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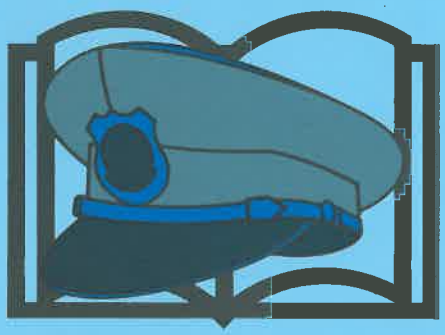
ISSUES OF INTEREST
VOLUME NO. 45



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ISSUES OF INTEREST

VOLUME NO. 45

Written by John M. Post
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USE OF CRIMINAL CODE SEARCH WARRANT TO SEIZE NARCOTICS; WARRANTLESS SEARCHES UNDER NARCOTIC CONTROL ACT; EXCLUSIONARY RULE; GOOD FAITH

REGINA v. GRANT - Supreme Court of Canada - 84 C.C.C. (3d) 161

In a routine road block police noticed that the accused carried on his truck items consistent with marihuana growing. Subsequently police received reliable and confidential information that the accused was involved in an organization to enhance the growing of marihuana and that at the time he was stopped he was on his way to set up an "operation". Police conducted a warrantless perimeter search of the dwelling house the accused was using for this purpose and found the typical evidence of hydroponic cultivation. That same day police spotted the accused at this dwelling house and followed him from there to an apartment building where he apparently resided. A few days later police observed the accused transporting ingredients used for cultivation from the apartment to the dwelling house. Police then conducted a second warrantless perimeter search and again observed evidence of hydroponic cultivation and learned from the hydro company that electrical consumption at the dwelling was unusually high compared to similar homes.

All of the above was included in the application for search warrants for the dwelling house and the accused's apartment. The execution of these warrants resulted in the seizure of 80 marihuana plants and drug related paraphernalia.

The Crown failed to have the evidence admitted in that the warrantless perimeter searches had constituted an unreasonable search. This despite the fact that when the officers conducted these searches they did have the prerequisite grounds to conduct a warrantless search under s. 10 of the Narcotic Control Act. In the absence of urgency police should have obtained a search warrant under s. 12 of that Act. A warrantless search is *ipso facto* an unreasonable search[1] unless the Crown shows that in the circumstances it was not unreasonable. Another snag the Crown's case encountered was that the search warrants executed by police were issued under s. 487 of the Criminal Code which authorizes a justice to issue a search warrant in respect to any offence "against this Act or any other Act of Parliament". These warrants may be issued for "a building, receptacle or place". The search warrants under the Narcotic Control Act can only be issued for a dwelling house.

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[1] Hunter v. Southam Inc. - Volume 18, page 12 of this publication - 14 C.C.C. (3d) 97.

The trial judge applied the doctrine of specificity. He held that both places searched were dwelling houses within the meaning of the Narcotic Control Act and the warrants the searches required were provided for in s. 12 of that Act. In these circumstances the warrants executed were invalid.

The Crown eventually appealed the accused's acquittal to the Supreme Court of Canada (S.C.C.). This Court firstly observed (but did not so hold as it was not an issue) that a warrantless perimeter search under s. 10 of the Narcotic Control Act must only involve the perimeter and not the dwelling house. The Court seemed to indicate that if this had been an issue the police observations of the dwelling house from its perimeter grounds are not authorized under s. 10 of the Narcotic Control Act. This matter simply was not an issue as the Crown conceded that warrantless searches under s. 10 of the Act are restricted in availability "to circumstances in which it is impracticable to obtain a warrant". The Court reiterated that s. 10 N.C.A., being restricted by supreme law (s. 8 of the Charter) only authorizes warrantless searches in exigent circumstances e.g.: imminent danger that evidence will be lost if a search is delayed. This includes evidence believed to be in vehicles, boats or aircraft. Although the latter will usually amount to exigent circumstances, there is no "blanket exception". The Court reiterated that if s. 10 of the NCA is used on a broader basis, it is in breach of s. 8 of the Charter and consequently "inoperable".

This, of course, required the Court to address the propriety of placing such a restriction on law enacted by Parliament. Section 10 NCA is unambiguous. To accommodate law enforcement and meet its needs, Parliament said police may search any place without a warrant except where it involves a dwelling house and provided for a warrant in s. 12. In other words it is the only warrant available under the Act. The structure involved in this case involved a house used exclusively for cultivating marihuana and was apparently not occupied by anyone for "living" purposes. It is assumed that this made police use the Criminal Code provisions as explained above. If the search provisions in s. 10 NCA, with the intent of Parliament so clearly indicated, do violate the Charter, should the Courts then not use their powers under the Constitution and declare that law without force or effect? In this case it seems that the Court usurped the function of Parliament by, in essence, amending s. 10 NCA, a power they clearly do not have.

The S.C.C. concluded that they not amend the impugned section but did "read it down". They preserved the objectives of Parliament and simply gave this section, which was enacted long before the Charter came into effect, an interpretation within the constitutional parameters.

This then left the Court to decide if the warrants under the Criminal Code were valid for searches to enforce the NCA. The Trial Court and Court of Appeal had held that they were not. The S.C.C. disagreed with that view and held that the Criminal Code provisions were valid for searches in the enforcement of the NCA. There is a considerable difference between the warrants under NCA and the Criminal Code. The former gives police far broader power while the latter has a lot of safeguard restrictions. The Criminal Code warrants are valid for any statute of Parliament, provided they do not grant more power to police than the warrants provided for under a specific statute. Then of course, the use of the Criminal Code provision

may be an abuse in that the authorities seemingly wanted to circumvent those restrictions. In this case it is the other way around. The differences are considerable under the NCA search warrant provisions as police:

1. can search any time while Criminal Code warrants are mostly restricted to day time searches;
2. need not bring all items seized before a justice for disposition as they are required to do under the Criminal Code;
3. who execute the warrant must be named in the warrant to be held responsible for the manner in which the search is carried out.

This last provision was enacted in 1960-61 (C 35) to counter-balance the wider scope of the NCA warrant. The restrictions placed on the Criminal Code warrants negate the need for greater specificity. The S.C.C. held that the two provisions for search warrants operate simultaneously and provide police with separate avenues to obtain judicial licence to search and seize. The choice of which to employ is that of the police.

With regard to the perimeter searches, the S.C.C. held that they were unreasonable. As explained above s. 10 NCA did, in these circumstances, not operate. The S.C.C. found that without the evidence gathered by means of the warrantless perimeter searches there was at the time of the application for the search warrants, sufficient grounds for the Justice to issue the warrants. Consequently the three criteria for the search to be reasonable were met. The searches were authorized by law; the law is reasonable; and the manner of the search was reasonable.

One would think that this would make any consideration for exclusion of evidence under s. 24 (2) of the Charter unnecessary. But this was not the case despite the fact that s. 24 (2) of the Charter only seems to target evidence for exclusion "that was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter". The S.C.C. firstly held that the warrants issued properly and the searches did not violate s. 8 of the Charter. Yet, apparently applying a facsimile of the "poisonous tree principle" (don't eat the fruit if there is fungus on the roots) the S.C.C. said:

> "However, this does not eliminate the possibility that the entire search process was tainted by the warrantless perimeter searches which violated s. 8, so the possibility of excluding that evidence under s. 24 (2) of the Charter must be considered."

The Crown argued that the Justice of the Peace could have properly issued the search warrants, without the information police gleaned from the unreasonable perimeter searches. Therefore a consideration for exclusion of any of the evidence obtained by means of these warrants was going beyond the intent and meaning of the exclusionary rule contained in s. 24 of the Charter. Responded the S.C.C. (in essence applying the poisonous tree principle):

> "I disagree with that submission on the basis that an infringement of s. 8 of the Charter has occurred in the investigatory process in the case at bar; quite apart from the fact that a reasonable search was undertaken subsequently pursuant to a valid warrant".

The S.C.C. reasoned that the evidence the defence wants excluded was gathered by police in an investigatory process triggered by an unreasonable (warrantless) perimeter search. In other words, if the gathering of evidence follows a Charter violation s. 24 (2) will be triggered. This despite the section stipulating that only evidence obtained "in a manner that infringed or denied any rights or freedoms" is subject to exclusion; and the Court holding in Regina v. Collins that our exclusionary rule is a conditional one.

The S.C.C. reasoned that there must be a temporal link between the Charter infringement and the obtaining of impugned evidence. Where that infringement and the discovery of the evidence "occur in the course of a simple transaction" then that "figures prominently" in the assessment for admission of the evidence. In this case, there was a mere temporal link between the warrantless searches of the perimeter of the home and the eventual search of the place with the warrant. That link was sufficient to consider exclusion of all the evidence obtained with the warrants. The Court held that the warrantless searches were an investigatory tactic that could not be separated from the whole investigation that unearthed the evidence. All of the evidence obtained by executing the search warrants was therefore subject to consideration for exclusion.

The S.C.C. reiterated the three fundamental factors relevant to the consideration for exclusion:

1. If admission of evidence will affect the fairness of a trial then it tends to bring disrepute on the administration of justice and generally the evidence should have been excluded. However, where the evidence is "real" and existed irrespective of the Charter violation, its admission will rarely cause the trial to be unfair.

2. The seriousness of the alleged offence must be in balance with consideration for exclusion due to infringements committed in good faith; by inadvertence; infringement of a technical nature; infringements motivated by urgency or prevention of destruction of evidence. And, of course, the question if the evidence could have been obtained without infringing the rights of the accused.

3. Where the Charter infringement is trivial while the evidence considered for exclusion is substantial to prove the offence. Where the offence alleged is serious and admission of the evidence would cause the trail to be unfair, it is particularly important that the seriousness of the offence will not render the evidence admissible.

The S.C.C. found that all the evidence was "real" and admitting it would not render the trial unfair.

The Court then considered if the officers had acted in good faith. After all the officers had acted as Parliament had authorized them to do by means of the Narcotic Control Act when they conducted the warrantless perimeter searches. They had no way of knowing that a challenge under the constitution would result in the Courts placing a restriction on that authority. In another BC case involving warrantless perimeter searches, the Courts found that the officers had not acted in good faith as they were prevented at trial to give this prerequisite ground for such a search in evidence.[2]

As a consequence the conduct of the officers in this case is distinguishable from that other BC case (Kokesh). The officers had acted in good faith held the court. The offence alleged is serious, the evidence is real and exclusion would result in acquittal. Consequently the evidence is admissible.

Crown's appeal allowed; acquittal set aside. New trial ordered.

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[2] Regina v. Kokesh - Volume 33 and 39 of this publication, pages 42 and 6 respectively.

UNREASONABLE PERIMETER SEARCH - ERRONEOUS INFORMATION IN APPLICATION FOR WARRANT - SEARCH OF UTILITY RECORDS - VALIDITY OF WARRANT - ADMISSIBILITY OF EVIDENCE

REGINA v. PLANT - 84 C.C.C. (3d) 203. Supreme Court of Canada

A "Crime Stopper" tip gave police not an address, but a detailed description of a house on a certain street where marihuana was hydroponically cultivated. Police found the house and by using a terminal in the police service building that was linked to the City's utility main frame, discovered that the electrical consumption was four times the average for a similar home. This had been so for the last six months. Two officers then went to the home during the day and knocked on the doors but apparently no one was home. As they walked around the house they observed covered windows and vents customary for places where marihuana is grown. The officers were chased off the premises by a resident who happened to arrive home. A search warrant was issued and police found 112 seedling plants. The accused was convicted of cultivation but acquitted of possession for the purpose of trafficking. He appealed this conviction eventually to the Supreme Court of Canada (S.C.C.). His main grounds for appeal were the alleged improprieties of police who:

1. had searched the perimeter of his home without warrant;
2. did violate his rights under section 8 of the Charter by searching the utility records related to his home; and
3. did violate his rights under section 8 of the Charter by the way the search warrant was obtained under the Narcotic Control Act.

The S.C.C., as they did in 1990,[3] held that the warrantless perimeter search was an infringement of the accused's section 8 Charter right. Despite the Narcotic Control Act's provisions for warrantless searches they are in the absence of urgency *ipso facto* unreasonable[4] while the prerequisite grounds for a warrant or a warrantless search are the same. This left the S.C.C. to decide if, after removing the evidence obtained by the perimeter search, there was enough information left in the application for the search warrant, for the judge to have issued same. This, of necessity, lead the Court to examine the propriety of the computer search and the evidence of "the tip".

It is clear by now, that section 8 of the Charter is there to protect persons and not property. There must not be police intrusion where there is a reasonable expectation of privacy. To determine this the Courts must balance the right of the person's reasonable expectation of

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[3] Regina v. Kokesch - 61 C.C.C. (3d) 27 - Volume 39, page 6 of this publication.

[4] Hunter v. Southam Inc. - Volume 18, page 12, 14 C.C.C. (3d) 97.

privacy against the public's interest in law enforcement. The S.C.C. has made decisions with regard to searches resulting in seizures of informational privacy.[5] However, the S.C.C. found this to be distinct from inspection of computer records.

Sometimes we must or want to give information about ourselves. Usually there are or we have specific purposes from doing so. We then should have a reasonable expectation that the information will only be used for the purpose for which it was given and will remain confidential for any other purposes. This is a reasonable expectation of privacy. Needless to say, the nature of the information plays a significant part in this. The Court held that for recorded information to be protected by section 8 of the Charter it must be personal and confidential in nature, e.g.: information a person in a free and democratic society would wish to control in terms of dissemination to the government including information of lifestyle, personal choices, medical records and like details about oneself. The consumption of electricity does not belong in this category and is not protected under s. 8 of the Charter. The relationship with the electric company is hardly confidential or personal and is no more than a commercial relationship. The company is not contractually bound to keep that information confidential. No intrusion of privacy was involved. Consequently the information about consumption of electricity was available to police to support the application for a search warrant.

The accused also attacked the "Crime Stopper's unanimous tip" being a valid part of the application for the search warrant. It simply was too unreliable to have amounted to reasonable and probable grounds for believing that the offence of cultivating was being committed at the accused's home. The credibility of this unanimous tip was corroborated by police reconnaissance which resulted in finding the exact address "described" by the informer. This description had been sufficiently detailed that it was equivalent of him/her having given the exact address. Therefore the tip was sufficiently reliable to be part of the application for a warrant.

The accused also alleged that the police had deliberately been deceptive and had mislead the justice who had issued the warrant. The informer had not given police an address but a detailed description of a "cute house" on a certain street. In the application for the warrant police stated that the informer had said the marihuana was being cultivated at a specific address. This address was discovered by the police from what the informer described. Instead of relating how police deduced the address, the officer had in good faith attempted to draft the information concisely without reference to too much detail. Rather than staring at this flaw in the application the S.C.C. amplified their sources to determine if there was a deliberate withholding of information to mislead the Justice who did issue the warrant. There was evidence before the trial court that police had found the address from the description the informer gave. This linked with the electric company computer showing excessive consumption of electricity at that address had

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[5] Regina v. Dyment (1988) 45 C.C.C. (3d) 244 - Volume 34, page 24 of this publication.

formed adequate grounds to issue the warrant. In other words, had the application related all the details, the grounds necessary would have been made out. Consequently the warrant was valid.

Despite the unreasonable perimeter search the S.C.C. held that the evidence obtained by the warrant was admissible in evidence.

Appeal Dismissed,
Conviction upheld.

SUSPECT REFUSES TO PARTICIPATE IN LINE UP - POLICE SURREPTITIOUSLY VIDEO TAPE SUSPECT AND NINE LOOKALIKES - VIDEO LINE UP - ADMISSIBILITY OF EVIDENCE

REGINA v. PARSONS - Court of Appeal for Ontario, 84 C.C.C. (3d) 226.

The accused was charged with two counts of armed robbery. After his arrest he was asked to participate in an identification line up. Upon the advice of his lawyer the accused refused. He was then surreptitiously video taped when he walked down a hallway in the police station. Nine other persons were video taped in the same location and for the same period of time. These people were representative of the accused and the defence conceded that the video line-up was fair terms of appearance similarities of the persons on this 45 minute tape.

Defence counsel had argued that since the accused had a right to refuse to participate the police had violated that right by what they did. The police action amounted to a trick and captured evidence identical to a conventional line-up. Admitting that evidence would render the accused's right to refuse meaningless. The practice was simply unfair argued the defence.

The Crown relying on a precedent[6] submitted that no consent is required to photograph a person and doing so does not violate the rule against self-incrimination. The trial judge had agreed with the Crown's position on this issue. Taking a picture of or video taping a suspect in a public place without intrusion, trespass or improper actions is not a breach of privilege, invasion of privacy or an infringement of a Charter right.

The accused appealed his convictions to the Court of Appeal for Ontario. His counsel depended heavily on a decision made by the Supreme Court of Canada[7] to have the Court hold that once a suspect refuses to cooperate with investigators or surreptitious or alternate means to obtain the desired evidence is rendering that evidence so obtained inadmissible. Hebert had refused to make any statement to police. An officer, posing as a prisoner, had engaged him in a conversation that led to police obtaining an inculpatory statement. This had been a subversion of Hebert's right to remain silent. The Court of Appeal rejected the defence submissions. The Supreme Court of Canada had found that in the Hebert case police had infringed the suspect's right to remain silent under s. 7 of the Charter, that right being a principle of fundamental justice. The accused's rights in this case, to refuse to participate in a line-up was not a Charter Right. The right against self-incrimination under the Charter is not one that operates at investigative levels. It is a right of a witness or accused person during court proceedings.

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[6] Regina v. Shortreed (1990) 54 C.C.C. (3d) 292.

[7] Regina v. Hebert (1990) 57 C.C.C. (3) 1 - Volume 37, page 15 of this publication.

With regard to the identification procedures used by police the Court of Appeal was of the opinion that police, in the circumstances, were entitled to adopt the procedure they did. It was seen as a means of applying modern technology as an aid to criminal investigations. It is not illegal and does not amount to an intrusion. Unlike with the right to remain silent, surreptitiously obtaining the evidence that is not to be had with cooperation in regard to identification, is not a Charter breach. Also, observed the Court, this method produces a far more accurate record of the procedure than a standard line-up. The tape can be played over and over again by the parties concerned - Crown, Defence, Court, Jury, witnesses, etc.

Appeal from conviction was dismissed. Conviction upheld

FEMALE PRISON PERSONNEL IN AN ALL MALE PENAL INSTITUTION - CHARTER OF RIGHTS OF INMATES TO REASONABLE SEARCH AND PRIVACY - DIGNITY -

CONWAY v. THE QUEEN - 2 S.C.R. [1993] - 872.

Conway, an inmate in a penitentiary, challenged the federal prison system on the constitutionality of female guards in male prisons conducting frisk searches, scheduled counts and unscheduled patrols. The frisks are from head to toe including the genitals and the counts and patrols frequently catches inmates while undressed or using the toilet. Conway claimed this practice of cross-gender security violated the inmates' right to security of his person, his rights to reasonable search and inequality based on sex. He argued that the inequality arose from female prisons not having male guards.

The Supreme Court of Canada (S.C.C.), reviewing the decisions rendered by the Federal Court of Appeal, found that the security measures carried out by the female guards were for the benefit of the whole institution and the inmates in particular. The frisk policy does not exclude the genital area from such searches, and emphasizes preservation of the dignity of the inmate by avoiding such touch, unless considered necessary.

All cells are designed to maximize proper assessment of security by prison guards. There is a considerable reduced expectation of privacy in a gaol and a cell is open to observation and inspection. The reduction of that expectation is such that the security practices like counts, patrols and searches do not infringe an inmate's right to be secure against unreasonable search or seizure.

In regards to the equality issue under s. 15 of the Charter the S.C.C. reiterated, "Equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality." There is a difference between men and women that justify differences in the area Mr. Conway challenges. Historically the violence perpetrated by men against women is not anywhere matched by the physical violence women inflict on men.

Biologically women have more private parts on their bodies than men. Chest searches for hidden items under clothing or parts of the female anatomy would nearly always be essential in a frisk search. Sociologically women occupy a disadvantaged position to men. Comparing the two scenarios of female guards in male institutions and male guards in female gaols, the later is far more threatening for the inmates than the former. Consequently the equality Mr. Conway demands would in fact create inequality.

The S.C.C. observed that even if Mr. Conway was correct the practice of female guards in male prisons is demonstrably justified in our free and democratic society (s. 1 Charter). The practice and policy enhances, by its humanizing effect, the rehabilitative objectives of the penal system. Furthermore it promotes employment equity. "The importance of these ends would thus justify its breach of s. 15 (1), if any."

Mr. Conway's appeal was dismissed.

REQUIRED LINKAGE BETWEEN MURDER AND THE OFFENCE CAPABLE OF ELEVATING MURDER TO FIRST DEGREE MURDER - MURDER AND SEXUAL ASSAULT

REGINA v. RICHER - 82 C.C.C. (3d) 385. Court of Appeal for Alberta, June 1993.

The victim of a murder was found in her apartment. She had been strangled with a towel. The body was naked and there was proof that there had been vaginal and anal intercourse. The accused had been convicted of first degree murder in relation to this incident.

In his appeal to the Court of Appeal of Alberta the accused did not seriously challenge that he had murdered the woman, but he argued that the evidence against him only supported a verdict of second degree murder.

Section 231(5) C.C., provides that murder is first degree murder, where death is caused, "while committing or attempting to commit" sexual assault. There was no evidence of forced entry into the apartment. This was consistent with consent to the sexual acts with the victim. The Crown countered this with testimony from the victim's boyfriend that she did not like and would not consent to anal intercourse. However, the main argument by the accused was that the Crown had failed to prove that the victim was alive when the sexual activities took place. In other words there was no proof that the murder was committed "while" the victim was sexually assaulted.

The Alberta Court of Appeal did reject the argument with regard to the issue of consent. In respect to the Crown not being able to prove that the assault of a sexual nature was being committed upon the victim at the time she was murdered, the Court held that the link between the two offenses must be temporal or causal. It is not the order in which they were committed that is important but the linkage between murder and the crimes that elevate murder to first degree murder.

Accused's appeal dismissed,
Conviction upheld

NOTICE OF SECOND BLOOD SAMPLE IS PART OF DISCLOSURE. FAILURE DEPRIVES CROWN FROM PRESUMPTION OF EQUALIZATION

REGINA v. EGGER - Supreme Court of Canada, 82 C.C.C. (3d) 193, June 1993

The accused was involved in an accident in which two people were injured. Due to facial lacerations the demand made of the accused was for blood samples instead of breath. The accused agreed and a qualified nurse took samples of blood. It was explained that one was for Crown purposes and the other for the accused's own use should he want it analyzed for defence purposes. The blood / alcohol level was exceptionally high and this resulted in two charges of impaired driving causing bodily harm and one charge of "over 80".

The accused was served with a certificate of analysis and one day prior to his trial with the certificate of a qualified technician (CA and CQT respectively). The CA did not make mention of the second blood sample but the CQT did. However the CQT was not served on the accused until six months after the samples were taken. This, of course, was at a point in time beyond the three months within which the accused could apply for that sample under s. 258 (1)(d)(i) C.C.

The trial judge had not allowed in evidence the CQT because it had been served one day before the trial while it could have been served when the samples had been taken. The fact that the accused had been told of the purposes for the second sample, at the time it had no significance. According to the trial judge these injuries, disorientation and extremely high blood / alcohol level rendered that conversation superfluous in terms of due notice. The trial judge had, due to this flaw also disallowed the CA and held that due to this short coming the statutory presumption that the alcohol level at the time the sample is taken is the equivalent of that at the time of driving, was not available to the crown.

The Alberta Court of Appeal reversed the trial judge's conclusions. It said that the trial judge had assumed that the accused had not understood what he was told by police about the second sample. The accused did not raise the issue and did not confirm the judge's presumption. Secondly, if the trial judge was right with regards to the lack of notice, or the taking advantage of the right and entitlement to that second sample, one could effectively veto the Crown's use of the certificate evidence in regards to the first sample.

The accused took his plight to the Supreme Court of Canada (S.C.C.). The issues raised, clearly left the following questions to be answered with regard to s. 258 (1) (d) (i) C.C.;

a) What must the Crown disclose to an accused person and when to have the benefit of the presumption of equalization?; and
b) What, if any action by the accused to obtain the second sample is necessary before that presumption is available?

For technical reasons the S.C.C. found that the accused did not receive notice of the second sample until the day before his trial. It was the trial judge's finding of fact that the accused had due to his condition, not received notice when told of the second sample at the hospital. The Court of Appeal had no authority to reverse that finding. This as the Crown can only appeal points of law. Consequently the CQT was inadmissible.

The S.C.C. held, however, that "the admissibility of the CA and CQT does not depend on meeting the conditions for the presumption" of equalization. Due to the CA having been found inadmissible by the trial judge there was no evidence to equate anything in terms of blood / alcohol content.

The S.C.C. examined the reasons for the trial judge disallowing the CA and could not find any. This notice had been served on the accused well in advance of his trial and the Court found that the trial judge had been wrong. The Court did at this stage re-emphasize that this does not influence the availability of the presumption. But if it is available, then at least, there would be something to equate it to.

Then the reasoning of the Court went to considering the constitutional propriety of all this. The Crown took the position that the accused was represented by competent counsel and there was no obligation or need to inform the accused of his rights under s. 258 C.C. to get the second sample of blood. Even if no counsel was involved, is the Crown obliged to advise the accused person of all of his rights and defences available to her or him? In Canada we have law quite distinct from that in the US where the Miranda precedent is predominant. We place emphasis on the right to counsel and it is the "pearly gate" to legal advice and representation by presumed competent professionals.

In answer the S.C.C. reminded the Crown of its decision in 1991 in *R. v. Stinchcombe* which placed on the Crown "a duty to disclose to the accused all information reasonably capable of affecting the accused's ability to make full answer and defence, and to do so early enough to leave the accused adequate time to take any steps he or she is expected to take that affect or may affect such right". This decision derived its "constitutional underpinnings" from s. 7 of the Charter.

This "disclosure rule" must be adhered to and the Crown must, where it has failed to disclose, show that this was done under one of the exemptions to the rule, i.e.: (a) information that is irrelevant; (b) information subject to the rules of privilege; or delay of disclosure to not compromise investigations or protection of witnesses.

Needless to say none of these exemption conditions did exist and the accused for reasons explained above, did not receive notice of the second blood sample. In other words the Crown failed to disclose where it should have done so and did thereby prevent the accused from making a full answer and defence to what the crown alleged.

The S.C.C. held that the consequence to the Crown for the infringement of the accused's right under s. 7 of the Charter is unavailability of the statutory presumption that the blood / alcohol level at the time the sample was taken was the same as at the time of driving.

The Court did not hold that the service of the CQT is mandatory. However, it held that where an additional sample of blood has been taken the disclosure rule demands that notice as effective as a CQT or certificate of a qualified medical practitioner is given to the accused. The CA or the summons do not meet that requirement as neither document refers to the existence or availability of the second sample for testing.

Needless to say, if the accused has received notice and does not make use of it, that does not affect the availability of the presumption to the Crown.

Accused's appeal allowed
Acquittal restored

MANSLAUGHTER - STANDARD OF MENS REA
FORESEEABILITY OF DEATH

REGINA v. CREIGHTON - [1993] 3 S.C.R. 3, September 1993

The accused and a male companion attended a woman's apartment where they had an alcohol / drug feast. After 18 hours of ingestation the accused injected the woman with a quantity of cocaine. He did so with her consent. She immediately got into difficulty and convulsed severely. The "male companion" wanted to call for emergency medical assistance but was intimidated by the accused not to do so. The accused attempted to resuscitate the woman to no avail. He then placed her on a bed, wiped the apartment clean of his fingerprints and left. The woman was then still alive but obviously in difficulty. After about 7 hours the male companion returned to the apartment and called for an ambulance. It was too late for remedial treatment. The woman was pronounced dead.

The accused was convicted of manslaughter in that he had caused the woman's death by means of an unlawful act, to wit "trafficking". The Court held that injecting the woman with cocaine amounted to that offence under the Narcotic Control Act.

The accused appealed the conviction claiming that the common law definition of manslaughter the Court applied, breached his right under s. 7 of the Charter.

The Statutory definition of manslaughter is causing the death of another person by means of an unlawful act. Needless to say, that by itself is fairly broad. The common law has addressed the issue of intent and stipulates that "unlawful act manslaughter requires objective foreseeability of the risk of bodily harm which is neither trivial nor transitory in the context of a dangerous act". Since the foreseeability of the risk of death is objective the person who commits the unlawful act that causes death is not required to have foreseen that death could result.

The accused claimed, that considering the gravity of the crime (unlawful act manslaughter) it requires too minimal a level of *mens rea*. This inconsistency is a breach of s. 7 of the Charter in that it deprives him of a standard that is in accordance with the principles of fundamental justice. The least the Crown should have to prove for manslaughter is a subjective foreseeability of the risk of death when he committed the unlawful act of trafficking which caused the woman's death.

The accused thought to have found some support for his arguments in a precedence established by the Supreme Court of Canada in 1987.[8] In that case Vaillancourt had participated in an armed robbery. When one of his partners showed up with a gun Vaillancourt had made sure

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[8] Regina v. Vaillancourt - Volume 30, page 1 of this publication.

there was no ammunition in the possession of the person carrying the gun. However, the person obviously had at least one bullet as he shot and killed someone during the robbery. By means of its statutory definition Vaillancourt committed murder while he had no intent to take anyone's life. The Court held that without the mental element with respect to death, which gives rise to blameworthiness, a person cannot be convicted of murder. The S.C.C. did in that case, set manslaughter apart from murder and held that the distinguishable element that does so is the one with regard to mental blameworthiness. Vaillancourt lacked subjective foresight and therefore did not have the requisite intent for murder. The law as it was then, was not in accordance with the principles of fundamental justice, Vaillancourt's appeal was allowed and his conviction for murder was set aside.

Manslaughter is homicide, reasoned the accused and the judge made laws that established the requisite essential elements to that crime, do, as explained above, no longer meet the requirements of the principles of fundamental justice (s. 7 Charter). The Supreme Court of Canada (S.C.C.) responded by reiterating the distinction between murder and manslaughter with regard to moral blameworthiness.

> ".....murder is distinguished from manslaughter only by the mental element with respect to death. It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder."

By its title, the law indicates clearly that in manslaughter the blameworthiness is less than it is for murder. Consequently, the *mens rea* requirement of objective foreseeability of harm is entirely appropriate with regard to manslaughter. This does not offend s. 7 of the Charter concluded the S.C.C.

Appeal dismissed, conviction upheld

Regina V. Gosset[9]

The accused was a police officer. He had effected an arrest for an outstanding warrant. When the prisoner was let out of the car at the police station he bolted and ran. The accused drew his service revolver as he pursued his prisoner on foot. The gun went off and the prisoner died of a head wound. The accused conceded that the gun must have been cocked and that he had aimed it at the prisoner. He testified that he had not intended to fire his gun and that it had gone off accidentally.

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[9] See Volume 41, page 5 of this publication for decision by the Court of Appeal for Quebec.

The accused's acquittal for "unlawful act manslaughter" was set aside by the Quebec Court of Appeal and a new trial was ordered. The accused appealed this decision to the Supreme Court of Canada (S.C.C.).

The S.C.C. held that the unlawful act of "careless use of a firearm" was for a properly instructed jury, reasonable to find. The accused had not exercised a standard of care of a reasonably prudent person in these circumstances. This must be assessed on an objective standard.

Accused's appeal dismissed,
Order for a new trial upheld

ADMISSIBILITY OF OUT-OF-COURT STATEMENTS GIVEN TO POLICE BY RECANTING WITNESSES - HEARSAY - NEW RULE RESPECTING SUCH STATEMENTS CREATED BY THE COURT - SUBSTANTIVE USE OF STATEMENT ALLOWED IF RELIABILITY TEST HAS BEEN MET.

REGINA v. K.G.B. - 79 C.C.C. (3d) 257. Supreme Court of Canada

The accused and three other youths had an altercation with a young man (JW) and his brother. In the street fight that ensued JW was slashed in the face and stabbed in the chest. The latter wound caused his death. Two weeks after this incident the three companions of the accused were questioned by police. An adult was present for each and for one youth a lawyer was present. The interviews were videotaped and proper cautions were adequately conveyed to these suspects. All three told police that the accused claimed to have stabbed and caused the death of JW. Consequently the accused was charged with second degree murder and was tried in youth court.

At trial the Crown called the three young men but they refused to adopt their earlier statements to police. They said they had lied to exculpate themselves from any possible criminal liability. They said the accused had not made statements to them as they had claimed and they had forgotten what happened. All three were declared adverse witnesses under s. 9 of the Canada Evidence Act and the Crown cross-examined them on the inconsistencies between their previous statements and their testimony.

As per the long established common law surrounding this issue, the trial judge held that the only use of the prior inconsistent statements is in respect to the credibility of the witnesses. The Crown could not in these circumstances, have such a prior statement admitted as evidence of the truth of its content. Assuming that the Crown totally relies for its case on the testimony of a witness who turns adverse, then the previous out-of-court statement cannot be placed before the jury to accept as fact what they believe to be the truth - the statement or the testimony they heard.

The Crown could not gain a conviction without testimony consistent with the previous statements and the accused was acquitted. The three witnesses did sometime later plead guilty to perjury and the Crown appealed the acquittal to the Supreme Court of Canada urging it to review and revise the common law that surrounds the "orthodox" rules about inconsistent statements.

It has been the collective judicial opinions that s. 9 of the Evidence Act only provides for the party whose witness has recanted, to contradict that witness by means of cross-examination to undo some of the harm he/she may have inflicted to the interest of the party that called him/her, "The section does not provide that what was not otherwise evidence becomes evidence by the section, but simply that, before the witness can be contradicted he/she must, in the opinion of

the Court, prove adverse..." Those opposing revision of this old rule say that the section enacted by our supreme parliament is clear and the Courts have no jurisdiction to alter the intent of the elected lawmakers. In a democracy the appointed officials (the judiciary) can only interpret the law but not alter the meaning and intent of the elected lawmakers. Another argument to have the law stay as is, is "dangers" of admitting and relying on an unsworn out-of-court statement over the sworn testimony in a Court of law.

Those in favour of revision and change submitted that in our modern society "the power of an oath must be discounted as a means of ensuring reliability for a statement". In the New Zealand Law Journal it was argued that the oath now, is no more than "a lingering relic of primordial superstition" and "primitive mumbo-jumbo".[10]

The demeanour of a witness while testifying has always been considered to be of significant importance in judging credibility. The critics of revision and change argue that the acceptance of the out-of-Court statement, if accepted over testimony, discounts the benefit of observing such behaviour. In this case, of course, the taking of the statements were videotaped and consequently the jury could observe the demeanour of these witnesses when they made them.

Any reform of the orthodox approach to this issue always runs amok of the stringent hearsay rules. Any testimony the giver cannot vouch for in terms of truth, is hearsay. This truth must have been personally discovered by one of the giver's senses. Any evidence that is admissible outside of this basic test is an exemption to the hearsay rule. However, the Supreme Court of Canada has been adding to these exemptions and indicated a relaxation of the stringent rule. *Regina v. Dr. Kahn*[11] is a good example of this. The evidence in question was that of a mother whose four year old daughter told her on the way home from the doctor's office how the physician had put "his birdie" in her mouth. All the mother could vouch for is that, that is what her daughter told her. Other than expressing opinion the mother could not say if it was true. Therefore the evidence of the mother was hearsay, while the child's evidence was unsworn and immature. The child's statement was not a spontaneous declaration to her mother and it did not amount to an exemption to the hearsay rule. The Chief Justice of the Supreme Court of Canada said that due to reliability and necessity, the mother's evidence was admissible and that this was a triumph over a set of ossified (rigid convention opposed to change) judicially created rules that signalled an end to the old categorical approach to the admissibility of hearsay evidence. The common law must not be rigid but must evolve with the practical situations in our contemporary society. It is not only the jurisdiction but also the responsibility of the Courts to reform the common law. The law under review in this case is not law that was enacted by Parliament (s. 9 Canada Evidence Act) but the judge made common law rule applicable to hearsay evidence. In view of the Court's role it is notably better left to the Courts to amend this judge made law, concluded the S.C.C.

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[10] D.F. Dugdale "Against Oath Taking" [1985] NZLJ 404

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

The S.C.C. decided that the "blanket exclusion of reliable evidence for a particular purpose" be replaced with "a general rule of admissibility for all purposes" when certain criteria have been met. In general prior inconsistent statements of a witness other than the accused should be admissible for substantive purposes, if found reliable and necessary. Before such a statement is admitted for substantive purposes, there must be a *voir dire* in which the Court must satisfy itself that the statement is indeed reliable. Needless to say that only those portions of such a statement are admissible as they would have been had the witness testified without recanting. For instance, if it says in the inconsistent out-of-court statement "I saw Y fire the gun" that of course is admissible. If it says in the statement, "X told me that Y fired the gun" that is clearly hearsay and inadmissible. Needless to say that, "Y told me he fired the gun" is admissible under the "admission - exception" to the hearsay rule. It is clear that the new rule is not intended to make any part of the prior inconsistent statement admissible for substantive purposes that would not have been admissible had the witness testified without recanting.

Reliability:

The S.C.C. observed that despite the diminishing meaning of an oath, many recanting witnesses will offer the explanation, (when confronted by their inconsistent prior statement), that they are now under oath and feel compelled to the tell the truth. This does privilege, the trial testimony in the mind of the trier of fact (jury). This problem would be eliminated if out-of-court statements were made under oath. Since both statements cannot be true, the inability to explain the recanting to be a matter of conscience due to the oath, the trier of fact would get a true picture of the witness's low regard for the oath and the truth. The practice of taking witness statements under oath or affirmation will probably cause a considerable reduction in recanting. Prospective witnesses should be warned of their exposure to prosecution under the provisions of s. 137, 139 or 140 of the Criminal Code suggested the S.C.C., to render these sanctions effective. They should be told also, that the statement may be used at a subsequent trial, as evidence against them should they recant the statement. This procedure will effectively prevent a jury from being asked to accept an unsworn statement over sworn testimony; verdicts will not be based on unsworn testimony; and it will promote truthful trial testimony. This would satisfy the reliability test, said the S.C.C. In terms of administering the warning and the oath the Court suggests that a justice of the peace be used for the warning before the statement is taken and the oath when the statement is signed. Should this in certain areas of the country be problematic the Court suggests that the "officer in charge" (as he/she is known for the release of prisoners), be made a commissioner of oath. The S.C.C. then stressed that they did not want to set up stringent and technical requirements that would inhibit liberalizing the hearsay rule.

They emphasized that there are other circumstances that will satisfy the reliability test where the witness has been appraised of the importance to tell the truth. Said the Court,

> "While these occasions may not be frequent, I do not foreclose the possibility that they might arise under the principled approach to hearsay evidence."

Demeanour

A transcript of an interview tells very little if anything about body-language. The tone of voice of interviewer or interviewee are not reflected in a transcript, and yet they can speak volumes in terms of the relationship between the two or the tenor of commitment. The reaction to questions, e.g.: hesitation, indifference or indicators of inducement or credibility are lost to the trier of fact, unless they were verbalized. Those who oppose change to the hearsay rules argue that these omissions cause juries difficulty in their ability to judge the veracity of the witness when he/she made the out-of-court statement. This, they claim, causes substantive use of that statement to find facts, an unreliable and flawed practice.

The S.C.C. agreed but held that this can be overcome by means of video taping the interview. In this case a split screen was used, one showing the witness faceon with the interviewer sitting across the table from him and in the corner of the screen a close-up of the witness's face. Along the bottom of the screen was a date and time counter to ensure the continuity and integrity of the tape.

This practice, the S.C.C. said, is another important indication of reliability which will satisfy the principled basis for the admission of hearsay evidence.

Cross-Examination

Cross-examination is the main tool by means of which credibility is tested. If the out-of-court statement of a recanting witness may be used as evidence of the truth of its content the lack of contemporaneous cross-examination renders admitting that statement in evidence a dangerous practice, submitted the critics. The S.C.C. held that this flaw is easily remedied. After all, the adverse witness is cross-examined by both parties to the criminal proceedings. Although this may not be ideal, the lack of cross-examination when the out-of-court statement is made may not be a barrier to substantive admissibility of the statement. As a further remedy, the Court saw nothing wrong with counsel drawing the lack of cross-examination during the interview to a jury's attention. After all, the jury has to decide whether to accept the content as fact. Needless to say, often no one is charged at the time these interviews take place and this makes cross-examination somewhat impractical.

Necessity:

Necessity could cause an exception to the hearsay rule if the person who could give first hand evidence was not available due to death, insanity, being outside the geographical jurisdiction of the Court, or is of too young an age. Their declarations may be admitted in evidence. There are very high standards of reliability attached as a prerequisite to admissibility. In the case of a recanting witness it is patently obvious that the party who called him or her cannot get evidence of the same value as was given in the statement. For that purpose the witness is not available. He/she now holds the relevant prior statement, the evidence, hostage. If that is the case and the prior statement withstands a test to establish sufficient reliability, then the trier of fact should be allowed to weigh both statements in the light of the explanation the witness gave for the difference between the prior statement and the testimony.

The S.C.C. then described the new procedure in the event a witness is adverse to the party who called him/her, (s. 9 (1) & (2) Canada Evidence Act). The party who called the witness must indicate for what purpose he/she wants to use the prior inconsistent statement by the witness. If it is intended to be used only to impeach the credibility of the witness, then the old orthodox rule will apply. In other words, then there is nothing new under the sun. Where the party indicates that he/she intends to make substantive use of the recanted statement then the new and reformed procedure must be followed. The *voir dire* must then continue for the trial judge to determine the reliability of the statement the party seeks to have admitted into evidence. That reliability must be shown on the balance of probabilities. The elements of reliability include, oath, video taping and warnings plus certain elements of the prerequisites to the admissibility of the statement made by an accused person. Particularly where police are involved, statements by witnesses have many characteristics in common with confessions. If the veracity of the statement has been undermined to the extent that it cannot be relied upon in terms of the truth of its content, then a trial judge must not allow substantive use of the previous statement by the recanting witness only where the test of reliability (as in this case established by the S.C.C.) can be met, may the out-of-court statement by a recanting witness be used as evidence of the turth of its content.

Crown's appeal allowed
New trial ordered

RECANTATION - ADMISSION OF OUT-OF-COURT STATEMENT OR PREVIOUS TESTIMONY BY ADVERSE WITNESS AS EVIDENCE OF TRUTH OF CONTENT

REGINA v. CLARKE 82 C.C.C. (3d) 377, REGINA v. K.G.B. 79 C.C.C. (3d) 257. Ontario General Division Court and Supreme Court of Canada Respectively.

The accused was caught in the company of a 16 year old girl, TM, trafficking in cocaine. The girl also had cocaine in her possession and she told police how she received her supply from the accused. The accused was charged with trafficking and at the preliminary inquiry TM testified consistent with the statements she gave to police. She was vigorously cross-examined but did not falter in her testimony. At the accused's trial TM recanted her testimony and said she lied at the preliminary inquiry.

The Crown applied successfully under s. 9 of the Canada Evidence Act and had TM declared adverse to the party who called her. This allowed the Crown to cross-examine TM on those parts of her trial testimony that were inconsistent with her previous statement or preliminary hearing testimony. However, the Crown wanted more. Without TM's testimony the Crown simply had no case and it therefore applied to cross-examine TM on all of her evidence and to use the previous statement (testimony) substantially. In other words introduce the entire transcript of TM's statement and previous testimony into evidence and if admissible, expose the jury to its content. This substantive use of an inconsistent statement is now common law created by the Supreme Court of Canada in February of 1993 in *Regina v. K.G.B....*[12] Subject to a "K.G.B. test" the Crown may now be able to introduce into evidence a previous statement or testimony that is inconsistent with the testimony a witness gives.

K.G.B. murdered a youth, he and three other young persons had an altercation with. The three companions were interviewed and made statements, on video tape and while accompanied by adults, how K.G.B. had told them that he was the one who had stabbed the deceased youth and he thereby caused his death. At K.G.B.'s trial the three companions distanced themselves from their statements. They testified that they had made the statements but had lied. The trial judge declared the witnesses adverse to the Crown, but as the common law then was, he only allowed it to go to the credibility of the witnesses. The Crown was not allowed to use the statements as evidence of the truth of their content.

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[12] **Regina v. K.G.B. - 79 C.C.C. (3d) 257.**

This caused the acquittal of K.G.B. and the Crown eventually appealed the verdict to the Supreme Court of Canada (S.C.C.). It, by means of its judgement, devised an additional exemption to the hearsay rule. It held that under certain conditions, such a recanted statement may be used as evidence of the truth of it's content.

The requisite conditions to the exemption are tests that the recanted statements are "reliable" and that it is a matter of "necessity" for the Crown, as without the testimony of the adverse witness it simply has no case. As part of the reliability test the Crown must prove that the statements were given voluntarily. This test is the same as the one applied to reliability of a statement given by an accused person as a prerequisite to its admissibility in evidence to show the truth of its content. The Supreme Court of Canada had held that our approach to this issue had been orthodox. Reforming this rule does not expand the scope of criminal liability and is not an infringement of any right or freedom guaranteed to us by means of the Charter.

In this Clarke case the defence argued that the K.G.B. decision is distinguishable. Not TM's statement to police but her testimony at the preliminary inquiry was applied to be used substantively. The S.C.C. in K.G.B., only referred to previous out-of-Court statements made by witnesses to persons in authority. The trial judge responded that the principle remains unaffected by this distinction of circumstances. In terms of the tenor of the test of reliability, testimony under oath in public, before a judge exceeds the reliability of a statement made in private to a police officer. Consequently the Court held that the "K.G.B." application by the Crown was valid.

Transcript of preliminary hearing admitted in evidence for the truth of its content.

WHEN IS AN ASSAULT A SEXUAL ASSAULT?

REGINA v. K.B.V. - Supreme Court of Canada, 82 C.C.C. (3d) 382.

A three year old boy had the annoying habit of grabbing adults in the genital region. His father, to deter him and showing what it is like to be the recipient of such a gesture, grabbed his son in the same way. He did so on three occasions with considerable force causing severe pain and bruising. The father was charged with sexual assault. The point of law was whether the assault was one of a sexual nature. This question ended up in the Supreme Court of Canada (S.C.C.).

In 1987[13] the S.C.C. had answered the question by judicially defining the offence of sexual assault. The sexual integrity of the victim must have been violated and objectively the sexual context of the assault must be visible, meaning it must be so to a reasonable observer. All circumstances to the assault are relevant to determine the nature of the assault. Sexual gratification may be the motive but seems not to be an essential element. However, the absence of such a motive needs to be accorded some weight to determine if an assault is one of sexual nature.

The S.C.C. agreed with the Courts below, that the accused's acts were a misguided cruel form of discipline deserving punishment and that the assault was a sexual assault. The boy's scrotum had displayed bruises and evidence of severe pain. From all the circumstances it is reasonable to conclude that the boy's sexual integrity had been violated.

Appeal dismissed,
Conviction of sexual assault upheld

Note:

One justice of the S.C.C. dissented and held that the absence of a sexual motive, either in terms of gratification or touching of genitals region had not received sufficient consideration. As misguided as the discipline was it may have been the equivalent of wrapping the child's knuckles to deter him from a bad habit. He had apparently no doubts that what occurred amounted to a contemptible assault, but he was not convinced it was sexual in nature.

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[13] Regina v. Chase - Volume 29, page 35 of this publication, 37 C.C.C. (3d) 97.

OFFERING INDIGNITY TO HUMAN REMAINS

REGINA v. MOYER - 83 C.C.C. (3d) 280.

The accused, who was "a skinhead" and a friend who also believed in white supremacy, decided to attend a jewish cemetery take some "Neo-Nazi" photographs and "show some disrespect". They did not damage any of the graves but took pictures of each other urinating on tombstones, displaying Nazi symbols with the graves as a background, sitting on graves flaunting their symbols in front of Star of David tomb stones and like depictions.

The accused was convicted of three counts of "indecently offering an indignity to human remains" under s. 182 of the Criminal Code. He appealed these convictions to the Ontario Court of Appeal. His argument was a simple one. To offer an indignity to human remains there have to be such remains present. Graves and tombstones are not human remains. No physical involvement with such remains did occur. There are very few cases reported under this section and most are over a century old. All of them do involve the person accused with actual human remains. The expression "dead human body" refers to an unburied body and the phrase, "whether buried or not" refers to human remains themselves and not an indignity offered to monuments or graves where there is no physical contact with the human remains.

The accused expressed contempt by acts or gestures for what the deceased persons stood for. That in the Courts opinion was not offering indignity to that person's remains. Despite the fact that the actions of the accused and his friend was a vicious and repugnant affront to the persons buried in those graves, it did not amount to the offence charged.

Appeal allowed,
Acquittal entered.

TERMINALLY ILL PATIENT SEEKING ASSISTANCE TO COMMIT SUICIDE - CONSTITUTIONALITY OF S. 241 (b) C.C.

SUE RODRIGUEZ v. THE ATTORNEY GENERAL OF CANADA AND THE BC ATTORNEY GENERAL - [1993] S.C.R. 519

Suffering from the Lou Gehrig's disease, Ms. Rodriguez, knowing that she would lose the physical ability to commit suicide, turned to the Courts for a solution. She claimed that the section in the Criminal Code prohibiting aiding or abetting another person to commit suicide is unconstitutional as it infringes her rights under s. 7, s. 12 and/or s. 15 of the Charter of Rights and Freedoms. This entitled her to a remedy under s. 24 (1) of the Charter or obliged the Courts to declare s. 241 (b) of the Criminal Code without force or effect.

Little over two decades ago Parliament appealed the section in the Criminal Code that prohibited attempting a suicide. This clearly signified that we were granted self-determination in this regard. Ms. Rodriguez reasoned that by the time she will have lost all quality of life she will also have lost the physical ability to take her own life by whatever means. This as the disease does totally paralyse its victims. This then deprives her, *de facto*, of committing the lawful act of taking her own life unassisted. To meet her objective at that stage of the disease she requires assistance and rendering such aid is tantamount to a crime under s. 241 (b) of the Criminal Code. Consequently, reasoned her counsel, the law treats her unequally due to her physical inability. That amounts to discrimination under s. 15 of the Charter. Furthermore s. 241 (b) C.C. deprives her to live her remaining life with dignity of a human person; causes her to lose control of what happens to her body while alive; and creates government interference in making a decision to commit a lawful act in relation to a very personal issue. This violates her right to liberty and the security of her person under s. 7 of the Charter. Furthermore, not granting a remedy in her circumstances would cause cruel and unusual treatment under s. 12 of the Charter.

The BC Courts rejected Ms. Rodriguez's application and challenge. She then took her plight to the Supreme Court of Canada (S.C.C.) which rendered judgement on August 31, 1993. All nine justices of this Court participated and this synopsis is that of the five justices who joined in the majority judgement. The other four justices dissented by means of very interesting reasons.

The S.C.C. was very much aware of the "slippery slope" our society may slither on with the quantum changes advocated to accommodate this application. No matter what was intended at the onset of an enactment or precedent, law is subject to evolution that causes it to be unrecognizable from its origin decades hence. Removing the simple one line enactment in question (s. 241 (b)) from our Criminal Code will render the aged, infirm, and disabled among us quite vulnerable. Aiding or abetting such persons to end their lives can range from the most humane and unselfish acts to outright murder. The former to end a life deprived of all dignity

and quality where that person has made a voluntary decision that death is the only cure for the agonies to be endured for the remainder of their lives. The latter to remove someone who is a burden, economically or in terms of care, or to ensure early succession of property. No safeguards of any kind are in place to regulate the then lawful act of assisting someone to end his/her life. Also voluntariness will eventually be affected as it is predictable that what comes under the guise of a right to die will with considerable inequality, become a duty to die. What is now applied for under s. 7 of the Charter cannot be divorced from the sanctity of life, the very object this section is designed to preserve.

The Court had to firstly overcome some threshold issues to reach the heart of this case.

1. It seems obvious that the Court had no hesitation to assume its jurisdiction in so far as the law is concerned. However, law is only a means to an end and that means is here the end in itself. The issue is one of morality and conscience which should be determined by Parliament. It has the means to discover the will of the people and pass legislation reflecting that preference. By using the Courts we come to grips with this crucial issue through those who as appointed officials are only mandated to interpret and apply the law.

2. It was also argued that Ms. Rodriguez had no standing in her circumstances, to avail herself of the rights guaranteed her under s. 7 of the Charter. For that, one has to be engaged in interaction with the criminal justice system. Her reason for seeking remedy is to avoid that interaction for those who will assist her in taking her life. If anyone would have standing it would be that assistant. The S.C.C. rejected this argument. The fact that the impugned section deprives Ms. Rodriguez from lawfully ending her life when she is no longer able to do so unassisted, is enough of an interaction with the justice system to give her standing.

3. The Court also would not accept as valid the argument that Ms. Rodriguez's problems are due to her terminal disease and not any action on the part of the government. The prohibition in s. 241 (b) C.C. contributes to her distress that she will not be able to lawfully manage her death.

4. More merit was found in the argument that "security of the person" as it is found in s. 7 of the Charter cannot by its nature encompass an action that will end one's life. This, as the security is intrinsically concerned with the living person.

This left as the kernel question to be answered in this application for remedy, "Has there been any deprivation of the security of the person that is not in accordance to the principles of fundamental justice?"

Security of the person means the absence of State interference with bodily integrity or State imposed psychological stress. It includes right of access to medical treatment for conditions representing a danger to health or life itself. Section 7 of the Charter does protect both our

physical and psychological integrity. The Court found that s. 241 (b) C.C. does affect the "security of the person" interest of people, who like Ms. Rodriguez, are unable to lawfully commit suicide because their physical disabilities are such that they require assistance from another person. This, by itself will not cause an infringement of a right under s. 7 of the Charter unless the deprivation is not in accordance to "the principles of fundamental justice."

Examining the current acceptable and lawful practices in Canada, the S.C.C. concluded that suicide is not unlawful and the law surrounding this act of ending one's own life, consists of only one section in our Criminal Code; the one Ms. Rodriguez seeks relief from. This prohibition, she claims, is arbitrary. At common law doctors are allowed to withhold life-maintaining treatment from patients who instruct him/her. To treat, differently, patients who cannot do anything for themselves is contrary to the principles of fundamental justice, claimed Ms. Rodriguez.

These principles must not be broad and vague but must be capable of being identified with precision. For this the S.C.C. reviewed the rationale, principles and practices that underlie the continuation of criminalizing assisted suicide. To determine if a prohibition violates a persons right under s. 7 of the Charter to the extent that he/she is entitled to a remedy, it must breach the principles of fundamental justice. These principles are a precarious balance between private and public interest. If the latter overshadows the former, abolishing the prohibition may well amount to a legal luxury society cannot afford. In other words the prohibition must have a valid and superseding purpose otherwise its restriction of a right under s. 7 of the Charter will violate the principles of fundamental justice.

The State's objective by s. 241 (b) C.C. is to protect those who are vulnerable among us and to preserve human life and maintain the sanctity of that life. The latter, however, no longer requires that all human life is preserved at all cost. To determine if Parliament's means and objectives are valid considering the balancing of private and public interest the S.C.C. reviewed the legal history of suicide; the current medical care at the end of life; and how do other western democracies legislate this protection.

Suicide had been seen as a crime against "God and King" and before that it was condemned by the Greek philosophers as a similar offensive act. In England, until about 1½ centuries ago, the property of the person who committed suicide was seized by the Crown and the body was publicly exposed. Attempting suicide was a criminal offence and assisting someone to commit suicide was considered to be an accessory to murder or murder itself. The latter was so in England until 1961 when rendering such assistance was considered to be an offence on its own. In Canada, as mentioned above, attempting to commit suicide was an offence until 1972.

The law with regard to medical care at the end of life has been the issue in Court cases here as well as in other democracies. Patients have a right to refuse or order medical treatment to be discontinued even where that will result in death. Imposing unwanted treatment may amount to battery. The Courts here, in the US and England have authorized withdrawal of life supporting treatment upon the application of lucid patients but also where the patients were in

a vegetative state. All emphasized the distinction between refusing or withdrawing treatment and active euthanasia. Said the House of Lords:

> ".... the sanctity of life is not an absolute one, but if forbids the taking of active measures to cut short the life of a terminally ill patient."

In other words the laws draw a critical distinction between active and passive euthanasia.[14]

An examination of the laws of other western democracies reveals that none expressly permit assisted suicide. They are as follows:

Italy	To bring about, reinforce or facilitate another's suicide is a crime.
Austria & Spain	Aiding and abetting another person to commit suicide is an offence.
United Kingdom	Suicide Act (1961) prohibits to aid, abet, counsel or procure the suicide of another person or for that person to attempt a suicide. This law was tested for propriety before the European Commission of Human Rights and found not to violate the right to privacy.
Denmark	Assisting someone to commit suicide is an offence. To do so for self interest is a more serious offence.
Switzerland	Inciting or assisting a suicide for selfish motives is an offence.
France	Omission to provide assistance to a person in danger; involuntary homicide by negligence or carelessness; or provoking suicide may be used to prosecute those who assist another to commit suicide.
United States	Nearly all States consider assisted suicide a crime by Statute or Common Law. Referendums in Washington State and California on doctor assisted suicides were defeated by the electorate.

[14] On these points the Law Reform Reports (Canada) Working Paper 28 (1982) and its follow up in 1983 are interesting to read.

The Netherlands

The Netherlands is reported to be the first democratic nation to decriminalize passive as well as active euthanasia. This is actually a typical sensationalized media version of what evolved in that country of about 15 million people. Its Parliament decided that although assisted suicide and voluntary active euthanasia are officially illegal the matter should be left as an issue between doctor and patient. When the Parliament began to see to it that the practice was regulated it did not do so to commence a new process but to control what was already going on. The practice had started to alleviate unnecessary suffering and seemed acceptable. Parliament commissioned the medical profession to establish regulatory guidelines and as long as these are adhered to it assured no prosecute. In other words the practice came in the back door and caught the nation when it was well on its way down "the slippery slope". Critics of the Dutch approach are quick to point to undeniable evidence that even involuntary active euthanasia (which is not permitted by the guidelines) is practised to an increasing degree.[15] What Ms. Rodriguez went to the Courts for she could have received under the medical guidelines in Holland. Officially it would be illegal but if done in compliance with the guidelines the doctor would not be prosecuted.

Despite arguments that the distinctions between passive and active euthanasia is a legal fiction and is not maintainable in our contemporary society, the S.C.C. held that there was a clear difference. Death will ensue in either practice. In passive euthanasia where life support is withdrawn, nature takes its course while inactive euthanasia nature is interrupted and death results from human action. Palliative care to the terminally ill is a form of pain management by means of drugs that undoubtedly hastens death. This is an active contribution to death. However, it is nonetheless a medical treatment with the sole intent to make the agonies of the disease bearable and not to hasten death. The latter is a side affect as it were. Distinctions based on intent form a basis of our criminal law. Admitting that there is a reality that may not fit in the niceties of our law, the S.C.C. said:

> "While factually the distinction may, at times, be difficult to draw, legally it is clear. The fact that in some cases, the third party will, under the guise of palliative care, commit euthanasia or assist in suicide and go unsanctioned due to the difficulty of proof cannot be said to render the existence of the prohibition fundamentally unjust."

and

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[15] Some who know the Dutch approach well, claim that the succession laws of that country have a considerable influence on the practice.

> "To the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it."

In answer to the claim that s. 241 (b) C.C. creates cruel and unusual treatment the S.C.C. found:

> ".... it is my view that a mere prohibition by the State on certain action, without more, cannot constitute 'treatment' under s. 12 [of the Charter]."

In terms of s. 241 (b) C.C. violating the equality right of patients like Ms. Rodriguez who are due to physical disabilities unable to commit the not unlawful act of suicide, the S.C.C. found that although the section does violate the rights of those patients under s. 15 of the Charter, the prohibition of assisted suicide is "demonstrably justified in our free and democratic society" (S. 1 of the Charter).

Ms. Rodriguez's appeal was dismissed.

ADMISSIBILITY OF HEARSAY EVIDENCE. PURCHASER OF GETAWAY CAR IN ROBBERY MAKING STATEMENTS TO VENDOR

REGINA v. EVANS - [1993] Supreme Court Reports 653.

The accused was convicted of having robbed two security guards as they picked up a quantity of money from a retail store. One of the guards was seriously wounded by the robbers. The accused was convicted of robbery and attempted murder and appealed these convictions to the Supreme Court of Canada.

The main issue in dispute was the admissibility of the evidence of two witnesses. The two robbers were chased on foot to a location where they entered a waiting car. The licence number lead the investigators to a married couple who had sold their car to a person who had asked if he could use their licence plate. The couple had consented despite the fact that the purchaser had refused to identify himself or complete a bill of sale. He had told the couple that he worked in link fencing and had a large dog that was about to have pups. Investigation took police to the accused's townhouse where it was found that the accused's large dog was in fact about to have pups and that he had been employed in link fencing. In addition it was found that the house had been used as a hide-out for the co-accused and a third man. Police also found a map of the area where the robbery took place, with a route traced out from the scene to where the car was abandoned.

The couple had failed to identify the accused from a photo line-up but testified in court that he looked "familiar" and "vaguely familiar". The statements the purchaser of the car had made to the couple were admitted as evidence of the truth of its content. The defence objected and argued that it was clearly hearsay and could not serve as evidence of truth of its content. Furthermore, without positive identification the statement could not be accredited to the accused. The trial judge had held that all of the evidence showed beyond a reasonable doubt that the accused had purchased the car. This the defence argued was erroneous in law.

The Supreme Court of Canada, S.C.C., held that the trial judge had mistakenly grouped the stages of determining the admissibility of the statement together with other evidence and had held that the aggregate had amounted to proof beyond a reasonable doubt.

The S.C.C. stated that the trial judge should have made some preliminary determinations. First, whether on the basis of evidence admissible against the accused, the Crown had proved on the balance of probabilities (not beyond a reasonable doubt), that the statement was made by the accused. Secondly, the issue of guilt or innocence must then be considered on the basis of the content of the statement. In this last stage the content of the statement is evidence of the truth of the assertions made by the accused.

Despite this error, no miscarriage of justice was done. In view of the strength of all of the evidence and the slight difference of the approach that had been taken and that held to be appropriate by the S.C.C.....

The appeal was dismissed, convictions upheld.

TID BITS

DISCOVERING IN MIDDLE OF CONFUSION THAT ACCUSED IS UNDER 18 YEARS OLD

Police interviewed the accused in relation to break and enter. He was given all the proper warnings, and yet he made inculpatory statements. During the interview police discovered accused was under 18 years of age and immediately gave him all the cautions under s. 56 of the Y.O.A. He waived again his right to counsel as well as his right to the presence of an adult and continued his confession.

The Ontario Court of Appeal held that the statement made before the Y.O.A. warnings were inadmissible. Those made after those warnings were admissible.

Regina v. D.R. - 84 C.C.C. (3d) 126