorney-General had control over police and was ultimately responsible for police behaviour at discretionary and investigative levels. The only revealing utterances from the Bench in this regard, come from a superior court level with regard to a no-tolerance order a provincial executive branch had imposed on police. The Court observed that such an order could by the minister responsible for prosecutorial services be imposed on his/her agents (prosecutors) but not on police as that would amount to an interference in original discretionary powers of the "peace officer".

Concepts that jeopardize police independence have by monotonous exposure crept north across the 49th parallel. They have by decades of repetition subtly caused misconceptions about our own system that has too many quality features to not oppose this evolution, that will when completed, have caused a quantum and a predictably unwanted change.

The apparent lack of interest in who the "constable" is, what "office" he/she holds in terms of mandate and place in society's structure, at nearly all levels within our power sources allows this regrettable erosion to continue. The intended status of that office is in jeopardy; its independence demanded or offered at the altar of politics; and its image of impartiality is diminishing.

It is impossible in these few lines and this limited space, to touch on all ancillary issues or discuss other evidence of this erosion. The object of this writing has been met if the reader draws the irresistible inference that police involvement in any public election, is unbecoming and inconsistent with the status entrusted to them.