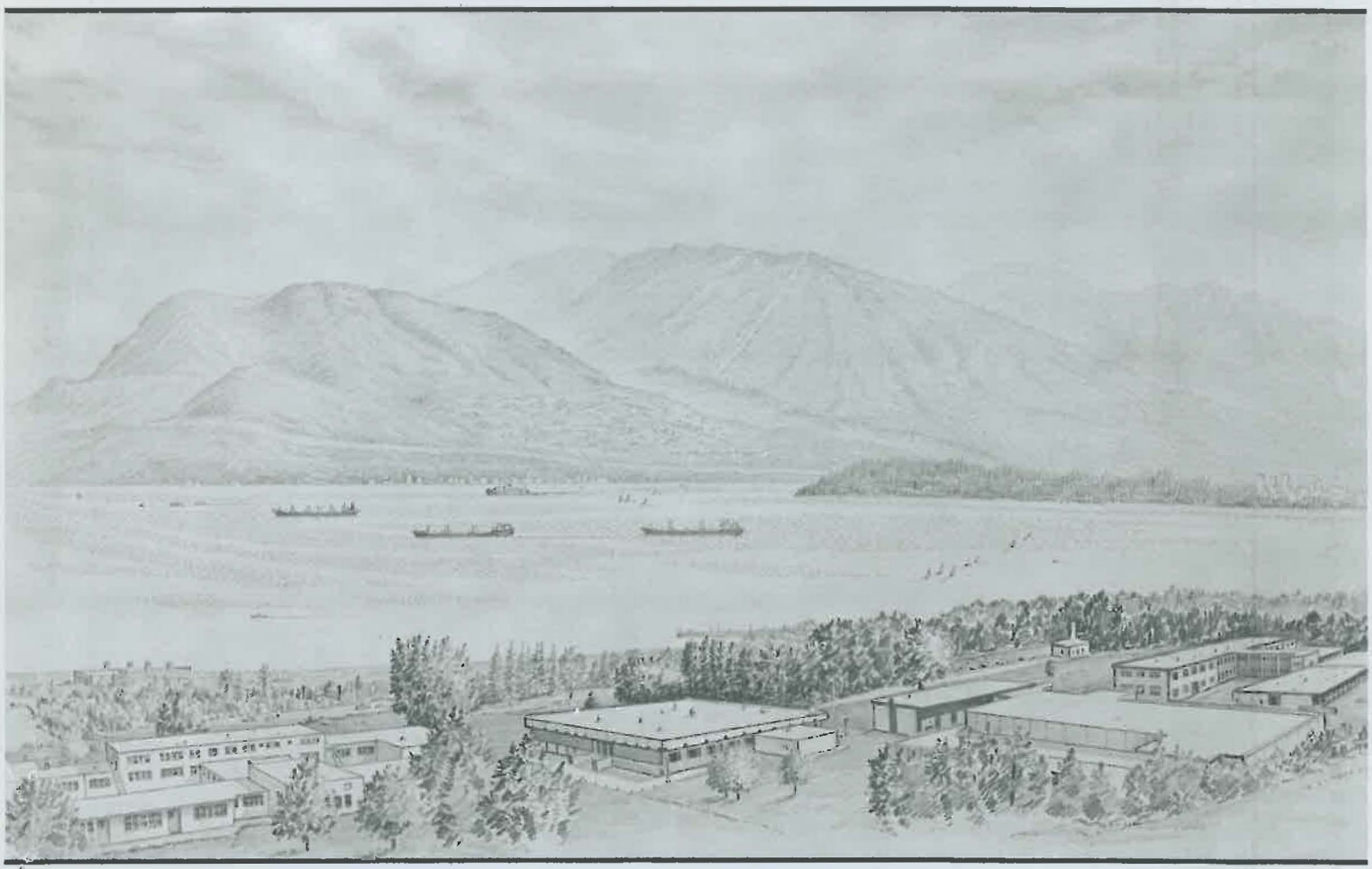
ISSUES OF INTEREST

VOLUME NO. 3



Written by John M. Post

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ISSUES OF INTEREST

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TABLE OF CONTENTS

PAGE

PAGE

TRAFFIC VIOLATION REPORT

"ISSUED" and "SERVED"

The Queen and Blackshaw
The County Court of New Westminster (not reported)

Section 126 of the Motor Vehicle Act states that an alleged violator must be "served" a copy of the Traffic Violation Report.

In this case the officer testified that he stopped Mr. Blackshaw and "issued" a T.V.R. to him.

The Court concluded that there is a distinction between the meaning of these verbs. A Justice, for instance, can issue a summons but that does not mean that the document is served.

In view of the unfortunate words by the constable there was no evidence that the T.V.R. was served. Therefore, the determination that the violation was committed as alleged, was set aside.

Note: This is a precedent binding on all B. C. Provincial Courts.

CONTINUITY OF EVIDENCE

DeGraaf v. The Queen
British Columbia Court of Appeal C.A. 800562 (not reported)

The accused was found in possession of marihuana and charged accordingly. The investigating officer placed the narcotic in "exhibit envelopes", sealed and marked them with the accused's name, the case number and his signature. He then placed the envelopes in a "security box" provided for the purpose of delivering such exhibits to the laboratory. Evidence was adduced how it is impossible that exhibits are removed from that box other than by laboratory personnel.

The officer received the envelopes back a few days later. They obviously had been opened and resealed. Attached were certificates stating that the exhibit envelopes were received sealed and unopened, bearing the markings as described above. In addition, the document states that the substance the envelopes contain is marihuana.

The trial judge held that the continuity of evidence was broken in that the Crown failed to show how the exhibits got to the crime lab, when they were received there or who had access to the dispository box. As a result the accused was acquitted and the Crown appealed this verdict.

The B. C. Court of Appeal held that the trial judge "erred" and placed "much stricter requirements of proof upon the Crown than the law requires". The Court agreed with its Ontario counterpart* that "the ordinary practice which prevails in commercial dealings in our country" does suffice to show continuity. If this was not so, continuity could only be shown by personal attendance and the investigator looking over the shoulder of the analyst. Dispatch by ordinary mail has been found adequate to show continuity.

The court also agreed with the Alberta Court of Appeal** that the Crown "does not have to call every person through whose hands the exhibit passed". Although it must be proved beyond a reasonable doubt that the substance is marihuana, continuity of the exhibit can be found by a rational conclusion. Considering all the safeguards taken, to say that someone might have tampered with the exhibit during the transport is sheer speculation or conjecture, which does not justify to hold that there is a reasonable doubt that the substance dispatched by the investigator may not be the substance received by the analyst.

* Regina v. Labreche (1972) 9 C.C.C. (2d) 245.
** Regina v. Orocheski (1980) 48 C.C.C. (2d) 217

The Court of Appeal held that the evidence of continuity was "clear and uncontradicted". The Court said that the statements made in the analyst's certificate in respect to the identification of the envelopes he received are admissible in proof of continuity. Without a shred of evidence to support possible tampering, the trial judge had simply speculated.

Acquittal set aside.
New trial ordered.

Note

The reason for ordering a new trial after finding that the accused "should have been found guilty of possessing marihuana" is that he was by virtue of the quantity charged with possession for the purpose of trafficking. It seems that the Court ordered that he must be found guilty of possession and that the trial to determine if the quantity was sufficient to prove his intent to traffic must continue. (section 8 N.C.A.).

ARE MUNICIPALITIES OBLIGATED TO PAY FOR SPECIAL TREATMENTS IMPOSED BY SENTENCE OF THE JUVENILE COURT FOR CHILDREN "BELONGING TO THEM"? (Section 20(2) J.D.A.)

Re Regional Municipality of Peel and 'A'. Ontario High Court of Justice 56 C.C.C.(2d) November 1980.

On page 4 of our first issue of this publication, we reported the opinion of the B. C. Supreme Court on the City of Vancouver having to pay for the cost of a delinquent receiving some treatment from a person in Alberta respecting his anti-social behaviour.

In Ontario the Municipality of Peel appealed a similar order of the Provincial Court to the High Court of Justice and won.

'A' was found to have committed a delinquency and a medical assessment showed that the youth suffered of severe learning disabilities. An order was made that the juvenile was to attend a special "learning centre" and the Municipality was to contribute in excess of $7,000 for the cost of this special education. This program proved to be remedial and tremendous improvements became evident.

The Municipality opposed to pay this cost and claimed that in spite of the provisions of sections 20 and 38 J.D.A. the Provincial Court had no jurisdiction to make the order.

The High Court of Justice found in favour of the Municipality and held that the funding the Municipality may be ordered to undertake is restricted to supplying the "necessaries of life" only and not to supply remedial treatment for such things as behavioural, emotional, or educational problems.

CRIMINAL BREACH OF TRUST

R. v. Hammerling 4 W.W.R. [1981] 742
Manitoba Court of Appeal

The accused, a lawyer, used his trust fund as a source of funds for his own personal benefits, and would use the funds placed in trust for one specific transaction or purpose for the paying of other trust obligations. In other words, he robbed Peter to pay Paul. However, no one was ever at an economic disadvantage and everyone was paid as per the trust obligation. But, the accused conceded when testifying that he did not have sufficient funds to cover all those obligations.

The accused was acquitted of criminal breach of trust (s. 296 C.C.) and the Crown appealed. The Court of Appeal convicted the accused quoting the Supreme Court of Canada:

> "The element of deprivation is satisfied on proof of detriment, prejudice or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud".

The Court also held that the elements of theft and criminal breach of trust were essentially the same and observed that theft would have been an appropriate alternative charge in the circumstances.

WHEN DOES A JUVENILE BECOME AN ADULT?

R v. Allen [1981] 1 W.W.R. 344.
Manitoba Queen's Bench

On his 18th birthday the accused was arrested for impaired driving. When the accused was arraigned in open Court for the alleged offence his counsel reminded the Provincial Court Judge that in Manitoba a person under the age of 18 years is a juvenile. He argued that in view of section 3(1) of the Criminal Code, which stipulates that a person will not be deemed to have reached a certain age until the anniversary of his birthday is fully completed, the accused was still a juvenile on the day he committed the alleged offence.

Crown Counsel drew the Court's attention to section 25(9) of the Interpretation Act which states that a person shall not be deemed to have reached a specific age until the commencement of his birthday. By this provision the accused was an adult on the day of the alleged offence.

The Provincial Court Judge held that he had no jurisdiction to try the accused as he was a juvenile. The Crown consequently applied for an order of mandamus compelling the Provincial Court Judge to try the accused as an adult.

The Justice of the Queen's Bench had to decide which of the two statutory provisions applied in this case, or in essence, if a Juvenile Court had jurisdiction to try the accused. Needless to say that the law does not provide that a person is immune from the law on the day he becomes an adult.

The Court held that the Criminal Code provision determine jurisdiction under its section 12 and 13 (child under age of 7 years cannot be convicted of an offence and a child between 7 and 14 years cannot be so convicted unless he appreciates that what he did was wrong). It was the Court's view that the provisions of the Interpretation Act apply to the Juvenile Delinquents Act. This meant that the accused was at the time of the alleged offence 18 years of age and had been that age since the previous midnight hour.

Application granted
Accused to be tried in open court

DISOBEYING ORDER OF THE COURT

R. v. Clement [1980] 6 W.W.R. 695
Manitoba Court of Appeal

The accused was ordered by a Court of superior jurisdiction to refrain from molesting, harrassing, interfering or annoying his wife. He violated this order and was charged with "disobeying a lawful order by a court of justice" (section 116(1) Criminal Code).

In habeus corpus proceedings the warrant for the accused's committal was quashed. The Crown appealed this decision.

Section 116(1) C.C. states that violating an order of a Court is an offence "unless some penalty or punishment or other mode of proceeding is expressly provided by law". The Court dealing with the application to quash the warrant held the power of a court of superior jurisdiction to deal with contempt is "expressly provided by law". Therefore, section 116(1) C.C. did not apply.

The Crown disagreed with this decision and appealed it to the Manitoba Court of Appeal claiming that:

1. the inherent power of a superior court of civil jurisdiction to cite for contempt is not expressly provided by law; and

2. civil contempt and the offence under section 116(1) C.C. can stand together.

In dealing with (1) above, the Manitoba Court of Appeal observed that the unlegislated jurisdiction of a superior court to punish summarily for contempt of court has been used for over 200 years and is so entrenched that the jurisdiction is not merely implied but "inherent". This jurisdiction "is so well established in our law" said the Court "that it cannot be considered as other than falling within the import of the common meaning of expressly provided".

Before the Court could go on to point (2) above, it had to deal with the distinction between a civil and a criminal contempt of court and determine whether section 116(1)C.C. only applies to criminal contempt.

For instance, recently a man was charged under s. 116(1)C.C. and the evidence revealed beyond a reasonable doubt that the accused did a wrong to the person who was entitled to the benefit of the court order, which is a civil contempt as opposed to criminal contempt which must involve public injury. Since the act committed by the accused would have been lawful if it was not for the court order, the Provincial Court trial judge held that the act amounted to a civil contempt rather than the criminal contempt created by section 116(1)C.C. In other words, the act by the accused should by itself amount to an offence as well as be a violation of a court order before a conviction under section 116(1)C.C. is possible. Although the Manitoba Court of Appeal did not cite that case, it is quite obvious that it totally disagrees with that view.

It held that the Parliament of Canada simply "created a criminal offence in respect of conduct generally catagorized as a civil contempt, i.e., disobedience of a court order". Said the Court:

> "...It is drawn (s. 116(1)C.C.) in terms which encompass a contempt of court, whatever the origin of the proceedings, civil, criminal or quasi-criminal".

Does this then mean that the Parliament of Canada has dealt with civil matters which are the exclusive jurisdiction of the provinces? Apparently this is not the case in the view of this Court, as the reason for judgement continues:

> "Parliament has dealt with civil matters only in the sense that it has excluded civil as well as criminal contempt from the ambit of the offence (s. 116(1)C.C.) if another proceeding is expressly provided by law".

Since this Court of Appeal had found that the inherent jurisdiction of a court of superior jurisdiction to punish summarily for contempt of court, is a procedure expressly provided by law, albeit common law, civil contempt and the offence under s. 116(1)C.C. cannot stand together. Therefore point (2) above is incorrect.

Crown's application dismissed.

Comment

This leaves one to wonder what application s. 116(1) C.C.C. has, in Manitoba at least. This Court of Appeal in essence said that the section applies to civil as well as criminal contempt; is within the jurisdiction of the Parliament of Canada to legislate, but is at all times superseded by the common law, that is the inherent jurisdiction of the courts of superior jurisdiction (provincial supreme court and up), to punish summarily for civil contempt of court. The court also agreed that the distinction between civil and criminal contempt is "becoming progressively less important" and "unhelpful and almost meaningless in the present day". Even the punishments are undistinguishable from one another.

In the event one concludes that the rarely used s. 116(1) C.C. perhaps applies to violations of a court order issued by a court of inferior jurisdiction (Provincial Courts and County Courts), he may also be wrong. In Ontario it was held that for a superior court to punish for contempt for the violation of a court order, does not mean that the order which was violated had to be one issued by a superior court. In R and Monette 28 C.C.C. (2d) 409 it was held that the inherent jurisdiction of the superior courts includes punishing for violations of orders issued by inferior courts.

What may also be of interest to note is that there are two additional reported cases* where the arguments are similar but the procedures the opposite from that in this Clement case. The procedures taken were by motion in a court of superior jurisdiction to punish for non compliance with an order of the court. In those cases the accused argued that the common law enabling the proceedings had been superseded by s. 116(1) C.C. This defence failed in all three cases but the co-existence of the common law and the statutory provision creating an offence for disobeying a court order, was left unresolved.

In Ontario a trial was conducted for an alleged violation of section 116(1) C.C. in February of 1981**. The accused had been ordered to enter into a recognizance among other things. He was by means of this document directed not to attend at the business office of the well known entertainer Anne Murray. In the event he breached the direction, the sum of $1,000 had to be forfeited by the accused to Her Majesty the Queen. This amounted to an expressly provided penalty and section 116(1) C.C. did therefore not apply.

* R. Gerson Re Nightingale 87 C.C.C. 143
** R. v. Kieling 58 C.C.C. (1d) 418

It seems that where a violation of a court order was pursued in the courts, the procedure for civil contempt (a motion in a court of superior jurisdiction to punish for contempt) has been more successful than the ones persued under the provisions of the Criminal Code. As a matter of fact, one is hard pressed to find a successful prosecution under s. 116(1)C.C.

Please also note that the cases dealt with here are contempts out of Court and not in the face of the court. In the latter, all courts have jurisdiction to punish; in the former, that jurisdiction is exclusively by a court of superior jurisdiction.

Until a use can be found for s. 116(1) C.C., it seems that in spite of the punishment provided for criminal contempt in s. 8 of the Criminal Code contempt of court is the only remaining common law offence in Canada.

PEACE OFFICER EXERCISING HIS AUTHORITY OUTSIDE HIS JURISDICTION

R. v. Arsenault 55 C.C.C. (1d) 38
New Brunswick Court of Appeal

A municipal police officer attended to a complaint of an impaired driver in a neighboring jurisdiction. He found an intoxicated person behind the wheel of a car and made a demand for a breath sample. The accused refused and was acquitted as only a peace officer can make such a demand. The police officer was not a peace officer in the jurisdiction where he encountered the accused. The Crown appealed the acquittal to the New Brunswick Court of Appeal.

This Court reviewed the New Brunswick Police Act and the Criminal Code definition of 'peace officer' to determine the police officer's status at the time he made his demand.

The Police Act simply compels this officer to discharge his responsibility within the limits of the municipality for which he is appointed.

In regards to section 2 of the Criminal Code, the Court held that "mayors, wardens, reeves, etc.", are peace officers only "when acting within their territorial jurisdiction as such officials".

"Wardens and other officers" of a prison have jurisdiction as peace officers "within the limits of the prison premises or relating to his duties of office in connection with matters pertaining to prison problems, but not to act in extrinsic matters anywhere in Canada".

Regarding police officers the Court said:

> "The Code makes no provision for the enlargement of their territorial jurisdiction beyond that vested in them by their municipal appointment or as enlarged by provincial legislation".

Crown's appeal dismissed
Acquittal upheld.

Comment: This decision is not binding on the B. C. Courts. Furthermore, the reasons for judgement is based on the interpretation of the New Brunswick statute that regulates the jurisdiction of that Province's Municipal constables.

One cannot help to wonder, however, how the Crown in B. C. would fare if the defence would submit that a municipal constable is not a peace officer where the circumstances are similar to those in this Assenault case.

Section 24 and 30 of the B. C. Police Act deal with the geographical boundaries of a municipal constable's jurisdiction. Various suggested interpretations of these sections, which propose that the constable would have been a peace officer (had the scene been in B.C.) may well be too optimistic. The sections read as follows:

24.(1) The provincial force and every municipal force, upon receiving a request for temporary assistance made by the provincial force or a municipal force, shall assign to the force making the request such constables as it is practicable to assign for the purpose.

(2) Where a constable is assigned to a force under subsection (1), his jurisdiction extends to the jurisdiction of the force to which he is assigned. 1974, c. 64, s. 24.

30.(1) Subject to subsection (2) and section 24(2), a municipal constable and a special municipal constable has, subject to the direction of the board, jurisdiction within the municipality of the board that appointed him to exercise and carry out the powers, duties, privileges, and responsibilities that a police constable or peace officer is entitled or required to exercise or carry out at law or under any Act.

(2) Where the minister is of the opinion that an emergency exists outside the municipality in which a municipal constable or special municipal constable has jurisdiction, the minister may direct one or more municipal constables or special municipal constables to exercise their jurisdiction in the part of the Province in which the emergency exists.

(3) Where the minister makes a direction under subsection (2), the Minister of Finance shall pay, from the Consolidated Revenue Fund, the salary and other expenses of the municipal constable or special municipal constable during the period that he is performing duties in the part of the Province in which the emergency exists.

(4) Notwithstanding subsection (1), a municipal constable has, while he is on duty in the course of his employment, the jurisdiction throughout the Province of a provincial constable.

(5) Where a municipal constable exercises his jurisdiction under subsection (4) outside the municipality of the board that appointed him, he shall, if possible, notify the provincial force or municipal force of the area in which he exercises his jurisdiction in advance, but, in any case, shall forthwith after exercising his jurisdiction, notify the provincial force or municipal force. 1974, c. 64, s. 30."

The Courts must give statute law a liberal and broad interpretation so its objective can be met and reflects the intent of the law maker. Needless to say that the wording of that law is a major means to discover that intent

The key words in section 24 may well be: "Where a constable is assigned to a force . . .".

Is a dispatcher's or a supervisor's request and consequential direction from a similar level to look after a drunk in the municipality next door sufficient to be considered a constable's assignment to another force?

It does not seem unlikely for the Courts to hold that the section only covers arrangements for combined enforcement efforts like those of the Joint Forces Operations, or short notice requests for assistance in insurrections, major gatherings of people for whatever reason and like situations. Such arrangements are usually made between the management levels of the forces.

Section 30 is self explanatory except subsection (4) and (5). Subsection (4) seems to be drafted to give a jurisdiction as was reflected by the wording of the oath a peace officer used to take. It said he was such an officer "in and for" the municipality employing him. This meant that matters which arose within his jurisdiction while on duty" in the course of his employment" could be carried outside that jurisdiction without it affecting his status. Examples of this are numerous; execution of search warrants, effecting an arrest or issuing an Appearance Notice etc., in relation to offences committed within his jurisdiction. One case in which this became an issue was tried in Alberta. On appeal it was held that the officers who investigated a theft that took place in their jurisdiction and who went to a neighboring jurisdiction (within the same province of course) and executed a search warrant in an effort to locate the stolen goods, were

peace officers. This ruling was essential as the offence alleged was obstruction of a peace officer in the performance of his duty (executing the search warrant). The Court held that their jurisdiction was not confined to the boundaries of the municipality they served when they investigated a crime that took place within their jurisdiction; after all, they were not only peace officers "in" but also "for" their jurisdiction. Their omission to notify the force that had jurisdiction where the warrant was executed and lack of arrangements to be accompanied by members of that force, was somewhat undiplomatic to say the least.

What somewhat supports this theory is the stipulation in subsection (5) of section 30, that, if possible, the notification to the force in whose jurisdiction the authority is exercised, should be in advance. This does not indicate to include impromptu encounters.

However, when it comes to the interpretation of the law, the judiciary have the final say and the above is a mere crystal gazing prediction.

COMPETENCY OF PERSON TO TESTIFY AGAINST PREVIOUS SPOUSE

R. v. Marchand 55 C.C.C. (2d) 77
Nova Scotia Supreme Court, Appeal Division

During his marriage the accused forged his wife's name to mortgages and used them as though they were genuine. After the divorce from his wife he was charged accordingly (section 326(1)(a)C.C.) Although the wife was not the victim of the crime she agreed to testify against her husband.

At trial, defense counsel objected to the wife's testimony claiming that she was not competent as at the time the crimes were committed she was his wife. The trial judge said that at common law a wife is competent where the offence is against her person, liberty or health. As it is possible for a husband to steal from or defraud his wife the judge held that the wife was competent. This particularly as there had been "an attack on her person and liberty in the sense of her property and person". The accused was convicted and appealed the conviction to the Nova Scotia Court of Appeal.

The three Justices of the Court of Appeal rejected the trial judge's opinion as being correct in law, but agreed the wife was competent to testify against her ex husband. The first Justice found the matter uncomplicated and said that there simply was no law that renders a person fully competent to testify, incompetent because she has earlier been married to the accused.

The second Justice said that the common law rule that the spouse is competent if his or her person, health or liberty has been attacked, was irrelevant. He held:

> ". . . she was competent to give evidence upon the ground that at the time she testified at the trial, she was not the wife of the appellant".

The third Justice did an extensive review of the history of compellability and competence to testify against a spouse and the privilege of communications between spouses. Historically the spouse was considered to be incompetent "to preserve the peace of families" because of "the legal policy of marriage", or "because their interests are absolutely the same".

Now, the statute law (section 4 Canada Evidence Act) has "partly abrogated" this rule of incompetency by creating exceptions to it and the Courts have also modified their position on the rule.

This Justice agreed with the Ontario Law Reform Commission on this point

> "Although the case law on the subject is not absolutely clear, the weight of authority indicates that marital privilege may not be claimed after the dissolution of the marriage by annulment, divorce or death of a spouse".

Accused's Appeal Dismissed
Conviction upheld

ADMISSIBILITY OF PROVINCIAL CERTIFIED EXTRACTS TO PROVE THE FACTS THEY CONTAIN

R v. Richardson [1981] 2 W.W.R. 755
Alberta Court of Appeal

The accused was the sole occupant of a car he owned. Hashish was found in a compartment under the floorboards and he was charged with "possession". To prove that the accused owned the car, the Crown tendered in evidence a certified extract of the provincial records, which by provincial statute (like in all provinces) is prima facie proof of the facts it contains. The question, if such an extract is admissible in evidence in proceedings under Federal legislation, reached the Alberta Court of Appeal.

This Court did an extensive review of the law of evidence. There is no doubt that the documentary evidence is hearsay and if at all admissible, it is only so by these well known provincial provisions.

S. 37 of the Canada Evidence Act states that "the law of evidence in force in the province in which such proceedings (those created by the Parliament of Canada) are taken, . . ., apply to such proceedings".

The Court observed that the common law can only be superseded by statute law. Section 37 of the Canada Evidence Act does not alter the common law rule that hearsay evidence is inadmissible. Therefore, if the Parliament of Canada wishes there to be an exemption to the hearsay rule for proceedings over which it has jurisdiction, it must create the exemption. The provincial parliaments cannot do this other than for proceedings over which they have jurisdiction. Therefore the certified extract was not admissible in evidence to prove that the accused owned the car he was driving to link him to the contraband the car contained.

Accused's appeal was allowed.

Comment:

In 1978, a similar argument was raised in the B. C. Court of Appeal* and that Court's opinion is contrary to that of its Alberta counterpart.

* Regina v. Wilkinson B.C.C.A. No. 51/1978 Victoria. Not reported.

Wilkinson was convicted of impaired driving and the Crown sought the mandatory jail sentence based on the accused having been similarly convicted previously. The Crown attempted to prove the previous conviction by a certified extract of the accused's driving record at the B. C. Motor Vehicles Branch. The B. C. provisions re the admissibility of the document to prove the facts it contains is the same as in Alberta.

The B. C. Court of Appeal held unanimously:

> ". . . Section 37 of the Canada Evidence Act incorporates by reference the laws of evidence in force in a province, subject to the Criminal Code or other Acts of the Parliament of Canada. The fact that there are alternate means that may be used under the Criminal Code of proving a record does not preclude the use of methods provided by provincial legislation".

It seems that until this question reaches the Supreme Court of Canada, the law in Alberta and British Columbia differ.

With the same set of circumstances, the B. C. Courts appear, on account of the Wilkinson case, compelled to admit the document in evidence.

CARRYING CONCEALED WEAPON

MEANING OF "CONCEALED"

R v. Lemire 57 C.C.C.(2d) 561 (see also p. 42 of first issue of this publication. Case was then unreported) B. C. Court of Appeal.

The accused was checked by police in the early morning hours as he appeared to be carrying something under his jacket. A taped piece of led pipe with a chain attached were found on the accused. He was charged with carrying a concealed weapon but was acquitted as it was found that the accused neither intended to hide nor use the weapon. The trial Court was of the opinion that there must be an element of criminal intent in the act of concealing. If one carries a weapon in his pocket for the single and sole purpose to transport it, the inevitable included concealment is not what was intended by Parliament to amount to an offence.

The B. C. Court of Appeal did "respectfully" disagree with the trial judge's opinion and with that of its Alberta counterpart.*

The Court of Appeal held that the intention of Parliament, when using the verb "conceal" in this section, is it to mean "to keep it out of sight or notice", "to hide". Therefore what the Crown must prove to sustain a conviction, is the intent to place the weapon in place of concealment and not necessarily any intent to use it. The section is simply "to protect the community from persons carrying hidden weapons".

Crown's appeal allowed
Verdict of guilty substituted.

* R v. Coughlan (1974) 17 C.C.C. (2d) 430.

POLICE OFFICERS CHARGED WITH USING A SHAM AFFIDAVIT TO EXTRACT STATEMENTS

R v. Stevenson and McLean 57 C.C.C. (2d) 526
Ontario Court of Appeal

A lawyer had been found shot to death in his car. The accused, two homicide detectives, were of the opinion that the lawyer's wife and one Mr. Allen, described as "very cunning and unscrupulous people", had committed cold blooded murder.

"Well motivated and sincere in their desire to bring about the apprehension of a person they believed to be a murderer" and without intention to breach the law, the accused created a sham affidavit which expressed the lawyer's wife's willingness to testify that Allen was observed with her husband and had threatened her and the deceased's life. The accused then arrested Allen for the murder and showed him the phoney affidavit in the hope to receive an incriminating statement from him.

Consequently the detectives were charged with using a writing purporting to be the affidavit of the deceased's wife, knowing that the writing was not sworn by her (section 126 (b) C.C.). The accused were found guilty but received an absolute discharge.

The Ontario Court of Appeal heard their appeal.

The accused argued that what they did was not an offence as the use of the affidavit was not in judicial or administrative proceedings or in regard to a business transaction "whereby some decision of a judicial or a governmental body or some decision in a business sense is going o be made utilizing the affidavit". They also claimed that the Interpretation Act dictates that the Criminal Code section under which they were charged, must be interpreted in their favor. The heading of the Part to which the section belongs states, "Offences Against the Administration of Law and Justice" with a sub heading, "Misleading Justice". Their intent was not to do any of these things.

The Court of Appeal rejected the defence arguments and held that the wording of the section does not just deal with affidavits for use in business, administrative or judicial matters. The gravamen of the offence is creating a sham sworn statement and then use it for whatever purpose. The objective of the section was obviously to recognize the great faith that is placed and ought to be placed in sworn statements and to deter the abuse of them.

"To use" simply means, "to employ for a purpose". In this case the false portrayal of an oath was used to adversely affect another person's legal position.

The Court of Appeal, recognizing the accused's unselfish intention, said to be obliged to dismiss their appeal.

CIVIL ACTION AGAINST POLICE

Mr. B. v. Police Officers P. and C and Their Corporate Municipal Employer Saskatchewan Queen's Bench (Q.B. No. 137)

Officers P. and C. accompanied Mr. B.'s common law wife to the suite they shared and to which Mr. B. conceded, his wife had right of access in spite of the fact that the lease was in his name.

The couple had a spat and the wife required assistance to collect some clothing and the keys to her car.

Within the suite was a stairway to the top of which Mr. B. brought the required clothing. However, due a lien he claimed to have on his common law wife's car he refused to give up the keys. When entry to that part of the suite beyond the stairway was attempted by officer C., Mr. B. pushed him. Apparently all four persons involved occupied the stairway at the time and "tumbled to the foot of the stairs". Officer C. then "grappled" with Mr. B. and nearly had him in a full nelson when Officer P. came to his assistance. It was this assistance which was disputed and alleged to be excessive and unnecessary by Mr. B., who sought compensation for the loss of his employment, for suffering and endured pain and punitive and exemplary damages.

Officer P., when he saw the struggle continue between his colleague and Mr. B., he punched Mr. B., in the face a number of times. According to his own testimony when asked how many punches he delivered on Mr. B.'s face, Officer P. replied: "It could have been a dozen, I don't know but twice as far as I know". According to the evidence adduced, Mr. B.'s face was an unpleasant sight for more than a month and one could not tell where his nose ended and his cheek began. His employer disliked the sight of Mr. B., his salesman, so much that he fired him.

Mr. B. lost $2,400 in wages and was damaged and suffered $1,000 worth. As the Court found that Officer P. had been excessive and had applied unnecessary force the officer and his employer were ordered to compensate Mr. B. for these losses and damages. Nothing was awarded in punitive or exemplary damages.

The reasons for judgement also relate that Mr. B. was charged and acquitted of assaulting a peace officer. No reason was given for the acquittal.

POSSESSION OF A FOUND CREDIT CARD

R. v. Martin 5 W.W.R. [1981] 381
Saskatchewan District Court

The accused found a Chargex card belonging to a person he did not know. He treated a friend to dinner and paid with the credit card claiming that it belonged to his mother and signed the charge slip with a ficticious name. After this the accused destroyed the card.

As a consequence he was charged with "possession of a Chargex credit card knowing that it was obtained by the commission of an indictable offence in Canada". The accused was acquitted in Provincial Court and the Crown appealed.

The Crown argued that although the finding was innocent and was the means by which the accused obtained the card, there was a second unlawful "obtaining" and that is when the accused converted the card to his own use.

The Court disagreed with this submission and held that the use of the credit card was what was criminal. There was only one "obtaining" and it was continuous, it did not change, and did not amount to an indictable offence.

Appeal dismissed
Acquittal upheld.

Comments:

It seems that this case got lost in semantics and fails to recognize what Parliament really tried to prohibit by creating section 301.1(1)(c) C.C. The interpretation the Courts gave, "the obtaining by means of an offence", appears too narrow. Needless to say that the offence by means of which the credit card in the accused's possession was obtained, has to be theft in this case.

At one time, particularly when the offence of larceny existed at common law, it could only be committed by taking or carrying away someone else's property without the owner's consent. These no longer are the necessary ingredients to theft. It now includes any fraudulent conversion or

misappropriation of property whether or not it was in the owner's lawful possession at the time. This includes theft by means of appropriating property which was lost or mislaid, also referred to as "theft by finding". Whether or not the taking of misplaced property is theft totally depends on the circumstances. It will, for instance, be important how much time elapses between the finding and the conversion to the use of the finder. It is important what the article is, if it is recognized as anything of value to anyone. However, what is most important is whether the finder had the sincere belief that the owner of the found article could not be located. To determine this the Court must consider the probability of discovering the owner of the property.

In this case the name of the credit card holder was on the card, the credit company would have returned the Card to the owner. There was no reason for anyone to believe that the owner could not be found.

In regards to the prerequisite criminal intent, it seems the Court could have followed R v. Brochu (1950) 10 C.R. 183. There it was held that even if at the time of the taking (finding), the finder had no criminal intent, but shows such intent later by converting the property to his own use or preventing discovery that he found the article, he may be convicted of theft.

This would mean that in this case, the card was obtained by means of theft. The Crown proved the accused had such knowledge and had possession. Therefore it appears that there was nothing to bar a conviction.

CIVIL ACTION AGAINST POLICE

Greggersen and Greggersen v. Cornish, Dunor, LaBere, the City of Moose Jaw and that City's Police Commissior Saskatchewan Reports Volume 5, 370. Saskatchewan Court of Queen's Bench

Mr. and Mrs. Greggersen had been drinking and were involved in a minor accident on a parking lot. Mrs. Greggersen was driving as her husband's licence was suspended for a considerable period of time. They promised police that they would leave their car where it was. However, when police left, so did they with the car. They were spotted a short time later and a chase started. Mr. Greggersen was driving this time. To avoid a more serious charge, the couple managed to switch places during the chase, after which Mrs. Greggersen stopped the car. She was placed under arrest. A fight ensued when the constable demanded her to give a sample of her breath and the lady called out to her husband, "David, he is raping me". While both constables rolled on the street attempting to handcuff Mr. Greggerson, Mrs. Greggersen kicked the officers while the couple's dog (upon command) snapped away at them to it's heart's content. All this had been accompanied by the most colourful language on the part of the Greggersons and although the husband finally gave up, the wife continued resisting and kicking at the officers.

In the fracass, Mr. Greggersen suffered severe abdominal injuries, which were sustained, the Court found, during "the course of the police efforts to subdue Greggersen". This, said the Court, "arose directly from his own belligerence and that of his wife".

Greggersen was placed in cells and brought to Court the following day. It was apparent to counsel and court staff that he was in severe pain and he was rushed to hospital instead of making an appearance. Emergency surgery was immediately performed and prevented his otherwise imminent death.

The Greggersens sued for personal injuries, exemplary and punitive damages.

The Court held that the injuries sustained were wholly contributory to the Greggersens and not the defendants. However, Mr. Greggersen should not have been made to suffer severe pains all these hours he was kept in cells. The violence should have alerted police to the prospect of injuries and they should have observed Mr. Greggersen after his arrest. It was only for these hours of suffering that the Court awarded damages ($500). Mrs. Greggersen's suit was dismissed and for the exemplary and punitive damages the Court said that the couple's conduct had been outrageous and awarding them punitive damages would, in effect, reward them for that conduct.

ACCEPTING BRIBES

The Queen vs. Binstead - Not reported
B. C. Court of Appeal CA800477

The accused was "The Log Trading Manager" for MacMillan Bloedel Ltd. This, no doubt, is a powerful position with such a large company. Many log producers depend on the market created by the company to sell their logs, while producers of wood products often depend on the company to supply them with logs.

The accused proposed to an established log marketing business that he would come to work for them as an equal partner. The offer was rejected but a counter offer made that he join the company as a one-third shareholder. The accused agreed and promised to join the company shortly. The documents entitling him to his share of the profits were delivered to him but the accused failed to resign from MacMillan, Bloedel.

Two and three years later, still wondering when the accused would finally come to work to earn his share of the profits, the accused responded that he was too busy and that he could do the partnership more good by staying where he was. In the meantime, this company, depending on MacMillan Bloedel, continued to share their profits with the accused. Payments made to the accused were in the hundreds of thousands of dollars while the two partners who owned the company could not afford to be on the bad side of the accused. When charged with accepting bribes contrary to Section 383(1)(a)(ii) C.C., the accused contended that he had entered into a normal business transaction and had not accepted the payments to affect his duties at MacMillan, Bloedel.

To prove that it was the accused's intent to use his position at MacMillan Bloedel to keep the share of the profits coming although he had not fulfilled his part of the bargain, the Crown adduced similar fact evidence. It was the admissibility of this evidence the accused challenged when he appealed his conviction on six counts of accepting bribes from this one company.

Manufacturers of wood products, producers, buyers and sellers of logs testified about their experiences with the accused.

One cedar shakes manufacturer, who was wholly dependent on MacMillan Bloedel to supply him with logs, testified that he, over a period of ten years, supplied the accused (among other things) with all expense paid trips to Hawaii and Disneyland (for the whole family), supplied a stereo for the accused's family, a brand new car for his son and $1,000 worth of plumbing work for his house.

A log supplier had 74 truck loads of logs which the accused could instruct to be delivered some 100 miles from where they were. The accused accepted a truck and camper for purchasing the logs where they were. This saved the supplier a considerable sum of money.

A panel producer got the hint that the accused wanted his rumpus room panelled with some unusual wood product. The man took the hint as well as those which produced a dishwasher, and two weeks' worth of plumbing, wiring and cabinet work at the accused's home. The producer said he did this, to get logs supplied when they are scarce.

Similar fact evidence cannot be adduced to merely show that the accused likely committed the crime charged as he in the past had shown a tendency to commit an offence of the kind. The evidence must go beyond that; "it must be positively probative in regard to the crime now charged".

To gain a conviction the Crown had to prove that the accused accepted the payments resulting from the so-called partnership, while he did not perform his original part of the bargain, as bribes so the accused would use his powerful position to show favor to the company his employer did business with.

The trial Judge and the B. C. Court of Appeal found that the evidence given by the other business people, had "positively probative value" and could serve to show that the accused accepted the benefits as a bribe. This effectively rebutted the defence of an innocent and legitimate purpose.

Conviction upheld.

EVIDENCE TO THE CONTRARY

Regina v. Davidson
B. C. Court of Appeal C.A. 800861 (not reported)

The accused was stopped at 12:25 and breath samples were taken at 12:59 and 1:16, resulting in readings of .18% and .20% respectively. He was charged with "over .08%" and the Crown adduced the certificates to prove the blood-alcohol content.

The accused called a designated analyst and a breathalyzer expert to show that the discrepancy in the readings obtained amounted to "evidence to the contrary" which would effectively rebut the presumption that the lowest reading obtained was equal to the blood alcohol level at the time of driving. The analyst said the discrepancy could have been caused by a rising of the blood-alcohol level of the accused, an inherent error in the breathalyzer or a "shallow blow". This expert evidence, the defence claimed, caused reasonable doubt.

Not so, said the Court of Appeal. Without a factual basis for the analyst's speculative opinion, his testimony, together with the certificate of analysis, does not constitute evidence to the contrary. The evidence before the Court was proof that the accused's blood alcohol level was .18%.

Accused's appeal dismissed.

REASONABLE EXCUSE

R. v. Karanagh
Supreme Court of B. C. No. S.C.C. 626 Kamloops (not reported)

The accused was found in an apparent intoxicated condition in his car. Upon demand he arrived at the breathalyzer and when asked to blow he requested the opportunity to phone his lawyer. He placed the call and spoke to his counsel for four minutes and then refused to give a sample until his lawyer arrived. This caused him to be lodged in cells one minute later, charged with refusing. Sixteen minutes later the lawyer arrived and at that time the police had one hour and seven minutes left to take the sample to be within the two hour time limit.

The Provincial Court Judge ruled that the accused had a reasonable excuse to refuse and that the accused's action did not amount to a refusal under the Criminal Code. The Crown appealed by stated case.

The defence, of course, referred to the famous Brownridge case* where the Supreme Court of Canada held that being deprived from retaining and instructing counsel, creates a reasonable excuse for a suspected impaired driver to refuse to give a sample of his breath. Even if this case was not distinguishable from the Brownridge case the accused would not have a reasonable excuse to refuse, said this B. C. Supreme Court Judge. The Supreme Court of Canada had said in Brownridge:

> "I am content to say for the purposes of this case that the accused's right under section 2(c)(ii)** would have been sufficiently recognized if, having been permitted to telephone, he had reached his counsel and had spoken with him over the telephone. I would not construe the right given by section 2(c)(ii), when invoked by an accused upon whom a demand is made under s. 223(1) as entitling him to insist on the personal attendance of his counsel if he can reach him by telephone . . ."

* Brownridge vs. The Queen (1972) 18 C.R.N.S. 308
** Bill of Rights

Said the B. C. Supreme Court:

> "The police do not have to wait until the lawyer arrives at the police station at the conclusion of a consultation between the accused and his advisor before they can demand he give a breath sample. So long as the accused is given access to a telephone, the call can be made in private and he has a reasonable amount of time to give instructions and receive advice on the telephone, that is sufficient".

Crown's appeal allowed
Case referred to Provincial Court
for continued trial.

DISCIPLINARY REPRIMAND AND CRIMINAL CHARGES - DOUBLE JEOPARDY

R. v. R. 2 W.W.R. [1981] 657

An R.C.M. Police member, in compliance with the R.C.M.P. Act, was investigated for mistreating a juvenile prisoner. As a consequence he received an "Official Reprimand" and was, in addition, charged with two counts of common assault under the Criminal Code. The reprimand was strictly on the facts revealed in the investigation report - there was no plea taken or trial conducted.

The officer claimed double jeopardy when tried for the common assault allegations. This issue ended up before the Saskatchewan Court of Appeal which held that due to the fact that no previous trial by a Court of competent jurisdiction was conducted and no judicial verdict rendered, there was no previous jeopardy.

LEGAL TIDBITS

(Written by John M. Post)

R. v. Dimmel 55 C.C.C. (2d) 239 Ontario District Court

A 15 year old male pupil refused to complete a detention assignment for speaking in class. The teacher doubled the assignment and sent the boy to the principal's office. This required completing a small form giving the circumstances of the incident. The pupil, reading the comments said: 'It's stupid I am not going to do it". The teacher grabbed the boy by the shirt and shook him for the purpose ". . . to shake some sense into him . . .". The teacher was convicted of assault but appealed. The district Court Judge held that insufficient attention had been paid to s. 43 C.C. which states that every school teacher is justified to use reasonable force "by way of correction". The Judge acquitted the teacher commenting that the accused had as a responsibility "... not only to teach that class, but the keeping of order in that class, because without the second there can be none of the first...".

As Soon as is Practicable"

R. v. Carter 55 C.C.C. (2d) 405. B. C. Court of Appeal

The accused, after striking a building with his car at 8:45 p.m., arrived upon demand at the police station at 9:10 p.m. Two samples of breath were taken, one at 9:37 p.m. and the other at 9:54 p.m. A County Court Judge hearing the accused's appeal from a conviction of "over 80" held that there was no evidence of a blood-alcohol level as the samples were not taken "as soon as practicable" in compliance with s. 237 (c)(ii) C.C. The Crown then appealed the resulting acquittal to the B. C. Court of Appeal which held that "practicable" as used in the section means, feasible, fair and convenient and is not synonymous with "possible". The taking of the sample "must be done as soon as reasonably can be expected". The few minutes it took to prepare the breathalyzer and the 20 to 25 minutes spent observing the accused, were reasonable. Hence the samples were taken "as soon as practicable".

Interference with Person in Lawful Use of Private Property

55 C.C.C. (2d) 408.

The accused, engaged in a labour dispute with an employer who used a certain portion of an office building, led demonstrators in preventing all persons from entering the elevators to reach all offices contained in the building. He was charged with interfering with persons in the lawful use, enjoyment or operation of private property. The accused claimed that only interference with owners or leaseholders would constitute the offence.

The Ontario Court of Appeal held that employees or invitees are included in the words "any persons" in s. 387(1)(d) C.C.

Bestiality

R. v. Triller 55 C.C.C. (2d) 411

The accused, while in an advanced state of intoxication tried to have sexual intercourse with a large male dog. As a result he was tried for "attempted bestiality" contrary to s. 155 C.C. In his defence he submitted that the offence can only arise where the animal is of the opposite sex to him. He also raised drunkeness as a defence. The Vancouver County Court Judge held that bestiality includes having an "unnatural connection with a beast" regardless of the sex of the animal.

Furthermore, bestiality is an offence requiring general rather than specific intent. Therefore, drunkenness was not a defence.

Sawchyn v. R. [1981] 5 W.W.R. 207

The accused testified that when he was questioned by police regarding a rape, he believed that if he gave a statement it would expedite his release. No one had done anything to make him believe that and the accused admitted that this conclusion was arrived at by his own reasoning process. However, he argued that since he did believe so, his statement to police was misleading and full of untrue details and should therefore not be relied upon to prove any facts.

As "nothing said or done by the police officers came near to offending the test for admissibility" the statement was admissible in evidence said the Alberta Court of Appeal.

R. v. McAvoy 60 C.C.C. (2d) 95

The accused, a taxi driver, drove an unidentified passenger to a department store and waited while he entered the store. Moments later the passenger returned carrying merchandise and being pursued by two store personnel. The accused drove off with the wanted man who was never identified. The accused was charged as an accessory after the fact and was acquitted in Provincial Court because the principal had to be convicted first according to the trial Judge.

Not so, said the Ontario Court of Appeal. They held that the words of Section 521C.C. are plain and clear. It stipulates that an accessory after the fact to any offence may be indicted whether or not the principal or other party to the offence was indicted or convicted.

Transcript of a Sentencing Procedure

JUDGE: How did you ever allow yourself to become so intensely intoxicated?

ACCUSED: I got into the wrong company Your Honor. There were four of us. I had a bottle of whisky and the other three don't touch the stuff.

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58 C.C.C. (2d) 385. R v. Downey. Alberta Queen's Bench

In 1974* a man offered police to give them a sample of blood when he was demanded, but refused to give a sample of breath. He was convicted of refusing to give a sample of breath, as his alternative offer did not amount to a reasonable excuse. Five years later a suspected impaired driver made an identical offer in response to the demand for a breath sample. Quite distinct from the first case, the constable accepted the offer and made arrangements for a doctor to take the sample.

The accused was charged with "refusal". A Justice of the Queen's Bench in Alberta held that the acceptance of the offer by the accused indicated that police considered the blood sample a substitution for the sample of breath. The accused had therefore a reasonable excuse to refuse to comply

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* R v. Wall 19 C.C.C. (2d) 146

Is a Key a House Breaking Tool?

B. C. Court of Appeal February 1981 58 C.C.C. (1d) 251

A university student, as a member of the "stunt committee" was in possession of master keys giving access to various buildings and offices.

To accommodate some pranks the accused used one of the keys and was caught inside the offices of a rival faculty. He was acquitted of breaking and entering and of possessing of a house breaking instruments, to wit the master keys. The Crown appealed the verdict on the possession charge. The B. C. Court of Appeal ordered a new trial holding that there was no doubt that the keys were instruments capable of being used for house breaking in the sense of being used to gain entry into a house by an unauthorized person.

"Noisy Party"

Alberta Court of Queen's Bench 58 C.C.C. (2d) 215

Miss A.'s house party was "a thumping success and enjoyed by all except the neighbours". Police arrived and requested the noise be kept down; their departure caused an increased output of decibels. Police returned and issued Miss A. a summons to appear in Court for an alleged violation of a noise by-law. Miss A. raised objection by coyfully saying: "There's no fucking way I'm going to Court". In regards to the "Sound of Music" she shyfully added: "There is no fucking way I'm going to keep the noise down". She then daintily crumpled up the summons. This resulted in the lady being arrested for obstructing a police officer in the lawful performance of his duty. She was convicted and appealed to the Alberta Queen's Bench.

The Crown relied on the officer's duty to preserve the peace to show that he was in the performance of his duty when the summons he issued was destroyed and Miss A. refused to turn down the noise (or music as it is referred to by some). The Justice held that the officer's preservation of peace is maintaining an absence of "individual or public alarm and excitement". Mere annoyance or insult to an individual (stopping short of actual personal violence) is not a breach of the peace.

The offence under the by-law were not likely capable of elevating the incident in "a statutory offence". Although at a loss what the constable could have done in the circumstances to stop the nuisance, the question was whether or not a crime was committed by creating the nuisance. Appeal was allowed and Miss A. was acquitted.

Supreme Court of B. C. No. 81/932 Victoria Registry (not reported)

An information alleged that the accused committed theft of "a steel equipment box from Crown Zellerbach's Nitinat site, of a value not exceeding $200". A Provincial Court Judge quashed the information, ruling it invalid as it failed to identify the owner of the property stolen. The Crown appealed by way of stated case. The Supreme Court held:

> "In this case I am satisfied that the information provided sufficient information to permit identification of the substance of the charge and the circumstances of the transaction out of which it arose".

The Court was persuaded of the above by s. 512(b) C.C. (made applicable to summary conviction offences by s. 729 C.C.) which says that no indictment is insufficient by reason only that it does not name the owner of property mentioned in a count.

Court validated the information and referred it to the Provincial Court for further proceedings.

Regina and Tateham No. Cr. 2419 Nanaimo Registry (not reported)
County Court of Vancouver Island

In May 1981, the accused was charged with the theft and the possession of a stolen car. He pleaded not guilty and the trial commenced. When the trial Judge would not allow the Crown to read into evidence the testimony of an absent witness, it (the Crown) stayed proceedings. In September 1981 the Crown proceeded with identical charges and the accused claimed to have been doubly jeopardized by pleading autrefois acquit.

When a trial ends due to the Crown staying proceedings, it does not mean that the accused is doubly jeopardized when the charges are proceeded with again. Before one becomes eligible to the protection of double jeopardy by means of this plea, the Court must have rendered a verdict in the previous proceedings. When the Crown exercises its right to stay proceedings, the Court has no right to interfere and is not required to do anything.

Plea was not allowed.
