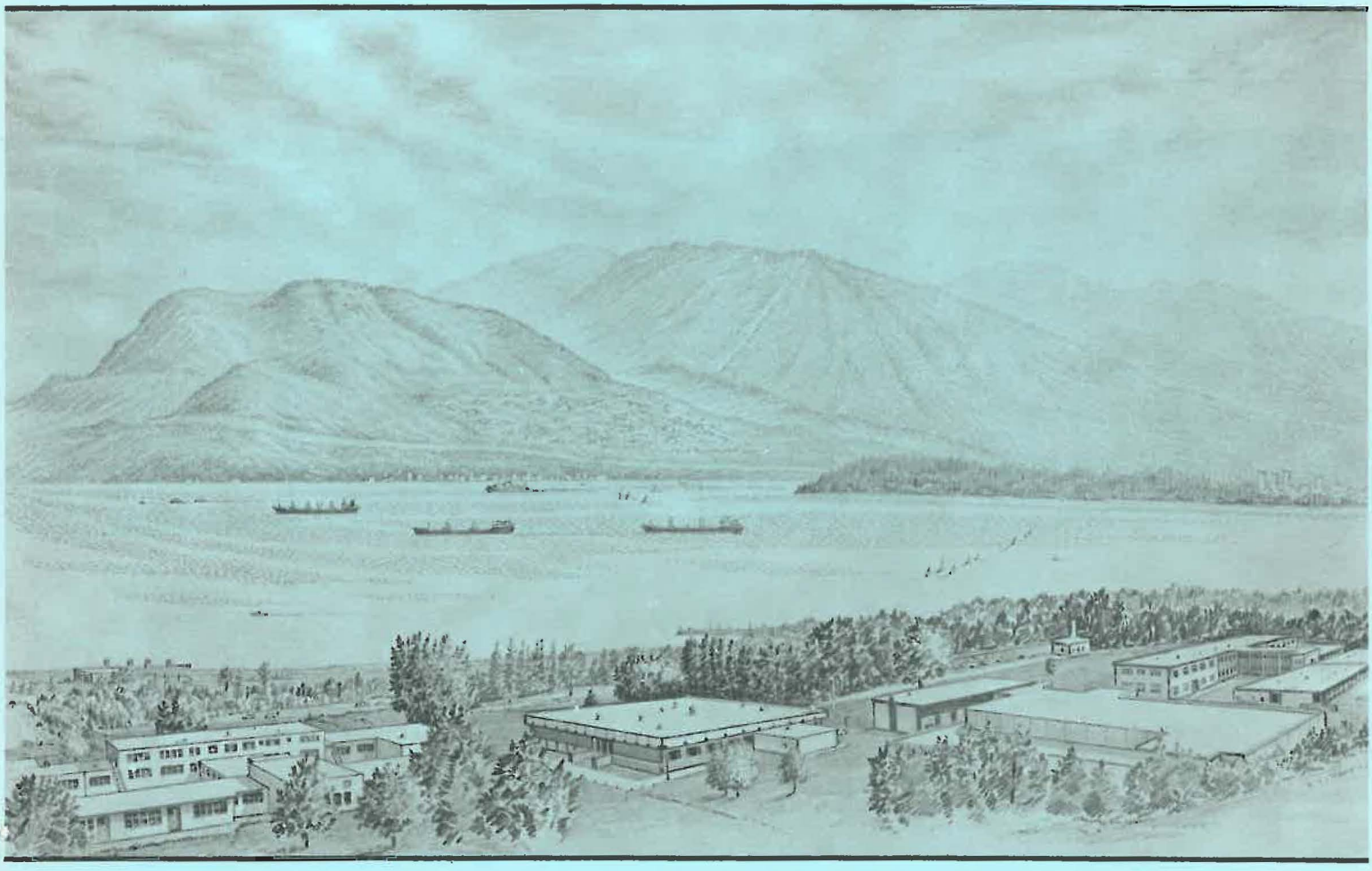
ISSUES OF INTEREST

VOLUME NO. 5



Written by John M. Post
03-19-82

Justice Institute
Of British Columbia
4180 West 4th Avenue
Vancouver, B.C.
V6B 4J5

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(VOLUME NO. 5)

(Written by John M. Post)
March 1982

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"AN ACT RESPECTING YOUNG OFFENDERS AND TO REPEAL THE JUVENILE DELINQUENTS ACT"

This Act is currently going through the legislative process in the House of Commons and is expected to pass third reading in April of this year. The effective date will be sometime in 1983 if the Act does not die on the vine as its predecessors did.

Recently, the Solicitor General of Canada announced that a "young person" will be all persons under the age of 18 years. This will be accomplished by amending this proposed Act to create uniformity across Canada. If the Act is proclaimed and the age is fixed as proposed, the provinces will, no doubt, have to pour considerably more funds into juvenile justice. This may well amount to an increase of nearly 50% over what is spent now. For some provinces (which have scarce juvenile services in place now) that increase may well be more.

This writing is an attempt to relate the highlights of this proposed legislation.

The preamble to the Act is a "Declaration of Principle", which declares that a "young person" who commits an offence must not suffer the same consequences as an adult and is in need of protection. Nontheless it is recognized that such a person requires supervision, discipline, guidance, and assistance.

In respect to the procedures to be followed with a young offender, preference must be given to measures other than judicial proceedings where that is not "inconsistent with the protection of society". The declaration also establishes and emphasizes certain rights a young person has in addition to those included in the Bill of Rights. For instance, young offenders have the right to be heard in the processes leading to the decisions that affect them; a right to the least possible interference with their freedom and a right to be informed of their rights. The declaration ends by stating that the Act shall be liberally construed to ensure that young persons will be dealt with in accordance with these principles.

The proposed legislation defines and sets ground rules for 'alternative measures' to judicial proceedings. In other words, it creates and legalizes what is known today as the diversion system.

The ground rules say that alternative measures are appropriate where the needs of the young person and the interest of society do not dictate otherwise. However, no alternative measure shall be taken unless there is adequate evidence to prosecute and the young person:

1. is informed what those measures are;
2. consents to participate;
3. does not deny his involvement in the offence; and
4. prefers to have the charges handled by the youth court.

In regards to not denying involvement in an offence, the Act emphasizes that the young person must confess or admit to have committed the offence before he is eligible for alternate measures. It is obviously not intended that he must make a clean breast of things as the young person's "acceptance . . . of partial or total responsibility for a given act" will not preclude him from being diverted from the court route. These confessions, however, are restricted to be used for the purpose for which they were given, and they are, says the Act, inadmissible in evidence against him whether this be in civil or criminal proceedings.

The proposed Young Offenders Act stipulates that a trial or adjudication may be carried out before a justice in spite of the fact that alternate measures had originally been taken in respect to the alleged offence.*

* Proceeding with criminal charges against a person because he failed to perform in accordance to some kind of 'diversion' contract resulting from the commission of the alleged offence, has been ruled inappropriate by the Courts. The issue for proceeding in such circumstances is the violation of the contract rather than the commission of the offence and, in a sense, it is an abuse of the process of the Courts. Furthermore, diversion is not a due process of law but penalization for wrong doing by the executive branch of government, a task inherently and exclusively assigned to the judicial branch. The voluntariness on the part of an 'accused' to become party to a diversion contract is no more than an illusion say the judicial precedents. It is akin to asking a person to co-operate while giving him an alternative that is more adverse to his interest or risky than it is to accept what is held out to him. This, at least, has barred proceeding against an <u>adult</u> upon breaching a diversion contract.

Except where the Young Offenders Act excludes them or where they are inconsistent with the Act, all provisions of the Criminal Code apply to processing a young person into the criminal justice system. For instance, for the purposes of arrests and pre-trial releases, a young person is dealt with the same as an adult. However the Court or trial procedures, whether or not the alleged offence is an indictable offence, shall be in accordance to Part XXIV of the Criminal Code which describes the summary conviction process. The only exceptions are the limitation of action provision in that Part and the Court's authority to levy costs for the issuing or serving process.

The Criminal Code will be amended to create immunity from conviction of any offence for a "child", which the Young Offenders Act defines as any person under the age of twelve years. The new Act also compels the provinces to appoint a "Provincial Director" (which can also be a group of persons) who actually, if one takes the aggregate of all the Act assigns to this entity, is the administrator of the young offenders justice system in the province. All "Youth Workers'" activities and duties, the reviews, predisposition reports, the supervision of disposition, are all within this directorate's jurisdiction.

The current provisions that 'juveniles' are not to be detained in places other than those specially designated for that purpose, are proposed for the new Act as well. However, every police officer can relate incidents where this provision was totally impractical, particularly when a young and boisterous youth needed to be subdued. It is proposed that the provision of custody in designated places only, does not apply "in respect of the arrest of a young person or in respect of any temporary restraint of a young person in the hands of a peace officer after the arrest of the young person but prior to his detention in custody".

The wording is somewhat puzzling but it would appear that upon an arrest and before transport to a designated place it is not wrong to hold the young person in holding cells rather than "baby-sit" him. This particularly, the section seems to say, where temporary restraint is required. One could go on to guess in what situations this all would apply, but it is important to emphasize that whatever is done, the exemption must be in tune with the provisions surrounding it. These say, that unless a Court otherwise directs, no detention of young persons in places other than those designated; and no arrested young person is to be detained in 'any part of a place' where adults charged with or convicted of an offence are held in custody.

The proposed Act also provides that the provincial governments may appoint "authorities for detention". In provinces where such appointments are made, no one may detain a young person prior to his appearance before a Court, unless they have the specific consent from that authority to do so. A violation of this provision constitutes an offence.

Whenever this proposed Act refers to a judicial process, it speaks of a "Youth Court" and defines a "Youth Court Judge" as a person appointed to be a judge of a Youth Court. Currently our Provincial Court Judges exchange functions and all can sit as Juvenile Court Judges. This may no longer be the case. Among others, in the provisions dealing with the 'Interim Judicial Releases' and 'consent to detain a young person other than in a designated place', the Act specifically gives that authority to the members of the judiciary appointed as Youth Court Judges and states that other judges may only perform these functions if a 'Youth Court Judge' is not reasonably available. As a matter of fact where a young person is ordered to be detained by a Judge other than a Youth Court Judge, a Youth Court Judge may, upon application, review and reverse the other Judge's decision. In cases where the alleged offence is one of the well known serious ones mentioned in section 457.7 of the Criminal Code, where only a Justice of a Court of Superior Criminal jurisdiction can deal with the release of a person held for trial, a Youth Court Judge and no other, may deal with consideration for release where the accused is a 'young person'; and only a Judge of the Court of Appeal can review the decision of the Youth Court Judge in respect to pre-trial custody. There are also indications that the law makers intend the Youth Court to be one of senior level. This not only on account of these provisions but also because it provides in regards to various issues: "In any province where the youth court is a superior court . . . ". Another unique authority of the "Youth Court" is that the Judges (with the concurrence of a majority of its judges in a province) may establish 'rules of court', which when gazetted (Federally and Provincially) are effective and binding on all the Youth Court Judges in the province. The Rules, of course may not be inconsistent with law, but may regulate duties of officers of the youth court, practices and procedures in the court and prescribe forms being used.

The Parents:

When a young person is arrested and detained pending a court appearance, the "officer in charge" must as soon as possible notify the parents as to the reason and place of detention. Note that this does not say "as soon as practicable". It means at the first opportunity; it takes priority over everything except emergent situations where it is physically impossible to do so. That is, of course, if this term will receive the same interpretation as it does with other statutes.

In view of the fact that the Criminal Code provisions apply to this Act, Part XIV of the Code applies in regards to arrests and releases from custody by police. The Act imposes duties on persons who "issue" a summons or appearance notice in respect to a young person, or on the "officer in charge" when a young person is released on a promise to appear or recognizance. They are compelled to notify a parent of that service of process as soon as possible. Where no parent can be located, such notice must be given to an adult relative or if there is none to be found to any adult. The conditions of a relative or other adult being notified is that the person must be known by the youth and "likely to assist him". If none of these can be located a Youth Court Judge must appoint someone.

Needless to say, anyone can foresee problems with the obligation to give notice to someone "as soon as possible". In certain circumstances it will be impossible. Therefore, the law makers propose that lack of giving notice "does not affect proceedings under this Act". When such a case comes before the Youth Court, it may be adjourned until notice is given to a person the Court directs or the notice may be dispensed with.

A parent who receives notice and fails to appear in Court with the "Young Person", may be ordered to attend. The violation of such a Court Order amounts to contempt of court and may be dealt with summarily. In the meantime whether or not the parent is held to be in contempt, the Youth Court Judge may issue a warrant for the arrest of the parent who was ordered but fails to attend or fails to remain in attendance.

Right to Counsel

Besides the fundamental right of anyone to retain and instruct counsel without delay when detained, the Act emphasizes this right and adds to it. In the declaration of principles or preamble to the Act, it states specifically that a young person has the right, in every instance where they have rights or freedoms that may be affected by this proposed Act, to be informed what those rights and freedoms are. The Act creates the U.S. 'Miranda Principle' in respect to a young person and stipulates that upon arrest he must forthwith be advised of his right to counsel; so must his parents when notice is served on them; the Youth Court Judge must inform the young person of all his rights when he appears without counsel; and every appearance notice, summons, warrant, promise to appear, recognizance must include the statement that the young person has a right to counsel. The Act also provides that a young person who is not represented by Counsel may, upon the permission of the Court, be assisted by an adult person whom the Court considers suitable.

Transfer to Ordinary Court:

Where the information alleges that the young person committed an indictable offence (other than the 'absolute jurisdiction' ones mentioned in section 483 C.C.) after he reached the age of fourteen years, the Youth Court may order that he must be proceeded against in an ordinary Court like an adult. This may only be done where the Attorney General or his agent, the young person or his counsel apply for such a transfer and where it is in the interest of the community and the accused young person.

The proposed Act also makes it possible for the transfer of jurisdiction from one province to another, by a procedure very much like the one prescribed in the Criminal Code for adults. The Attorney General of the province where the offence was committed must consent and the young person must "consent to plead guilty and plead guilty".

Dispositions:

Where a court finds a young person guilty of an offence it may, after giving reason:

grant an absolute discharge;
impose (having regards to the young person's means to pay) a fine, not exceeding $1,000;
order compensation to be paid to the victim of the offence, including that for income lost or special damages for injuries;
order to make restitution;
order personal services to be performed to compensate the victim;
order community work to be done; (240 hours maximum);
make orders of prohibition, seizure or forfeiture;
place the young person on probation for a maximum period of two years
or
commit the young person to custody for up to two years.

The Act then goes on to list all the considerations the Courts must give to the dispositions, such as interference with his education or normal hours of work, etc.

The Act also provides for special provincial work programs in which young persons can work and earn credits towards the fines they are to pay.

For the purpose of reviewing his progress, a young person under sentence, particularly probation, may be ordered to appear before the Youth Court Judge. A warrant may be issued for this purpose, although he is compelled to appear on a verbal notice.

Non-custodial dispositions will also be transferable. If a young person under sentence, becomes the resident of another territorial district or province, the Attorney General may transfer the disposition to that district or province. This can also be done upon application of the young person or his parents. However, the Youth Court that issued the disposition shall retain exclusive jurisdiction for all purposes of the Act unless it, with the consent of the Attorney General, waives that jurisdiction. Process issued in respect to the young person may be executed anywhere in Canada without any formalities other than the customary courteous ones.

When a young person is sentenced to custody for a period in excess of one year, he must be brought before the court at the anniversary of that disposition for the purpose of review. It may also be recommended to the Court that the young person be released from custody and be placed on probation instead. Such recommendation compels the Court to review the disposition within 10 days.

When a young person under sentence has mended his ways; where the grounds for the sentence have changed materially; or where new programs have become available since the sentence was imposed, he may be brought back to Court for disposition review six months after the disposition was made. For reasons the Youth Court deems appropriate, he can be brought back for review of sentence any time.

The proposed Act provides for Review Boards to be appointed by the provincial governments. Where 'such Boards are in place, the review of various categories of dispositions may be done by them.

Needless to say, the Act also provides for reviews of dispositions where the young person refuses or fails to live up to the conditions imposed on him. In such case the Crown must proceed similarly to the "breach of probation" provision in the Criminal Code. An information must be sworn alleging the "failing or refusing" of complying with the disposition.

This provision includes the offence of escaping or attempting to escape from lawful custody where the young person was committed to custody by the Youth Court upon being found guilty. The offence of escape prior to disposition must apparently be preferred under the provisions of the Criminal Code.

For the purposes of attending schools, employment or participation in special programs which may benefit the young person, releases from custody are provided for. Absenteeism is also possible (with or without escort) for compassionate, humanitarian or rehabilitative purposes.

In regards to conviction records of young persons, the Act creates an offence for any government department, any Crown corporation, the Canadian Forces or in regard to work undertaken or business within the legislative authority of the Parliament of Canada, to inquire for the purpose of application for employment about charges against the young person.

Protection of Privacy:

The Act prohibits the publication by any means of a report of offences committed or alleged to have been committed by a young person, or of proceedings or dispositions in relation thereto which may reveal the identity of or contains information that may lead to the identity of a young person. This, whether that young person is the one accused of or the one aggrieved by the offence. Contravention constitutes a hybrid offence over which the Provincial Court has absolute jurisdiction.

It is apparently intended that Youth Courts are open to the public. The Act provides authority for the Judge to exclude all the public from the Courtroom including any person who is not required in the conduct of the proceedings. The prerequisites to such an exclusion are an opinion that any evidence is imperious or prejudicial to the accused young person, or a young person who is a witness or person aggrieved by the alleged offence.

The Youth Court records may be made available, before or after completion of the proceedings to the young person to whom it relates, the Attorney General, Parole Boards, any peace officer for investigative purposes where there are reasonable and probable grounds to believe the young person has committed an offence; any court for sentencing that young person after he has become an adult, any correctional institute where he is held after becoming an adult, any person for granting security clearance required by the Federal or Provincial governments for the purpose of employment.

Police Records:

Records of convictions of young persons may be kept in designated central depositories of criminal records or records for identification of criminals.

Any police force may keep records of offences allegedly committed by a young person, provided that force did investigate or participate in the investigation of the offence. These records may be made available for similar reasons to the same persons mentioned above who have access to the Court records.

Photographing and Fingerprinting

The Identification of Criminals Act will apply to young persons, meaning that those charged with an indictable offence may be photographed and fingerprinted. The proposed Act stipulates that outside these provisions, a young person charged with an offence may not be so processed.

However, any photographs and fingerprints must be destroyed 'forthwith' at the end of the period during which an appeal can be taken by the Crown in respect to an acquittal or upon dismissal (not acquittal), withdrawing charges, or where subsequent to staying the charge, the proceedings are not reopened after three months.

When the young person is convicted, his photograph and prints may be kept by the Court if they were received in evidence, filed with the criminal records depository and may be kept by the police force who investigated the offence of which he was convicted.

The proposed Act empowers the provincial cabinets to designate a person or group of persons to authorize the fingerprinting and photographing of young persons. In a province where such an appointment has been made, no young person may be photographed and fingerprinted without such authorization.

When a young person has not been charged with an offence for two years after the completion of his last sentence in respect to a summary conviction offence or for a five year period after the completion of a sentence for an indictable offence, all records, photographs (including negatives) and fingerprints shall be destroyed. This is also the case where he receives a pardon as an adult.

The Act provides that where records are not destroyed as required they cannot serve any purpose, for instance, to prove that he has a record. However, if in such case a request is made on behalf of or by the young person that his records be destroyed, failure or refusal to do so constitutes an offence. It should be noted that these provisions regarding destruction of records will (when the Act becomes effective) also apply to all the records accumulated under the Juvenile Delinquents Act.

Furthermore, making these records available to those who are not entitled to them, or giving out information they contain, is guilty of a hybrid offence.

Evidence

The Young Offenders Act stipulates that statements made by a young person to a person in authority are not admissible in evidence unless it was made abundantly clear to the young person, in language he can understand, that he is not obliged to make the statement and that the statement in fact was made voluntary.

Other prerequisites to admissibility in evidence are that the young person must understand that the statement may be adduced in evidence; that he has a right to consult counsel, a parent or any adult person chosen by him; and that counsel or the adult person may be present when he makes the statement.

The Act creates an exemption for these prerequisites where a young person volunteered a statement prior to an opportunity for the person in authority to make him aware of all his rights.

Where a young person waives any of these rights, the waiver shall be in writing and signed by him. The waiver must clearly state that the young person was aware of all these rights.

The Act also provides authority for the Youth Court Judge to exclude statements made to persons who are not persons in authority. For this the young person must satisfy the Judge that the statement was given under duress imposed by any person.

The age of a young person may be proved by testimony of the parents, birth or baptismal certificates, or any other evidence the Court deems reliable. In the absence of any such evidence, the Court may infer the age of the young person from his appearance.

Where, in any proceedings under this Act, a young person or a child (under 12 years of age) is a witness, no testimony shall be received unless the Judge instructs him of the duty to tell the truth. The Act stipulates that the evidence of such person then shall be taken under "solemn affirmation" only, which shall have the same effect as evidence given under oath. And, of course, the Act provides that no case may be decided on the evidence of a person under the age of 12 alone, unless it is corroborated by some other material evidence.

At the outset of this synopsis, comment was made about the inevitable increased cost of the juvenile justice system when and if this Young Offenders Act becomes effective. Perhaps to make this Act more palatable to the provinces which have the exclusive jurisdiction to administer justice, the Parliament proposes in the Act that the Federal Cabinet, via the Solicitor General, may provide for payments to the provinces for "costs incurred for care of and services provided to young persons dealt with under this Act".

* * * * *

DISOBEYING A LAWFUL ORDER

R. v. Clement [1981] 6 W.W.R. 735
Supreme Court of Canada

On page 7 of Volume 3 of this publication, the views of the Manitoba Court of Appeal were reviewed and explained as they related to the allegation that Clement disobeyed an order by a court of superior jurisdiction. The order was by authority of a Federal Statute, and was in regards to a civil matter.

Clement was charged under section 116(1) of the Criminal Code which creates an indictable offence for anyone who, "without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money". However, the section is inoperative where some penalty or punishment or other mode of proceedings is expressly provided by law.

A Court of Superior Jurisdiction has, at common law, the inherent right to remedy disobedience of its orders by means of contempt procedures. The Manitoba Court of Appeal was of the opinion that these procedures are so entrenched in common law that they could be considered, in respect to the conditions under section 116(1) C.C., as "another mode of proceeding expressly provided by law". The information was quashed as the section was not found applicable. As a matter of fact, the Manitoba precedent rendered the section useless.

The Crown successfully appealed the decision to the Supreme Court of Canada which, in a unanimous judgment, disagreed with the Manitoba court.

The Supreme Court of Canada saw no reason why the words "lawful order" should receive a restricted interpretation. If a Federal or Provincial statute provides that a Court, person or body of persons may make orders, then, whether the matter be criminal, civil or other, a disobeyance of such an order may constitute an offence under section 116(1) C.C.

Then the Supreme Court of Canada dealt with the meaning of the words: "some penalty or punishment or other mode of proceeding is expressly provided".

Something that is inherent, like the right of courts to cite for contempt, is by its nature not "express"; "express" is the opposite of implied; "express" means to state explicitly, held the Court.

"By law" the Court said, must, considering the way the section is worded, be given its natural meaning: "by statute law".

Our highest Court held:

> ". . . I would construe the subsection as being available as the basis for a charge for disobedience of a lawful court order whenever statute law (including regulations) does not provide a punishment or penalty or other mode of proceeding, and not otherwise".

Crown's Appeal Allowed
Clement ordered to stand trial.

Note:

The Supreme Court of Canada stressed that its findings do in no way interfere with the inherent right of the Courts to enforce its own processes.

Comment: Although this seems to settle the question of whether section 116(1) C.C. was available in any circumstances, one important question seems left unanswered. Said the Court:

> "The expression 'by law' might, in these circumstances, be read as a reference to the criminal law only and finally, might, if limited to statute law, refer to either federal statutes or provincial statutes or both".

The Court order binding on Clement, was matrimonial and civil in nature and issued by the provisions of a federal statute. Therefore, the issue if the words "by law" in section 116(1) C.C. include provincial statutes, was not before the Court. It was therefore, if not improper, unnecessary to determine that.

* * * * *

CALGARY'S ATTEMPT TO CONTROL PROSTITUTION WITH A BY-LAW

R. v. Westendorp [1981] 6 W.W.R. 527
Alberta Provincial Court

A municipal government is not a senior, but a subordinate government. The British North America Act confers the jurisdiction over municipal affairs to the provincial government, which in turn have delegated self governing powers to incorporated municipalities. Therefore, laws made by these delegated powers are called by-laws, which are ultra vires the municipal government unless there is specific enabling legislation which may be found in various provincial statutes and particularly in 'Municipal' or like titled Acts.

The Alberta government has, by means of its Highway Traffic Act and the Municipal Government Act, enabled the Alberta incorporated municipalities to create by-laws to control and manage public highways and roads. Apparently experiencing a problem with "the ladies of the night" plying their aged trade on city streets, the Calgary city fathers assumed to have jurisdiction to control these activities by means of a by-law.

A very condensed version of the Calgary City Council resolve is as follows:

> Whereas prostitutes
>
> > locate themselves on our streets;
> > approach or are approached by others for the purpose of prostitution;
> > often collect in groups; and/or
> > annoy and embarrass the public and interfere with other persons lawfully using the streets;
>
> AND
>
> > whereas it is expedient to provide that the streets of the City shall not be used for that purpose, it shall be an offence for any person to remain or approach anyone on a City street in respect to the services of a prostitute.

The fines provided range from $100 to $500 with a maximum imprisonment of six months in default.

A Ms. Westendorp demonstrated a superb ability to sell sexual services when she approached a City of Calgary detective. As a result she was charged under the by-law. In her defence she apparently did not deny belonging to "the profession" or any of the circumstances. However, she questioned the propriety of the by-law.

The Provincial Court Judge inferred from the "whereases" included in the by-law that City Council was gravely concerned about the activities of prostitutes on the city streets. As a matter of fact, the words of the by-law identify a problem of such magnitude that one hardly expects a by-law to be remedial. Gathering in groups, alarming, embarrassing, obstructing and generally interfering with others amount to offences under the Criminal Code.

The Judge also questioned if City Council was possibly trying to revive the vagrancy legislation under the Criminal Code which was repealed in 1972. That repeal effectively provided that prostitutes, safe for conduct amounting to soliciting, can lawfully use the streets. The Alberta Municipal Government Act states that the municipal councils may regulate the use of the streets only where it is not contrary to any other law; and the Highway Traffic Act only enables municipal councils to classify vehicles and pedestrians for all purposes involving the use of City streets. The Court held that this did not mean that municipal governments were thereby authorized "to penalize and restrict the movements of any group or class of persons it so desired, be they prostitutes, professors, catholics, Liberals or otherwise".

The Court reminded itself that, when considering validity of legisiation, it must presume that the legislative body intended to confine itself to its own sphere and does not desire its laws to be operated or enforced beyond that which it has authority to regulate. If, however, the real nature and character of this by-law goes beyond council's jurisdiction, that is "the control of the streets", and is in fact "to abate nuisance and public inconvenience", which is not its jurisdiction, then the by-law is ultra vires an Alberta municipal government. (Presumably this would be the case in all provinces as a Municipal Act enabling by-laws to abate nuisances and public inconveniences would probably constitute a trespass on Federal legislative jurisdiction).

The Court also reviewed the history of the prostitute problem, in determining the "pith and substance" of the by-law. The trial judge reviewed that ever since the decision by the Supreme Court of Canada in the now famous or infamous Hutt[1] case, there has been a publicized "warfare"

[1] Reason for judgement reported in Volume 2 of the Western Weekly Reports, 1978 series, page 247.

between the Police and the prostitutes practicing on the City streets and other public places. Previously by-laws have been passed which are seemingly aimed to curtail the activities of prostitutes, and to substitute for what was considered lost by the Hutt decision. Precedents clearly show where a by-law which, on the surface seems to regulate or prohibit something within municipal council's jurisdiction but does as a fringe benefit and is in reality aimed to rectify something outside that jurisdiction, never withstood judicial scrutiny. Or, as it has been expressed by Chief Justice Laskin[1], where "the heart of a statute may be its secondary impact rather than its primary command".

In essence, the trial judge said that the by-law and its enabling legislation were inconsistent in their remedial intent, and that the solutions to problems created by "motor cycle gangs, rock concerts, sport events, the Calgary Stampede, noisy parties, beer parlors at closing time, prostitutes on the streets, etc.", must be remedied by Federal legislation. Said the Court:

> "I can reach no other conclusion than that the pith and substance or the real nature and character of the by-law is not . . . 'clearly' the control of the streets. It is simply this: it is to prohibit prostitutes from working the streets."

The by-law was held to be ultra vires the powers of the City and the provincial legislature. Consequently Ms. Westendorp was acquitted.

NOTE: **THIS DECISION BY THE ALBERTA PROVINCIAL COURT WAS REVERSED BY A UNANIMOUS JUDGMENT BY THE ALBERTA SUPREME COURT, APPELLATE DIVISION, DURING THE LAST WEEK OF FEBRUARY.**

WE HAVE SENT AWAY FOR THE REASONS FOR JUDGMENT BY THE COURT OF APPEAL AND WILL INFORM YOU OF ITS CONTENT IN OUR NEXT ISSUE.

APPARENTLY, THE COURT OF APPEAL HELD THAT THE BY-LAW, AS IT WAS WORDED, WAS INTRA VIRES THE CALGARY COUNCIL.

THERE IS A LIKELIHOOD THAT A DECISION OF THIS KIND WILL BE FURTHER APPEALED TO THE SUPREME COURT OF CANADA. IN VIEW OF THE UNANIMITY OF THE COURT OF APPEAL, LEAVE TO APPEAL FURTHER HAS TO BE GRANTED BY OUR HIGHEST COURT.

[1] Laskin's Constitution Law, 4th Ed. (1973)

IS PLACING A HAND ON THE THIGH OF THE WOMAN SITTING NEXT TO YOU ON THE BUS, INDECENT ASSAULT?

R. v. Burden [1982] 1 W.W.R. 193
British Columbia Court of Appeal

The accused got on a very scarcely occupied bus and while nearly all the double seats were vacant he went and sat next to a lady. After staring at her for awhile he placed his hand on her thigh for about 10 seconds.

The accused was charged with indecent assault but was acquitted. The trial judge said that although the act was stupid and fresh, it was not indecent. Furthermore the Judge said (referring to the definition of assault) that force had to be applied. In this case he found that more than mere touching is required to commit assault. Finding that no strength or power was asserted there was insufficient force applied "to qualify for the use of that word".

The Court of Appeal disagreed and concluded that "the law cannot draw the line between different degrees of violence and, therefore, totally prohibits the first and lowest stages of it; every man being sacred, and no other having a right to meddle with it in any, the slightest manner".[1] Placing his hand intentionally on the woman's thigh was an application of force within the meaning of section 244(a) C.C. Obviously concluding that the assault was not indecent the

Accused was convicted of common assault and the Crown's appeal was upheld

* * * * *

[1] Taschereau's Criminal Code (1893) p. 262.

ICE HOCKEY - ASSAULT

R v. Gray [1981] 6 W.W.R. 654
Saskatchewan Provincial Court

The accused jumped from the bench over the boards to join the members of his ice hockey club in one of those fine displays of Canadian sportsmanship where every player feels "compelled to grab an opponent and generally tug his sweater and jostle him".

One player of the opposing team stood off to one side and stayed out of the melee. The accused reached the "sports scene" by a detour. He first skated at full speed in a straight line from where he got onto the ice to the lone player. The accused struck the player with full force on the side of the face and neck. The victim who had not seen the accused approach, hit the ice heavily and swallowed his tongue. This and a concussion rendered him unconscious and resulted in hospitalization.

The accused was charged with assault occasioning bodily harm. He claimed in his defence that he had the victim's consent to apply force. Each hockey player knows that ice hockey is fast and vigorous with bodily contact. When a player gets on the ice to compete and play the game, he permits the bodily contact.

The Court disagreed with the accused and held that, regardless of the implied consent, there are legal limitations to it. Besides, the game had stopped at the time of the assault and the accused was by its rules, not even supposed to be on the ice. The accused's application of force was clearly intentional and no player consents to this kind of force being applied to him.

The accused also claimed that he did not intend to cause bodily harm to the player. This, the Court also rejected. With the amount of force the accused applied, he ought to have known and expect that injuries could result.

Finally, the accused submitted that his conduct did not come within the purview of the Court as it should not be involved in considering activities on the ice during a hockey game. He claimed that he was subject to the

policies and rules of the league and its penalties. He thought them to be sufficient to deal with any violation.

The Court responded:

> "His view is undoubtedly acceptable when his activities are within those usually condoned by participants and officials of the sport involved, but his view cannot be extended to activities which, as here, are blatant and excessive. . . . the hockey arena is not a sanctuary for unbridled violence".

Accused convicted

* * * * *

CREATING A DISTURBANCE

POLICE OFFICERS SUBJECTED TO OBSCENE LANGUAGE

The Queen v. Peters, B. C. Court of Appeal
Unreported, CA810555, January 19, 1982

The accused, along with another person, were the cause of an occurrence which apparently is of no significance as it is not explained. However, they were on a public street. Two policemen attended and instructed the two persons to leave the scene in a certain direction. The accused answered in a loud tone of voice, "Yes, sir, fucking pig sir". He did this on three occasions and left in the opposite direction as he was told to go. A repeat of the order caused the accused to repeat his response. He was arrested for creating a disturbance by using obscene language (section 171(1)(a)(i) Criminal Code).

Restaurants were nearby the scene but there was no evidence that anyone other than the officers heard the accused's shouted profanities. Even the officers failed to say how, being subjected to the accused's verbal abuse, affected them.

This, of course, raised the age-old question if peace officers (for the purpose of this section) can be disturbed. Furthermore, the fact that "this section and its antecedents have received two judicial interpretations, both of which have been adopted and followed by various Courts", was finally raised in this, B. C.'s highest Court.

These two views are as follows:

> "All that the section requires is that one of the specificied acts, i.e., fighting, screaming, etc., be done in circumstances where it disturbed a person or persons, or where such disturbance might reasonably be inferred"
>
> OR
>
> "That it is necessary that the specified acts, i.e., fighting, screaming, etc., must cause a secondary activity and that such secondary activity itself must be in the nature of a disturbance".

The B. C. Court of Appeal held that the correct interpretation of section 171 C.C. falls somewhere between these two opposing views.

When a person does any one of the things mentioned in the section, the act by itself, may or may not cause a disturbance. Needless to say if the reactionary activity by others causes a disturbance a conviction for causing it must result. Where the conduct has disturbed a citizen, a disturbance may also have been created.

The Court reiterated that "mere speaking in a loud voice of obscenities to police officers without more" does not constitute a disturbance.

Disturbance, in the sense of disorderly conduct, means that it must interrupt the peace and tranquility to which every community and citizen has a right.

Conviction was set aside
Acquittal entered.

Comment:

The questions raised in this case have been in need of answers for some time now and to see them posed in the reasons for judgment was like seeing a parcel which, because of its contours, is expected to contain something you really wanted. However, the circumstances in this case did not lend themselves for the Court to give a full answer and to finally give some guidelines. Reading the case and its conclusions was somewhat of a disappointment and the parcel simply did not hold the much desired item.

* * * * *

POSSESSION OF WEAPON DANGEROUS TO THE PUBLIC PEACE
CARRYING A CONCEALED WEAPON

Regina v. Udy, County Court of Vancouver
October 1981, Vancouver Registry CC810932

The accused was confronted by police. His right hand was in his jacket pocket. The accused had also positioned himself in relation to one of the constables so that his right side was out of the constable's view. The second constable observed the accused's maneuvering and, upon closer examination, saw an unsheathed hunting knife in the pocket. When asked why he was hiding the knife the accused answered, "so you wouldn't see it".

At his trial for possession of a dangerous weapon and concealing a weapon, the accused testified that he had the knife for camping purposes and marked the trees in the bush so he could find his way back again.

In respect to possession of a dangerous weapon, the accused was acquitted. The Court found that he had the knife for defensive rather than offensive purposes. It was observed however, that other Courts have held that carrying a weapon for defensive purposes may, in certain circumstances, be dangerous to the public peace. In this case, the Court had reasonable doubt that anything dangerous to the public peace was contemplated by the accused.

The accused was convicted, however, of concealing a weapon. There was no doubt in the Judge's mind that the weapon was concealed by the hand in the pocket and that the maneuvering was to avoid discovery of the knife.

* * * * *

SUSPECT RUNNING FROM SCENE OF INVESTIGATION REGARDING IMPAIRED DRIVING

Regina v. Quist 61 C.C.C. (2d) 207
Saskatchewan Court of Appeal

The accused had driven over a sidewalk when leaving the parking lot of a beer parlor. An officer blocked the accused's car with his police van and asked the accused to come and sit in his van. From a strong smell and all appearances, the officer formed the opinion that the accused was impaired. Just as he was to make his demand to be accompanied and samples of breath to be given, the accused "bolted" and took off out of the van and down some railway tracks. By this time, only two questions were asked of the accused and he only answered the first one. He was asked to produce his driver's licence which the accused claimed he did not have on him, and how much he had to drink.

Police outran the accused and charged him with obstructing a police officer in the performance of his duty. The trial court judge held that there was no obligation on the part of the accused to remain in the presence of the officer and that he was not obliged to answer the questions put to him. The investigation was simply not completed when the accused chose to leave and no demand had been made of him at this time. The accused was acquitted.

The issue ended up before the Saskatchewan Court of Appeal. It observed that if the findings of the trial judge were correct "then any person stopped by a police officer attempting to enforce s. 235 could completely frustrate enforcement of the section by simply driving off or running away".

The Court of Appeal held that the accused should have remained in the presence of the constable until he had completed the duty the law imposed on him. If that was not so, it would mean that it is up to a suspected impaired driver how much time the officer is allowed to decide if there are reasonable and probable grounds that he committed the offence.

In addition, the Court observed that the accused could not be charged with the lesser offence of refusing to give a sample as no demand had been made.

There was an obstruction, the officer was in the lawful execution of his duty and the accused obstructed the officer wilfully.

The accused was convicted.

* * * * *

CARE OR CONTROL OF A MOTOR VEHICLE
MEANING OF SECTION 237(1)(a) C.C.

Ford v. The Queen Supreme Court of Canada
February 9, 1981 (Unreported)

The accused attended a party that was held in a field. All participants arrived in cars. The accused drove his own car there but when he started to become intoxicated he arranged with a girl that she would drive him home. The weather was cold and the party participants went from time to time to their cars to get warm.

The accused also went to his car and started it up to gain the benefit of the car heater while he sat in the seat "ordinarily occupied by the driver".

A police officer on regular patrol spotted the cars in the field and went to see what was going on. He found the accused in his car as described above and made a demand for a breath sample. As a consequence of the breath analyses, the accused was charged with "over .08%" but was acquitted.

The issue in this case is the meaning of the definition of "care or control" of a motor vehicle in section 237(1) of the Criminal Code. This section provides that one shall be deemed to have care or control of a motor vehicle if he occupies the seat ordinarily occupied by the driver. However, this presumption does not apply when that person "establishes that he did not mount the vehicle for the purpose of setting it in motion".

The girl testified as to the arrangement to drive the accused's car and the accused told that his purpose for mounting the car was to get warm and not to drive. This, the trial judge had held, was a good defence to having the care or control of the motor vehicle. The Crown appealed this decision.

Firstly, the Supreme Court of Canada held that "establishing" that he did not occupy the driver's seat for the purpose of driving the car, is not a defence to the offence of "over.08%" but merely a rebuttal to the presumption that he did not have the care or control of the vehicle.

Secondly, the Court held that proving "care or control" can be done by means other than what is provided by section 237(1)(a) C.C. In other words, the section is not exhaustive; and care or control can be shown by evidence which does not include proof of an intention to drive. When a person establishes that he mounted the car for purposes other than driving it, he simply shifts the burden of proof back to the Crown to prove the essential ingredient of care or control.

Said the Court:

> "I cannot see that they (the words 'unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion') purport to create or define a defence to the charge or alter the nature of the offence created by s. 236 so as to import 'an intention to drive' as an essential element which the Crown is required to prove in order to secure a conviction under s. 236".

Quoting from other reasons for judgments which express similar views, the Court agreed that section 237(1)(a) C.C. does not apply unless a person occupies the driver's seat and is merely a statutory presumption of "care or control". The section did not change the law in existance when it became effective. The Crown can rely on other evidence to prove care or control.

However, if the only proof the Crown adduces is the fact that the accused occupied the driver's seat to show care or control, then establishing intention for occupying that seat for purposes other than driving will result in depriving the Crown of an essential ingredient to the charge of "care or control" while having a blood alcohol content in excess of .08%. The accused must prove that lack of intention on the "balance of probabilities". Simply creating a reasonable doubt that he entered for the purpose of driving is not enough to negate the statutory presumption. There is, the court held, "a wide difference between rebutting a statutory presumption and establishing innocence".

A passage of this reason for judgment explains the purpose for creating offences of care or control of a vehicle while incapable to do so on account of alcohol or a drug.

Said the Court:

> "Care and control may be exercised without such intent (to put the vehicle in motion) where an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion, creating the danger the section is designed to prevent".

The majority of the Supreme Court of Canada decided to remit the case back to the trial court for disposition "by it having regard to the above ruling".

* * * * *

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

McGuigan v. The Queen Supreme Court of Canada
March 2, 1982 (as yet unreported)

Two men (with stockings over their heads and armed with a shotgun) entered a variety store. The proprietor of the store was apparently unimpressed. He grabbed the gun and took possession of it. In the process, the gun discharged but no one was hurt. He chased the men out of the store and into a waiting car. Before the culprits had a chance to take off, the storekeeper smashed the windshield by hitting it with the gun.

The car was stopped 25 minutes later and the accused (who was driving) and two others were apprehended. The damage to the car, its contents and description all matched perfectly to link it to the attempted robbery.

The accused and the two other occupants of the car were charged with attempting to steal a sum of money while armed with an offensive weapon, as well as with the use of a firearm, to wit, a twelve-gauge shotgun, while attempting to commit robbery. All entered a plea of guilty to the charge of attempted robbery while armed but not guilty to the use of a firearm while attempting robbery. They argued that both charges referred to the same weapon and the same attempted robbery and that to be convicted of both would amount to multiple convictions arising out of the same delict, which was held to be improper by the Supreme Court of Canada in 1975[1].

The trial judge agreed with the accused and held that the essential elements of the attempted robbery charge were the same as those for the charge of committing that attempt while armed with a shotgun. He acquitted them of the second charge.

The Crown successfully appealed the trial judge's decision to the Ontario Court of Appeal and the accused McGuigan took the issue before the Supreme Court of Canada relying heavily on a decision that Court made in 1948[2].

In that case a fellow by the name of Quon robbed a restaurant owner of $75 while armed with a revolver. He was also charged with two offences, but the sections which created these have since been repealed. The first charge was preferred under a section that created an indictable offence for being armed with an offensive weapon while robbing or assaulting someone. The second charge arose from a section which provided a penalty for having a firearm on one's person while committing any criminal offence. In that case the Supreme Court of Canada held that Quon could not be convicted of

[1] Kienapple v The Queen [1975] S.C.R. 729.
[2] R. v. Quon [1948] S.C.R. 508.

both offences as "any criminal offence does not include a criminal offence an essential element of which is the possession upon the person of a pistol, revolver or any firearm...". The way the law was then, to hold otherwise would create absurd situations. For instance, if someone would have had a revolver in a place other than his dwelling house without a permit, he could have been convicted of the offence as well as possessing a firearm while committing that offence. After all, the law then did prohibit possession of a firearm during the commission of any criminal offence. Therefore, the Courts interpreted the section to have the narrow meaning as quoted above.

However, the sections of the Criminal Code under which McQuigan was charged, are totally different from those in issue in the Quon case although the former replaced the latter enactments.

The distinctions between the old and the new law are that before, having a firearm on one's person during the commission of any criminal offence was sufficient to convict. The new section 83(1) imports an additional element and that is "the use of a firearm". This is in addition to the elements which constitute theft while armed with a firearm. Furthermore, the absurdities possible under the old law, which compelled the Courts to give it the restricted interpretation, are no longer possible.

This very question, whether it was proper to be convicted of both offences, was raised before in provincial Courts of Appeal. All held that the dual conviction as the law is now, is possible. The case that does appear to have set the trend and with which the Supreme Court of Canada agreed when deciding on the McQuigan case, was the Langevin case[1]. Some passages from the Langevin judgment are self explanatory:

> "It is clear to me that Parliament intended by s. 83 to repress the use of firearms in the commission of crimes by making such use an offence in its own right, and one which attracts a minimum sentence of one year consecutive to that imposed for the offence which such use accompanies. The use of firearms in the commission of crimes is fraught with danger and gravely disturbing to the community, and Parliament has sought to protect the public from the danger and alarm caused by that use by enacting the present legislation. It is not for the Courts to pass upon either the wisdom or the necessity for the legislation, but to give effect to the clear intention of

[1] R v. Langevin (1979) 47 C.C.C. (2d) 138

> Parliament expressed in language which reflects that intention.
>
> Manifestly, the legislation is directed at those crimes in which firearms are likely to be used, such as robbery, and not offences where they are not likely to be used, for example, forgery. To construe the section as not applicable to the use of a firearm during the commission of the offence of theft while armed with a firearm would largely defeat the clear intention of Parliament.
>
> I do not find persuasive as a reason for excluding robbery while armed with a firearm from the application of s. 83 the fact that robbery itself is punishable by life imprisonment under the "Code". Section 83 clearly would properly be invoked where a firearm is used in the commission of rape or breaking and entering a dwelling-house with intent to commit an indictable offence therein, both of which offences are punishable by life imprisonment".

The Supreme Court of Canada also drew attention to the penalty provided by section 83(2) C.C. It calls for a consecutive penalty to that imposed for an offence arising from the same event. Said the Court:

> "I do not know what clearer language could be used to negate the so-called Kienapple principle".

Accused's appeal dismissed
Charge of attempted robbery does not preclude a conviction on a charge under s. 83 of the Criminal Code.

* * * * *

DANGEROUS DRIVING

Imlach v. R. [1982] 1 W.W.R. 765
Saskatchewan Queen's Bench

The accused drove a car for a distance of 10 miles at speeds between 90 and 96 m.p.h. on a grid road. It was 1:00 a.m., driving conditions were good and the sole passenger in the car was also its owner. He had encouraged the accused to drive in this fashion. The trial Judge had convicted the accused of driving dangerously under the Criminal Code. He had found that any passenger in a car is a member of the public. He also held that since the driving occurred on a public street, members of the public might reasonably be expected to be on the road, whether any were there or not.

The accused appealed the conviction to the Queen's Bench claiming that the trial judge had applied the law improperly.

The Justice of the Saskatchewan Queen's bench said that if a trial judge finds as a fact that no member of the public was present or who could reasonably expect to be present was endangered by the driving, then he had to address himself to the relationship of the passenger(s), if any, to the driver. Any passenger, whether or not he paid for the ride, may be a member of the public for the purpose of this section.

Furthermore, driving as the accused did on an abandoned prairie road as opposed to such driving on an abandoned city street with intersections, may well differ in respect to creating a public danger as contemplated by section 233(4) C.C.

The trial judge had not addressed these issues in compliance with the law.

Matter remitted to the Provincial Court to be disposed of in accordance with the law.

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ADMISSIBILITY OF A STATEMENT MADE BY A PERSON WHO SINCE HAS DIED

Lucier v. The Queen Supreme Court of Canada
January 26, 1982 (as yet unreported)

The accused was convicted of arson. He had increased the insurance on his home and paid a friend $500 to set fire to it while he (the accused) "was absent from the locality". In the process of setting the fire the friend suffered severe burns and died a few days later in hospital. Before passing on, the friend made two statements to police officers confessing his arrangements with the accused and that he had set the fire.

The trial judge had admitted the statements by the friend in evidence at the accused's trial. This, by virtue of an exception to the hearsay rule in regards to statements made by a person against self-interest who at the time of trial "is unavailable by reason of death, insanity, or grave illness which prevents giving of testimony even from a bed".

A brief history of this rule is as follows. In 1844 a precedent was set in England[1] that recognized an exception to the hearsay rule that statements made by a person who since died, are admissible in evidence if the statement is against the pecuniary (financial) interest of that person. The exception did not apply if the statement was against the penal interest of the person who made it. This is of course, where a person confessed to a crime like in this Lucier case.

The Supreme Court of Canada held in 1978[2] that "a person is as likely to speak the truth in a matter affecting his liberty as in a matter affecting his pocketbook" and allowed such a statement to be admitted in evidence, the content of which was against the penal interest of its maker.

On the basis of that decision, the trial judge had admitted the friend's statement in evidence during the accused's trial.

The main concern in admitting hearsay evidence, is that the person through whom it is presented can only vouch for the fact that the statement was made and not for the truth of its content. As a consequence, no cross examination challenging the content being fact, is possible. However, in every case where such a statement was allowed in evidence the results were always in favour of the accused. In other words they had "an

[1]The Sussex Peerage case [1844] 11 Cl. and Fin. 82
[2]The Queen v. O'Brian [1978] 1 S.C.R. 591

exculpatory effect" and were introduced by the defence. The Supreme Court of Canada emphasized that the rule does not apply to statements which have an inculpatory effect on the accused. To allow that, would be too dangerous as, like in this case, the evidence was double hearsay: "it constituted the policemen's recollection of what the deceased said about what was said to him by the appellant concerning the lighting of the fire".

Accused's appeal allowed
Conviction quashed
New trial ordered.

* * * * *

ARE INFORMATIONS RELATED TO SERACH WARRANTS A MATTER OF PUBLIC RECORD AND OPEN FOR INSPECTION BY MEMBERS OF THE PUBLIC?

The A.G. OF Nova Scotia v. Linden MacIntyre
Supreme Court of Canada February 3,/82 (Not yet reported)

Mr. MacIntyre, a television journalist, was investigating a story of political patronage and fund raising. A Justice of the Peace had issued search warrants related to the same matters and Mr. MacIntyre demanded to see and inspect the informations prerequisite to the warrants claiming they were a matter of public record. The matter ended up in the Nova Scotia Supreme Court which granted MacIntyre's application. This decision was upheld by the Nova Scotia Court of Appeal. The Attorney General appealed the decision to the Supreme Court of Canada and was supported by Attorneys General of Canada and six other Provinces. The Canadian Civil Liberties Association also intervened in support of MacIntyre, of course. The application by Mr. MacIntyre refers to the right for any member of the public to inspect such an information, whether he be a journalist or whatever.

There is no doubt, that in Canada parties who have some tangible interest or proprietary right in a search warrant and its information, have a right to inspect after the warrant has been executed. Common sense tells us that the element of surprise is an essential ingredient to the success of this investigative aid.

The Supreme Court of Canada did, therefore, stipulate that their ruling only refers to search warrants and informations and that their response to this question "should be guided by several broad policy considerations", namely:

1. respect for the privacy of the individual;
2. protection of the administration of justice;
3. implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime; and
4. a strong public policy in favour of openness in respect of judicial acts.

Search warrants are of necessity issued in camera and ex parte. Such secrecy "may lead to abuse and publicity is a strong deterrent to potential malversation". Therefore, there must be maximum accountability without harming the innocent or the effectiveness of the search warrant as a weapon against crime.

The Attorneys General argued that the information to search warrants are none of the business of the general public and should only be open for inspection to those who have an interest other than curiosity. They submitted that often nothing is found and that no charges are laid as a result of the searches. So why embarrass those subject to the warrants and the innocent ones who may be residing or are employed under the same roof?

The Supreme Court of Canada responded that it is well established now that "covertness is the exception and openness the rule" in regards to judicial acts. The Justices found it difficult to accept that such acts during a trial are open to the public but that one performed at a pre-trial stage should remain shrouded in secrecy. The Court held that in spite of their understanding of protection of privacy and reputation, "the public right to know must yield to the protection of the innocent".

The Nova Scotia Court of Appeal had gone as far as to say that applications for search warrants must be made in open court. The Attorneys General argued that effective administration of justice would be frustrated if individuals were allowed to be present when search warrants were issued. The Supreme Court of Canada agreed and, in essence, said:

1. the element of surprise and secrecy must be maintained to avoid the destruction or removal of evidence;

2. the application for a search warrant made in an open Court "would render the mechanism of search warrants utterly useless";

3. when the warrant has been executed there is no reason why the information upon which it was issued should not be available to the public and not only to the persons who directly may have an interest in the search.

Said the Court:

> ". . . a third party who has no interest in the case at all is not a threat to the administration of justice".

In a majority decision, the Supreme Court of Canada, recognizing that every court may supervise and protect its records and can deny access where the ends of justice would be subverted by disclosure or where documents would be used for improper purposes, declared that:

> "After a search warrant has been executed, and objects found as a result of the search are brought before a justice pursuant to s. 446 of the Criminal Code, a member of the public is entitled to inspect the warrant and the information upon which the warrant has been issued pursuant to s. 443 of the Code".

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ADMISSIBILITY OF ADMISSION IN RESPECT TO A TRAFFIC VIOLATION

R. v. Sentell, County Court of Westminster
2 November 1981, Registry No. 81-5951

A bus was driven in excess of the speed limits. The only evidence that the accused was the driver was his admission.

When Mr. Sentell was found to have committed the violation he appealed claiming that the admission should not have been admitted in evidence without a voir dire to determine if it had been made voluntarily.

The County Court reviewed that the rule of voluntariness is first to deal with the issue of truth of any explanation or statement, secondly to assure that the right to remain silent has been observed and, thirdly, to control police conduct.

Although it has been the popular view that the "statement rule" is only applicable to proceedings under Federal statutes, this Court held that the dispute under Provincial statutes is also between a citizen and the State or the Crown and therefore a matter of criminality.

Therefore, the "voluntary confession rule" should be applicable in all hearings involving traffic violation reports. As no voir dire was conducted, the admission was inadmissible and the finding of the Justice of the Peace was set aside.

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