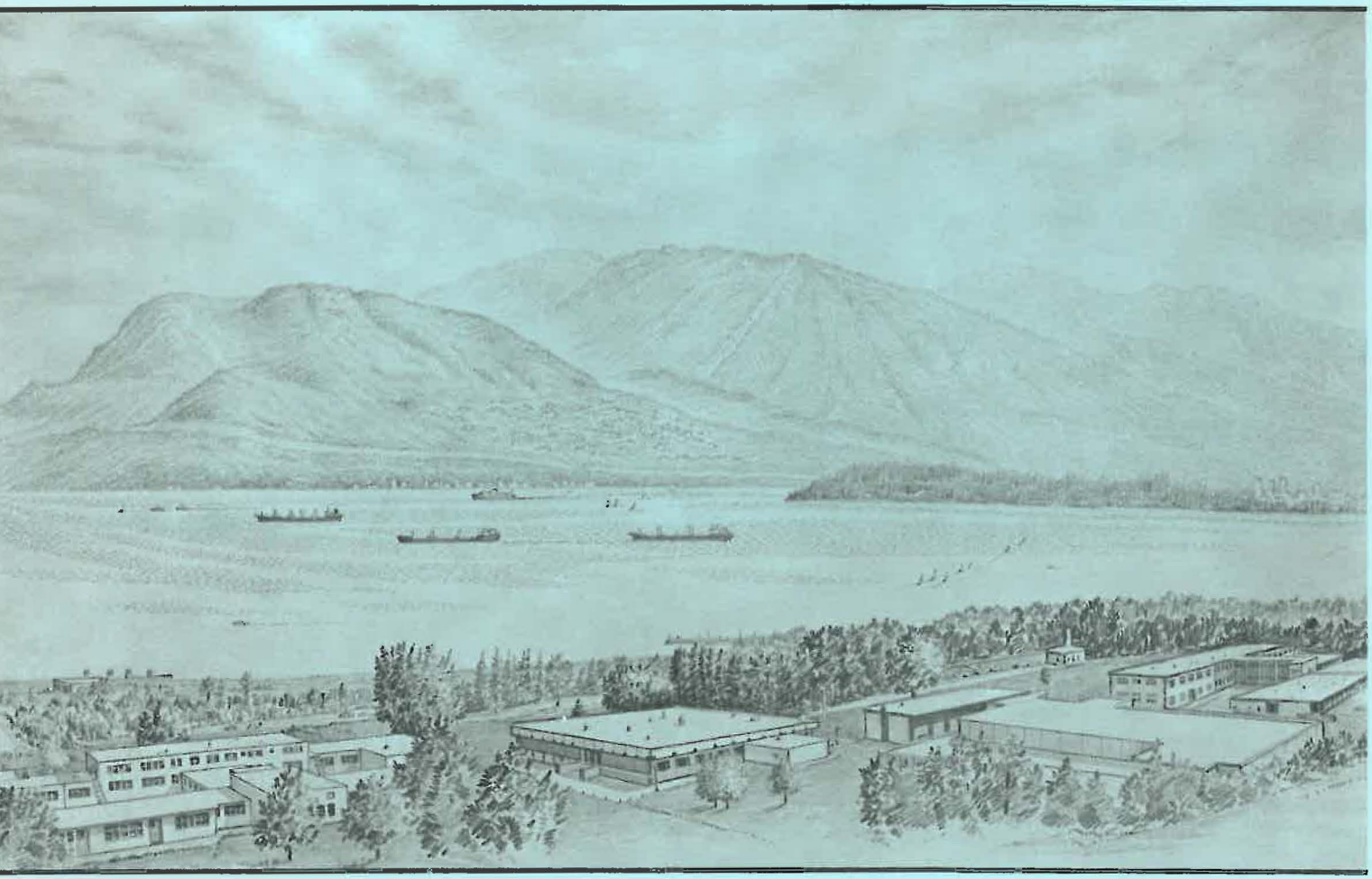
ISSUES OF INTEREST

VOLUME NO. 8



Written by John M. Post

Justice Institute
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ISSUES OF INTEREST

(VOLUME NO. 8)

(Written by John M. Post)
September 1982

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1982 September

Dear Readers:

Re: Police Academy Update

It has been some time since we reported to you on the activities at the Police Academy. In the following paragraphs I will attempt to relate our successes and failures, what we are doing and who is doing it, and make some projections for the future.

Recruit Training Program

Mr. Bob Hull is heading up our five-block program. In 1981-82, this program had to increase its enrolment by 50% and we managed to do this by scheduling 3 starts of two classes of 24 students each instead of the 4 starts of single classes. It would seem that, due to fiscal restraints, we will go back to our four single starts as of September of this year.

The increase was handled with a minimal increase in our seconded staff or other resources. This, no doubt, caused some inconveniences and over-crowding in certain classes, which had a negative effect on our teaching. There was less opportunity for personal tutoring or even dialogue between student and instructor in the class. We had anticipated the inevitable rivalry between the "simultaneous classes" to be constructive. We were accurate in our prediction about rivalry, but it was not always constructive. It was a learning experience and should there again be the demand for such increase in training we will be better prepared to cope with it, as we will be when the double classes come back for their upper level blocks of training.

Generally, we have been satisfied with the calibre of policeman we have been turning out and we sincerely hope that you share this opinion. You are our client and your satisfaction with our service is paramount.

Our recruit program is divided in various sections, each with its own specialty. A lot of changes in personnel and curriculum have occurred since I last wrote you and I assume you are interested to hear the highlights.

Traffic Studies

This section is still under the immediate supervision of S/Sgt. Al Lund (R.C.M. Police) who will be with us until the summer of 1983. Recently a number of personnel changes have taken place in a short period of time. Cpl. Don Mann (Central Saanich) who was in charge of all driver training was drafted to serve the remainder of his three year secondment period (until April 1983) as a co-ordinator of advanced training courses. Cpl. Jim Sutherland (Victoria) who taught traffic law and accident investigation (and sold peanuts on the side) returned to his force in March. Dan Dureau (Vancouver) and Nandor Leisz (Delta) filled these two vacancies. Since our last report to you, Chris Beach (Vancouver) was added to this section. We are pleased with the amalgam of expertise in our traffic department and experimentations to improve curriculum have had pleasing results.

In driver training we have switched to a system known as 'Hazard Avoidance'. The system is practical, emphasizes skill and safety, and every component is measureable to assess the learning outcome. The driving course is not a race track and particularly the skill areas are taught at low speeds. It also includes an exercise to measure and develop the ability to make split second decisions and instant reaction to specific instructions. The incident investigation courses are also meeting with favorable assessments. Besides offering this course via the Academy's Advanced Training section, it has become part of our Block III program. One week is devoted to the mathematicaal formulas and drawings required to do an adequate and professional investigation of an accident.

Al Lund is in close contact with legal staff in government who are responsible for the new traffic laws which were recently passed by the Legislative Assembly. Our involvement is strictly to respond to the training needs in this area. Together with these officials and the "E" Division (R.C.M.P.) Training Branch, we intend to conduct seminars on the Lower Mainland and the Island to familiarize the police community with the details.

Investigation and Patrol

There are two seconded instructors in this section, Cpl. Bjorn Bjornson (Vancouver) and Cpl. Mike Miller (Vancouver). Bjorn is leaving us in September to go back on to the Vancouver streets, while Mike will be with us until October of next year. These instructors have done a lot of work to update, experiment and revamp the material taught in this section.

The Academy is a training school and the practical aspects of what we teach must be emphasized, demonstrated and practised. To this end we have altered the Block III program and switched a lot of classroom

hours to simulation exercises which are made possible by the co-operation of borrowed police personnel and professional actors and actresses. This has proven a superior teaching method to the classroom style. The only negative side to this means of teaching is the cost, not only in respect to personnel and professional fees, but also on the furniture of our "apartment scenes". For the searching techniques of vehicles we have purchased a $200 - 1974 "Interceptor" that can pass anything but service stations and which has nearly been dismantled by our students to find varieties of contraband.

Officer survival is also a highlight in this course without creating the belief that every member of the public they encounter has the urge to assault or do worse things to police officers.

The latest investigative techniques are explored and converted into lesson plans and ancillary administrative functions are included in the exercises.

Firearms Training

This three man section is under the supervision of S/Sgt. Dave Church (R.C.M.P.). The two instructors with him are both from Vancouver, Cpl. Gordon Bader and Cst. Wayne Cope. By the time these recruits have finish Block III they have received 54 hours of instruction in the safe handling of firearms, i.e., 38 special revolvers, 12 gauge police shotguns and 30.06 bolt action rifles. The program is under constant scrutiny by this section's staff to improve the training methods, the resulting skills and to teach shooting from positions that are job related. A lot of time is devoted to the decision making of "to shoot or not to shoot". A matter of concern is training to the standards of each police force. Our curriculum now embraces all the skills these policies require and each student is made aware what the demands of his department are.

The firearms section also trains personnel of other Ministries required to carry firearms, to ensure that minimum provincial standards are met. It is also responsible for a good portion of E.R.T. training for the municipal forces.

This spring we have started to manufacture our own revolver ammunition. Purchasing the quantity of ammunition required for our training program became prohibitive. We purchased approximately $25,000 worth of equipment in California and entered into a contract with Mr. John Waddington, a retired B. C. Hydro technician (who knows more about firearms and ammunition than most) to do the actual production. These resulting savings are desperately needed to support other Academy Training programs in these economic difficult times.

At the outset there was some concern about the quality of reloads and an understandable reluctance to stop using the factory loaded ammunition. Bob Hull, Dave Church and John Waddington took every measure necessary to maximize the quality of our product and did so with success. Our instructors report that these reloads are as good, if not better, than the purchased ammunition.

Legal Studies

This section was recently reduced to two instructors. When Cpl. Hugh Waterton (Vancouver) left us this spring, he was not replaced. The increase of staff in this section in 1981 was in response to the increase in our recruit training program. When Hugh left there was no indication what the enrolment would be for the September Block I start and replacing him was left in abeyance. That class is a single one and the position will be left vacant.

Joanne Beamish, our resident lawyer, is sharing the teaching responsibility of this section with Cpl. Dave Pawson (Delta). Joanne has picked up her option for a one year extension of her current two-year contract with us. Dave's secondment does not expire until 1984.

The improvement we have tried to make in this section is to compliment the teaching of the substantive law with case law studies, and civil liabilities attached to the wrongful exercise of authority. The case law studies have proved to be an excellent vehicle to demonstrate the perimeters of statutory provisions, particularly in our upper level training blocks.

'Legal Studies' compliments the curriculum of Investigation and Patrol and Traffic and arranges Court simulations by means of which we teach the rules of evidence and desirable demeanor and behavior in Court.

The examination system has changed consistently with our curriculum in this topic area. The questions asked are in the form of realistic descriptions of scenarios and the answers are in the form of legal problem solving that requires not only the knowledge of the substantive law, but also its interpretation or anticipated meaning in the absence of precedents.

Physical Training

Until the middle of October, this section will be manned by Cpl. Larry Young and Cst. Phil Butterfield, both Vancouver members. The training standards in this section are high and our students leave the Academy in excellent physical condition. A considerable amount of hours are

scheduled for our courses which include not only general fitness and agility but a desired and necessary level of competence to defend oneself and subdue another person. However, a program of this kind requires a great deal of continuity and sophistication. Many legitimate questions can be and are asked about the validity of programs of this kind and its pre-testing. Other divisions at the Institute were not as fortunate as we have been in that we have been able to find competent police personnel to teach our courses. To give us and the other divisions of the Institute professional consultation and assistance, a competent and qualified P.T. instructor was hired by the Justice Institute. He, in addition, manages our gym facilities. Doug Farenholtz came to us from the R.C.M.P. Training Division. He was a Staff Sergeant and took his pension to accept our invitation to him. He has an abundance of academic qualifications and I can assure you, all physical attributes to provide the service we need.

The cost to employ Doug is shared by the five divisions of the Institute, but the Police Academy, because of its size and need, pays 50% of this cost.

Due to the reduction in budget and training demands, we have been forced to reduce our P.T. staff to one member only. Cpl. Young will return to the Vancouver force in the middle of October to take charge of its Firearms section. The termination of this secondment is five months premature and much regretted by the Academy and Larry alike.

Upper Level Training, Blocks IV & V

To say that these Blocks have been problematic is no exaggeration. A claimthat we did receive compliments about its curriculum would be an outright lie. The difficulties were manifold. Some of them were caused by our unawareness of the real needs of these students. This, coupled with the students' attitudinal response to our insensitivity, created an environment that was not necessarily conducive to teaching and learning. When a student returns to the Academy for Block IV he or she is at a stage of his or her career at which many issues are a matter of uncertainty and ambivalence; a mood which is not unlikely to cause emotions which vary from over confidence to doubt, from understanding to being frustrated, from needing assurance and encouragement to rejecting supervision and advice. An era in any career which is analogous to the difficult period in life known as adolescence. If there is such a thing as career adolesence, then there must also be career parenthood. The Academy concedes that it responded poorly to the students' needs at this career stage. When students return a year later for Block V there is a significant improvement in their response to our instruction.

These facts, and the valid part of the criticism we received about these training blocks, caused us to completely revamp the content. We have had the opportunity to expose some of the classes to the new upper level Blocks' curriculum and we are pleased with the results, only leaving some fine tuning to be done.

Advanced Training

This program existed with a few courses being offered by the Academy and for the rest with filling seats made available to us at the "E" Division Training Branch and the Canadian Police College in Ottawa. Considering the need for advanced courses, this was found to be inadequate. With some reorganization, sufficient manpower was assigned to develop a slate of 22 advanced courses of our own, with a content that directly responds to the needs of the B. C. Municipal police service. Two years of experimentation and use of modern curriculum development techniques has resulted in the Academy offering a full calendar of advanced courses each year in addition to using our allotment of course seats with the Canadian Police College and "E" Division Training Branch. One course in particular received a considerable amount of attention. Together and with leadership from our Research and Development section, our aged P.O.A.T.P. (Peace Officers Advanced Training Program) was given a physical check up. The recipients of the curriculum had already sensed some symptoms of an unknown ailment. Our examination of the patient lead to the decision to put it to sleep. For at least one year we worked on the curriculum for a "Constables' Advanced Program" by task analysis and dacum sessions. In the spring of this year the course was ready to go and have now offered it four times. We and the students are pleased with the results; as a matter of fact, the feedback we received was beyond our expectations. We have also been reasonably successful with our other courses and the reception they receive is gratifying.

Over the last year, Advanced Training, and the "E" Division Training Branch, RCMP, have been quite involved in roll-call training. Parts of it were under the direction of Allen Clapp, a professional film producer and parts on our own relying on the experience gained while under Allen's direction. Your reactions have been positive and a circulation system is now in operation.

We have also scheduled many of our advanced courses for delivery on the Island. The costs connected with Islanders coming to the Academy could no longer be fitted into our reduced budget. Our 'decentralized' program is working well and the co-operation we receive from Camosun College is sincerely appreciated.

The man directing the activities in this section is Sergeant Gunther Wahl of West Vancouver. He started in the section when S/Sgt. Gerry Roy headed up the development and experimentation mentioned above. To organize, co-ordinate and administer these courses, we have Cpl. Don Mann (Central Saanich) who will be with us until April 1983, and Cst. Dave Young (Vancouver). Cpl. Bob Murphie (Vancouver) who has just now finished his secondment, has returned to his home department after a two-year secondment, most of which was spent in the Advanced Training section. Due to economic restraints we are not able to fill this vacancy.

Sgt. Wahl will return to his department in September of 1983 and we will be inviting a competition for the Program Director's position he now holds.

Assessment, Research and Development

The Research, Development and Assessment Section was formed in August 1981. Keith Taylor, the Program Director, assumed responsibility for the already existing Assessment Centre and also for the new duties of research and development for police training. He was recruited from the Calgary Police Services where he was a Senior Planner, and offered a contract similar to the secondment model.

The section has three distinct functions. First, is the development of courses and materials within the Academy for use by serving police officers. The preparation of the Constables Advanced Program (C.A.P.) to replace the old P.O.A.T.P. is an example of the courses in which the section became involved and worked with the Advanced Training staff and co-ordinated the curriculum development which is not merely the throwing together of a few things which might keep people occupied for a week or two. The C.A.P. was preceded by a broad task analysis involving approximately one hundred and fifty officers representing each department in the province. Only after analysing the results of the questionnaire could the basics of the curriculum be decided upon. Realising that the climate for policing is changing, that the police officer today faces different challenges than his counterpart several years ago, we attempted to introduce different challenges into his courses. The C.A.P. course exposes the constable with between five and ten years service to some of the background, more theoretical aspects of policing; the history and future of law enforcement, the Charter of Rights, Labour/Management Relations, effective supervision and management. In addition, the class is divided into groups of four and each group is expected (during the two week course) to undertake research and prepare a presentation to help resolve the horrendous problems in the fictitious crime ridden town of Bedford. The presentations are judged by a group of senior officers who award a mark towards the final course score. The presentations in the three C.A.P. courses to date have been excellent. Candidates seem to enjoy the course.

The second aspect of the section's work is that of development of programs which, although not directly related to the training of police officers, impact upon policing in the province in a more 'off the wall' way. The career day earlier this year is an example. Two hundred grade twelve students attended a major incident simulation followed by a career discussion. A cross-divisional internship program at the Justice Institute is anticipated next year for grade twelve, college and university students who are serious candidates for police departments. Also planned is an advanced education certificate in which a number of selected college and university courses combined with Academy or CPC courses and a dissertation will provide a three level certificate for police officers.

The third portion of the section is devoted to the assessment process. This includes, of course, the Assessment Centre but an increasing amount of time is devoted to the development of broad examinations at recruit and promotional levels and the implementation of a revised selection process. The revamping of the interview component of the selection process involves the offering of courses to all levels of the police hierarchy. Those at senior levels will be offered courses on the complete selection process. At less senior levels course candidates will be taught how to prepare and perform effectively in the interview process.

The Assessment Centre itself is likely to go through a number of changes both concerning staff and Centre format. At the termination of his secondment in September, Carl Bolger has returned to Saanich. His work in the Centre has been invaluable. Due to budget cutbacks it was decided not to replace Carl. Staff Sergeant Wykes Huggan (New Westminster) is doing an excellent job in maintaining the Centre services. We are now undertaking research in preparation for content changes which will make it even more effective. In addition, it is planned to make the Centre more integrated into the overall personnel assessment process, which includes Academy administered recruit and promotional exams. A study is being undertaken to determine the effectiveness of the Centre and, following the completion of that work, we will possibly make some changes to improve the format. Research conducted by UBC staff last year showed that the exercises used in the Centre very reliably test the dimensions in which the assessors are interested. A committee of Justice Institute personnel has also been formed to examine the feasibility of an assessment centre which applies to all the divisions. This system has been used in the U.S. and is more cost effective than a centre devoted to just police.

Clerical

Sanda Morwick is the Academy's Administrative Secretary. She balances books, scrutinizes plans of spending for approval, orders the materials we need, is the secretary to the Director's position and supervises our office staff. She is the kernel (and the Colonel) of the Academy, one without whose excellent services we simply could not function.

The use of the word processor is quite extensive and our investment in such a machine has proven to be astute. Frances Lockerby is in charge of the "Micom" and due to her outstanding ability and the machine's capability, we are able to produce manuals, "Issues of Interest", Municipal Constables' Registry, Student Performance Evaluations, general correspondence, etc., far more efficiently and with considerable time saving.

Joan Overend handles all the administration for recruit training and Susan Baryluk does this for the Advanced Training program. If it was not for the outstanding efforts of all these people our operation would grind to an instant halt.

Recent Budget Information

Since writing this report, the Academy was made aware of its share of the government imposed cut-backs. Between September 1 and March 31 of next year, we must spend $178,000, less than what our contract with the Ministry of the Attorney General calls for.

We intend to meet this obligation by means of the following measures:

1. S/Sgt. Carl Bolger (Saanich) who returned to his department after three years of service in our Assessment Centre, will not be replaced;

2. The vacancy created by Cpl. Bjorn Bjornson returning to the Vancouver Police Department after 3 years of service at the Academy in the "Investigation and Patrol" section will not be filled;

3. Cpl. Bob Murphie (Vancouver) returned to his force from the Advanced Training section. He will not be replaced;

4. One seconded position in our Physical Training section will be prematurely vacated without replacement;

5. The roll-call training production will be suspended;

6. Reduction in the number of our leased driver-training cars.

In anticipation of the budget cut, our budget has been managed with outright frugality. This, coupled with the above measures of suspension of positions and equipment and the reduced workload due to the drop in enrolment allowing for the remaining staff to assist one another, we feel able to continue our services to you as before. At least, we will give it a good try.

Yours truly,

John Post

John M. Post
Director

RETROACTIVENESS OF PROVISION IN THE CHARTER OF RIGHTS AND FREEDOMS THAT A DETAINED OR ARRESTED PERSON MUST BE INFORMED OF HIS RIGHT TO RETAIN AND INSTRUCT COUNSEL WITHOUT DELAY

Regina v. Hutton and Beaveridge B. C. Provincial Court May 1982
File # CCC297 Crim. Kamloops, B. C.

Hutton went to the home of his previous landlord at 3:30 a.m., rang the doorbell and heaved a rock through the window (this was on a date well before the Charter of Rights and Freedoms became effective on April 17, 1982).

When stopped by police a short time after the incident, both accused were arrested quite properly for a weapon found in the car they were driving. However, the accused were not informed of their rights to retain and instruct counsel.

Counsel for the defence claimed that section 10(b) of the Charter must be retroactively applied as it is procedural in nature and not substantive. In view of the fact that the charges alleged against the accused required the Crown to prove that the police officers were in the lawful performance of their duty when they effected the arrests, the issue was important.

Usually when law is substantive in nature then it has prospective application. Procedural or adjective law is regarded as retroactive in application.

The Provincial Court Judge observed that nothing in the Charter dictates that section 10(b) is retroactive; secondly the provision of the right to be informed did not exist before in any form and thirdly the provision is so important in nature that it is substantive law.

Therefore, its application is not retroactive but prospective. This means that it only applies to arrests and detentions since April 17, 1982.

* * * * *

DRIVER'S LICENCE SUSPENSIONS

Laurie and The Queen County Court of Vancouver May 28, 1982 No. CC820610

Section 92(1) of the B. C. Motor Vehicle Act provides for suspensions of driver's licences of persons convicted of drinking and driving offences in B. C. The suspensions are for varied periods of time depending whether it is a first, second or subsequent conviction. Subsection (7) states that for the purpose of subsection (1) the Superintendent shall consider a conviction in the United States.

Mr. Laurie was convicted in the State of Washington for driving while intoxicated. By virtue of section 92(7) M.V.A. the Superintendent of Motor Vehicles suspended Mr. Laurie's licence who appealed that decision.

The County Court Judge held that subsection (7) does not give authority to the Superintendent to suspend the licence of a person who was convicted for a drinking/driving offence in the U.S.A. or other provinces. Whenever a person is convicted of such an offence in B.C., the Superintendent may only consider a conviction in the U.S.A. to determine if the B. C. conviction is a second or subsequent conviction, to determine the duration of the suspension of that person's driver's licence. In other words, if Mr. Laurie would be convicted in B. C. of a drinking and driving offence in the future, then to determine the duration of the suspension the B. C. conviction would be his second one due to the conviction in the U. S. A.

Driver's licence restored.

* * * * *

REASONABLE EXCUSE TO REFUSE GIVING SAMPLE OF BREATH

Day and the Queen County Court of Vancouver May 28, 1982 Vancouver No. CC820176

The accused was demanded to give a sample of breath. He complied but the breathalyzer did not function and no reading resulted. He was then taken to another breathalyzer in the same room and refused to give a sample as his concern that the second instrument was malfunctioning also was not negated by the answers he received from the technician. Although the trial judge found that the accused honestly believed that the technician did not know if the second instrument was working properly, he found that the accused did not have a reasonable excuse to refuse to give samples of his breath. The accused appealed his conviction.

The County Court Judge held that had the instrument which malfunctioned again been used, then perhaps the accused had an excuse to refuse.

> "The excuse must refer to a particular machine, not to the breathalyzer generally, and the knowledge that the instrument was not working properly would have to be based upon a firm foundation sufficient to raise in the mind of an ordinary, reasonable layman a fear that the performance of the test would be of little or no use".*

The failure of the first instrument to function cannot be transferred to the demand to provide a sample to be analyzed by a second instrument.

Accused's appeal dismissed
Conviction upheld.

* * * * *

* Regina v. Phinney 49 C.C.C. (2d) 81

REASONABLE NOTICE TO ACCUSED
EVIDENTIARY WEIGHT OF JARGON

The Queen and Vine Court of Queen's Bench for Saskatchewan June 16, 1982

The reasons for judgement in this case were forwarded to us by R.C.M.P. Constable Matt Lowther of Maple Creek, Saskatchewan.

Two samples of breath were analyzed and showed that there were 170 milligrams of alcohol in every one hundred millilitres of the accused's blood (170 mg%). Subsequently, a certificate of analysis was placed on the table in front of the accused, whose wife picked it up and gave it to the accused a little later. The accused took the certificate to his lawyer.

This manner, the trial judge found, did not amount to the reasonable notice prerequisite to the certificate being proof of its content. Furthermore, the technician, in his testimony, used the jargon of "170 milligrams percent". This the judge held, meant nothing to him and therefore he had nothing in evidence to support a finding what the accused's blood-alcohol content was at the time of analyses. The accused was acquitted and the Crown appealed.

In relation to the "reasonable notice" of the certificate being adduced as proof of the accused's blood/alcohol level, the Justice of the Queen's Bench held that the trial judge "was clearly wrong in rejecting this evidence".

The wife was obviously present during the test to assist the accused. She received the certificate as the accused's agent, and the notice to the accused was therefore reasonable.

In relation to the jargon ("170 milligrams percent") the Justice of the Queen's Bench said:

> "The learned judge jumped on the phrase and reached the startling conclusion that he did not know what the witness meant".

and observed:

> ". . . this conclusion indicates the extent to which the learned judge seemed ready to go to acquit this accused".

It was held that the term used by the breathalyzer technician in his evidence, in context with all of his testimony, made it clear that it referred to 170 milligrams of alcohol in 100 millilitres of blood.

> "Surely that is the clear and obvious as well as common sense inference to be drawn from the witness' testimony"

Crown's appeal allowed
Accused convicted.

Thank you Matt Lowther!

* * * * *

PROOF OF A BY-LAW

R. v. Lum [1982] 3 W.W.R. 694
British Columbia County Court

The accused's dog had "harrassed and molested" someone and as a result the accused was charged under a city by-law which prohibits a person to "suffer or allow" his dog to do so.

The Crown failed to file a certified copy of the by-law. The lack of proof that the by-law existed and was effective caused the Provincial Court Judge to acquit the accused. The Crown appealed.

Section 10 of the B. C. Offence Act (previously the Summary Convictions Act) in essence states that the existence of a regulation made under an Act of the Province (like the Motor Vehicle Act for instance) needs not to be proved when a person is charged with violating it; the judiciary shall take notice of it being effective (judicial notice).

Valid legislation made by the two senior levels of government is called law. What enables them is the Constitution. Therefore their authority to so legislate is "original". These senior governments may also delegate or authorize other entities to legislate. This is done by means of a law which is then the enabling legislation for those entities to regulate certain things (the Municipal Act authorizes communities to incorporate and form municipalies who may regulate those things delegated to them by the Act; societies may register under the Societies Act and regulate their internal affairs, etc.). In other words, these entities regulate by law, hence the term "by-law".

Regulations made under an Act are in a somewhat similar catagory. The Act itself is the law that was passed by the parliament or legislative assembly; it is the skeleton which requires some meat to make it a functional body. The Act will, therefore, often include a clause that gives the cabinet authority to create regulations (a category of law known as "Orders in Council"). In other words, there is some similarity in the creation of by-laws and regulations in that both require enabling legislation. One can only assume that this caused the legislators to bundle by-laws and regulations in the same category. The Interpretation Act of B. C. does so by saying that "regulations" means inter alia a by-law enacted "in execution of a power conferred under an Act". It then follows that if the court

shall take judicial notice of a "regulation made under an Act of the Province" and "that no defendant shall be discharged, by reason only that evidence has not been given of the regulation", this also applies to by-laws.

Appeal was allowed
Matter was Remitted to the
Provincial Court.

Comment: In the event anyone finds fault with the explanatory parts of this synopsis, they are mine and were added to clarify the kernel issue of this case.

It may also be of interest that law making by Orders in Council has come under some criticism lately. Some knowledgeable observers claim that this exercise of "executive power" is becoming excessive and usurps parliament in that it deprives the elected representatives from questioning or debating those regulatory laws which often affect the man in the street more than the Act to which they are appendixed. They claim it to be a form of law making by the bureaucrats who usually write the regulations.

The Acts themselves become mere skeletons which perhaps by analogy do no more than select the key while the regulations are the music and the lyrics. This, of course, was not the intent when this form of law making was created.

* * * * *

"THE REASONABLE AND PROBABLE GROUNDS FOR MAKING A DEMAND"

The Queen v. Shimell Supreme Court of B. C. No. 1/82 Nelson Registry
April 2, 1982

The accused appealed his conviction for failing to give samples of his breath upon demand. The issue was the reasonable and probable grounds the officer had to make the demand. The trial judge had held that the honesty of the belief on the part of the officer, that the accused had committed an offence under section 234 or 236 of the Criminal Code at the time he made his demand, was established. Therefore, he felt that it was not open to him (the judge) to go on and determine if that belief was based on reasonable and probable grounds. In other words, the judge applied a subjective test to determine if the prerequisites to a proper demand existed.

In spite of the fact that the breathalyzer provisions were enacted over a decade ago the question if this test is a subjective or objective one is not quite settled in B. C.. In some provinces the Court of Appeal have held that the test must be objective. In B. C., this question has been put to the County Court on four occasions* and it appears that the learned judges favored the subjective test.

The following are some pros and cons of each and the Supreme Court Justice's decision:

The Objective Test

If the test is an objective one the Courts must look beyond the honest belief of the peace officer who made the demand. Then the reasonable and probable grounds must be based on evidence that there were facts and circumstances which would cause a reasonable man (with the experience and knowledge of the officer making the demand) to conclude that the suspect was probably guilty of the offence of impaired driving or over "80 mgs.". The conclusion of probable guilt is of course, not belief beyond a reasonable doubt or one based on the balance of probabilities. The Courts

* R. v. Forrester May 8, 1981 Westminster County Court
R. v. Thast February 18, 1981 County Court of Vancouver
R. v. Crisp January 17, 1980 County Court of Vancouver Island
R. v. Main May 8, 1981 County Court of Kootenay

have held that if such was the case, the "legislative purpose would be frustrated". In 1881[1] a court of superior jurisdiction had this to say about reasonable and probable cause:

> "I should find reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. . .".

Whenever the law grants authority to be exercised on reasonable and probable grounds, the test is usually along the lines as quoted above (objective).

The Subjective Test

A B. C. Supreme Court Justice[2] described the subjective test as follows:

> "As to the reasonable and probable grounds and belief, that is a matter for the mind of the peace officer and not for the mind of the trial judge".

Such test includes that the honest belief of the peace officer cannot be substituted by the opinions of the trial judge. If the peace officer swears that he believed the accused had or was committing the offence of impaired driving or over "80 mgs." when he made his demand, then if he is believed, the grounds requisite to the demand were met.

The arguments and reasons favoring the subjective test are persuasive. There is not a greater cause of death outside of disease, than the drinking driver. Yet, it is in a sense a socially acceptable crime, seen by many as an act of indescretion, while the devastating consequences are considered

1 Hicks v. Faulkner 8 QBD 167
2 R. v. Paine (1972) 12 C.C.C. (2d) 50

(usually by those not yet victimized) not unlike any peril of living in a motorized society. It is "the get home crime", and what nobler objective can one have. It is committed by people of all walks of life, including judges, policemen and prosecutors; the slaughter and maiming is abhorring and yet we carry on with little hope for our social acceptability (an influence superior to any legislation) changing in this regard. On the other side is the right of each citizen not to be arbitrarily interfered with in the exercise of his liberties. Lack of adherence to basic principles like these will inevitably lead to abuse; such is human nature. Relinquishing those rights to remedy an abuse which in magnitude seems to overshadow these principles, is attractive. Applying the subjective test to determine if reasonable and probable grounds existed to make the demand smells of such a remedy. Insisting on the objective test, it is argued, is adherence to fundamental principles, an erosion of which will lead to abuses we cannot live with.

The Supreme Court Justice in this Skimell case, found no B. C. precedents binding on him and applied the objective test, saying:

> ". . . Historically those words (reasonable and probable grounds) have been taken to indicate an objective test". . .

and:

> "In order to convict the Court must be satisfied beyond a reasonable doubt that the police officer had a belief in facts which, if true, would have created in the mind of a reasonable man a suspicion that the accused was driving a motor vehicle while his ability to drive was impaired by alcohol or, that he was driving while his blood alcohol level exceeded 80 milligrams of alcohol in 100 millilitres of blood".

Accused's appeal allowed
Case referred back to Provincial Court to hear further evidence.

Note: Although the conclusions are those of the Supreme Court, the explanatory portions, the comments on the problems of impaired driving and the dilemmas in respect to rights are mine. If this judgment stands, more evidence will have to be given by police on their reasons for making the demand.

* * * * *

PRIVATE PROPERTY - ACCESS BY THE "GENERAL PUBLIC" - HIGHWAY

Regina v. McMeekin - County Court of Westminster April 23, 1982
No. X827769 New Westminster Registry

The accused drove her car into a parking area of an apartment block which was designated by signs for "tenant parking only". Due to not securing the drivetrain, the car lurched forward and rammed into a wall while the accused leaned over the back of the front seat to get the parcel that had to be delivered. She was convicted of careless driving (s. 149 Motor Vehicle Act of B.C.) and appealed, claiming that the parking lot was not "highway" as defined in that Act.

To determine this the Court had to decide "whether the public has access to or is invited into the lot", this as the definition of highway says that it

> ". . . includes every highway within the meaning of the Highway Act and every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles and every private place or passageway to which the public, for the purpose of parking or servicing of vehicles, has access or is invited".

The Motor Vehicle Act regulates and is generally intended for the protection of the public. Therefore, it must apply to places where vehicular traffic and public may be found, whether the place is public or private. The public may lawfully not have access, yet the place may become a highway if the owner allows the public to use it. As soon as he denies the public that access the road ceases to be a highway.

The County Court Judge held that:

> "In B. C. the rule appears to be that general public access is shown when members of the public enter land for a purpose of their own rather than for a purpose incidental to the ownership of the property".

Further, the Court drew attention to the fact that the definition speaks of access by the general public in respect to highways, streets, roads and

of public when it deals with private property. The Court thought this to be logical as in the latter category the group is more restricted, particularly in B. C. where that access is only for parking or servicing of vehicles, or by invitation to the public.

In this case the Court found that parking by tenants only was too restricted to hold that the public had access. The owner does not offer the property for public parking nor does he even invite the public to enter. Therefore, the lot on which the accident occurred "falls below the threshold of the Act's definition and should not be included as a highway".

The Court gave a summary of its conclusions:

1. "General public access" means unrestricted entry to all members of the population within implied limits for a purpose unrelated directly to the property's owner-ship;

2. "Public access" to private property means entry to all members of the public who enter by legal right, or by implied or express permission of the owner, and as a matter of fact, the public enters the property unmolested by the owner;

3. The Motor Vehicle Act restricts the "public access to private property" group to those who enter for the purpose of parking, service of vehicle, or by invitation to the public;

4. The parking lot in this case has an even more restricted access and falls below the threshold definition of "highway" in the Motor Vehicle Act.

Conviction was overturned.

* * * * *

ENTERING A DWELLING TO EFFECT AN ARREST WITHOUT WARRANT

Regina v. Landry Ontario Court of Appeal November 17, 1981

A citizen pointed the accused and his companion out to a police officer as the persons who just attempted to steal a car from a parking lot. The officer followed the two to the accused's home. The officer entered the home either through an open door or one that was opened to him. The officer attempted to arrest the accused and quite a fight ensued. As a result the accused was charged with assaulting a peace officer in the lawful performance of his duty.

The trial judge had held that the officer had reasonable and probable grounds to believe that the accused had committed the indictable offence of attempted theft and did have the authority to arrest the accused. However, since the officer had entered the accused's home he was not in the execution of his duty. The jury acquitted the accused and the Crown appealed.

The Ontario Court of Appeal reviewed the geographical boundaries (spatial limits) of the officer's authority to arrest. Although the sections of the Criminal Code authorizing peace officers to arrest without warrant is silent on the spatial limits that does not mean that there are not any. Section 8 of the Criminal Code preserves the common law in Canada (except for offences created by it) and that includes the assurance that a man's home is his castle.

The Court, quoting from the Report of the Canadian Committee on Corrections (1969), held that a police officer has the right to enter premises including a dwelling house, by force if necessary, without a warrant, to prevent the commission of an offence which would cause immediate and serious injury to any person, if he on reasonable and probable grounds believes that such an offence is about to be committed; or to effect the arrest of a person who has been found committing a serious crime and who is freshly pursued and who seeks refuge in such premises.

Although anyone has an "implied licence" to go to a door to ask if he may be admitted "to conduct his lawful business", he (safe a police officer for reasons given above) can only enter with permission of the occupier.

In this case the officer never asked to be admitted; the offence the officer had grounds to believe the accused committed, had, when he entered the home, already been committed. None of the reasons for which the officer could enter without a warrant existed. Although he had followed the accused, there was no fresh pursuit and there was nothing that could be

considered expressed or implied consent on the part of the occupier of the home for him to enter.

Appeal dismissed
Acquittal upheld.

On the surface at least, this decision seems to differ from a finding by the Supreme Court of Canada when it dealt with a B. C. case in 1974. The apparent distinction between that B. C. case and this "Landry" decision by the Ontario Court of Appeal is that, in the latter the issue was whether the officer was in the lawful performance of his duty as a prerequisite to determine if Landry obstructed the officer; in the former, to determine if the officers were civilly liable for damages for trespass.

In both cases, the Courts had to decide on the right of the officers to enter a private home to effect an arrest outside of circumstances which, according to the Report of the Canadian Committee on Correction (1969), permit officers to enter premises. One could argue that also in this, the cases are distinct, as in "Landry" the arrest was authorized but discretionary (no warrant), while in the B. C. Case affecting the arrest was obligatory in that there was a warrant in the first instance. However, reading the reasons for judgment of the B. C. Case, these distinctions seem irrelevant to the issue, particularly in view of the Courts comments in its summation.

The following is a synopsis of the reasons for judgment by the B. C. Court of Appeal in Eccles v. Bourque et al 19 C.C.C. (2d) 129 (1974):

> Bourque and two others were police officers looking for a man for whom there were three warrants outstanding in Montreal for indictable offences. (The officers did not have the warrants in their possession). The officers received information that this man was staying at a certain address. They attended at this address and answering their knocking, the occupant of the home opened the door slightly. One officer showed his identification and the officers pushed their way into the home. They searched the place in spite of the objections of the occupant, but were unsuccessful in finding the wanted man. The occupant (Eccles) sued the officers for damages for trespass, and the B. C. Supreme Court found for Mr. Eccles.
>
> The B. C. Court of Appeal reversed this decision (14 C.C.C. (2d) 279) and Eccles took his plight to the Supreme Court of Canada.

This Court arrived at its decision by reviewing the officer's authority to do what they did, by exploring section 450 of the Criminal Code and the applicable common law. Firstly the Supreme Court held that in the

circumstances the officers had reasonable and probable grounds to believe the wanted man had committed an indictable offence and had they found him in the home they searched or elsewhere, they would have had the authority to arrest him.

The Crown had submitted that if the officers were authorized to effect the arrest, they were, by virtue of section 25 of the Criminal Code authorized to commit the trespass. After all, the section provides that if someone is authorized to do something by law, then that person is also authorized "to do anything in the . . . enforcement of the law" provided it is done on "reasonable and probable grounds". The Supreme Court of Canada rejected that submission saying that section 25 C.C. "does not have such aplitude". The question in this case "is whether the officers were required or authorized by law to commit a trespass; and not . . . whether they were required or authorized to make an arrest". The statutes are silent on that issue and therefore the authority for them to commit the trespass if it exists, must be found in the common law.

Although it was held in 1604* as well as in Biblical times, that a man's home is his castle and fortress for his defence against injury and violence, there is on the other hand a principle which the Supreme Court of Canada cited as follows:

> "But there are occasions when the interest of a private individual in the security of his house must yield to the public interest in the process to be executed. The criminal is not immune from arrest in his own home nor in the home of his friends".

That same case states that the "King's men" may break the party's house "either to arrest him, or to do other execution of the King's process". However, before any breaking takes place the authority must "signify the cause of his coming" and request the door to be opened.

The Supreme Court of Canada further said:

> "Entry can be made against the will of the householder only if (a) there are reasonable and probable grounds for the belief that the person sought is within the premises and (b) proper announcement is made prior to entry".

The Court observed that the fact of the fugitive not being there did not take away from the reasonable and probable grounds the officers had and consequently it did neither take away from their rights to search the premises in the circumstances. (The wanted man had been checked in the company of the householder; he had given the address as the place where he lived; was seen entering and leaving the building and had been seen entering just prior to the search).

* Semayne's case, 5 Co. Rep. 19a, 77 E.R. 194.

In addition to this judgment the Court made an announcement regarding a peace officer entering a private property:

> "In the ordinary case police officers, before forcing entry, should give (i) notice of presence by knocking or ringing the doorbell, (ii) notice of authority, by identifying themselves as law enforcement officers, and (iii) notice of purpose, by stating a lawful reason for entry. Minimally they should request admission and have admission denied although it is recognized there will be occasions on which, for example, to save someone within the premises from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required".

Note: This was the Supreme Court of Canada's view in 1974. Having granted leave to appeal the acquittal of Landry, the Court will have an opportunity to either change its mind or reiterate the above. Perhaps aspects of the Charter of Rights and Freedoms will be argued and this may cause changes. In December of 1980* the Court said that their decision in this case stood unaltered.

* * * * *

* R. v. Colet (see page 18 of Issues of Interest, Volume 1)

DRIVING WITHOUT DUE CARE AND ATTENTION

The Queen and Lower County Court of Vancouver Registry No. CC811186
April 16, 1982

The accused followed a motor cycle in her car at a safe distance and speed. Due to the open ventilation system of the car, dust created an inconvenience and she tried to adjust the vent to reduce or get rid of the nuisance. On account of this distraction she noticed too late that the motor cycle stopped to allow someone to cross the street and a collision occurred.

The accused was convicted of driving without due care and attention and appealed claiming a total lack of intent.

Based on case law, the County Court Judge held that criminal negligence and dangerous driving under the Criminal Code have mens rea as a necessary element. That is to say, that the act of driving in that manner must be advertent (heedful). However, for the careless driving offence created under the provincial statutes, showing inadvertance is not necessarily a defence; no element of mens rea is necessary, or "negligence deservant of punishment".

Accused appeal dismissed.
Conviction upheld.

* * * * *

MANSLAUGHTER BY LEAVING AN UNGUARDED EXCAVATION ON LAND

The Queen v. The Aldergrove Competition Motorcycle Association and Levy
County Court of Westminster Registry No. X81-6370 February 8, 1982

The accused association dug a substantial water hole to reduce other bodies of water on its land. The Levy supervised the excavating and was the president of the association. Levy and the association were charged jointly with manslaughter when three children drowned in the hole.

The land, used for motorcycle competitions, had a one-half meter fence around it and the reservoir was, according to the accused, marked with "metal drums with string and rope" so as to prevent people from approaching it.

Four boys, ranging in ages from 8 to 11, reached the excavation by getting through or over two fences. One was already down and the other (the accused's one-half meter high fence) was pushed down by them. In any event, the boys had no difficulty in getting to the edge of the water-filled 8 foot deep hole. They passed their time by throwing rocks at a piece of lumber that was floating on the water.

The bank gave way and one boy fell in the water. Another tried to rescue him but also ended up in the water as did the third who attempted to get the other two back on to the bank. The oldest boy did also fall in when he tried to help his friends but managed to get out again. The others were not so fortunate and lost their lives by drowning.

In spite of the fact that these unfortunate deaths were accidents and that the children were trespassers, the Criminal Code of Canada holds the owner or person in charge of land criminally liable in circumstances like these. Section 242 in essence states that anyone who leaves an opening in ice that is open to and frequented by the public, and any owner or person in charge of land who leaves an excavation on that land, is under "a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the opening exists". A violation of this legal duty (whether or not there are any consequences from not performing the legal duty) is a summary conviction offence. Bodily harm resulting from not performing this legal duty amounts to assault causing bodily harm. However, if death results, the person who failed to perform the legal duty is guilty of manslaughter.

The Supreme Court Justice who tried the accused of alleged manslaughter said that there were three reasons why the Parliament created this apparent

harsh law. Firstly, to create a statutory duty to guard excavations, secondly to remove all doubts that failure to so guard supports a conviction of manslaughter (in other words remove that decision from the judiciary) and thirdly, to make the issue distinct from criminal neglicence. To convict under section 242 the Crown does not have to show that there was a wanton and reckless disregard for the lives or safety of others in omitting to perform the duty of guarding the excavation.

To convict as the charge was laid in this case, the Crown must prove the four elements of this charge:

1. that there was an excavation (man made cavity or hollow);
2. that the accused is the person under a legal duty to guard the excavation;
3. that there was a failure to perform that duty; and
4. that that failure caused the death of a person.

The Court also held that to determine the adequacy of the guarding to satisfy the duty imposed by law, all circumstances must be considered. The word "guard" as used in the section includes "protect". Therefore the Court must examine the location of the excavation and the community in which it is located to determine the adequacy of barriers or whatever means is used to prevent the falling in by accident.

The land on which the children drowned was in a thinly populated rural area. Other children lived within walking distance and commonly played in the adjacent field. Furthermore, the motorcycle track and the water hole had a natural allurement for children.

The Court found that children trespassing on the land "ought to have been foreseen". The guards placed around the excavation were inadequate and the physical barriers only presented "a minimal obstacle to children".

The Court concluded that the accused clearly breached their duty to "guard and prevent" and it was that breach that "permitted the children to approach too close to the excavation and to fall prey to the soft sides and the deep water".

Accused found guilty as charged.

* * * * *

DEFENCE OF NECESSITY AND DISTRESS
REBUTTAL EVIDENCE - IS MARIHUANA MONOTYPIC OR POLYTYPIC?

Regina v. Perka et. al. B. C. Court of Appeal CA820110 July 23, 1982

A motor vessel called the "Samarkanda" landed in "No Name Bay" just north of Tofino, B. C. with 33.5 tons of marihuana from Columbia. The 23 accused were on the ship and another vessel which met her and guided her into the bay. All were jointly charged with importing a narcotic and possession for the purpose of trafficking.

In their defence the accused adduced evidence of mechanical problems and weather conditions which caused "an urgent situation of clear and imminent peril" which forced the crew to seek haven in Canadian territorial waters. This, the defence claimed, made the defence of necessity and distress available.

The Crown applied to rebut the defence evidence of mechanical defect and was prepared to call the armed forces personnel who sailed the seized ship to Victoria. They apparently had no problems starting the engine or running the ship along the open waters on the west side of Vancouver Island. The trial Judge had not allowed the application and held that the Crown wanted to "split" its case. This means that the Crown wished to prove its case before and after the defence evidence. It was held by the trial judge that the prosecutor should not have been caught by surprise in regards to the evidence of malfunctioning engines. The defence of necessity had occurred to him (the judge) before the Crown closed its case and the evidence of the armed forces personnel's experience with the vessel should have been adduced then (before the Crown closing its case).

The jury received instructions to acquit the accused as the defence of necessity was available to them. The jury complied and the Crown appealed.

The B. C. Court of Appeal disagreed with the trial judge on the issue of rebuttal evidence. It held that the Crown had not split its case. Said the unanimous Court:

> "As I understand the way the trial proceeded the Crown could not reasonably have been expected to anticipate the evidence which the respondents (accused) might call in support of the defence of necessity. Even if the Crown knew something of the defence which would be advanced, it could not reasonably have been expected to know the extent of the evidence to be called in support of it".

The Court added that the evidence the Crown had to call to rebut the defence evidence to substantiate necessity was irrelevant to what the Crown had to prove as part of its case. The Court, in support of their opinion, quoted from a precedent they set in 1977* saying that when considering an application for rebuttal evidence it must be expected that counsel are "ordinary, competent counsel instructed by ordinary clients (solicitors, police or individuals) and engaged in the usual way in the practice of their profession". In other words, Crown counsel does not have to anticipate every conceivable defence the accused may raise and negate this in advance.

To avoid standing trial again, the accused argued that the trial judge had failed to instruct the jury on the "botanical defence" they had raised. The indictment had accused them of importing and possessing "cannabis". The accused had called evidence to show that there are three species of marihuana (in other words cannibis is polytypic) and the Crown had not proved which of these the accused imported and possessed. The Narcotic Control Act defines marihuana to mean "Cannabis sativa L"; hence to be convicted the Crown must prove that the marihuana the accused had on board was of that kind. Lack of proof that the cannabis was "Sativa L" entitled them to an acquittal the accused argued.

The B. C. Court of Appeal held that when the Narcotic Control Act was enacted the botanical taxonomists were of the opinion that Cannabis sativa L covered all cannabis (monotypic). (It is only recently that some are of the opinion that plant is polytypic). Therefore Parliamant intended to cover all cannabis when it made the laws the accused allegedly violated. Their arguments were therefore rejected.

The accused then submitted that the defence of distress should have been left with the jury. The B. C. Court of Appeal disagreed with that also and said

> "I think the facts of this case support the conclusion that there is a merging of the defences of necessity and distress".

If the accused claimed that weather and engine failure necessitated them to seek protection in Canadian waters, then the defence of distress melds with the defence of necessity. Whether or not this was the case remains to be seen when the evidence of the armed forces personnel has been heard regarding the condition of the vessel.

Because the jury might well have reached a different conclusion had the members heard the rebuttal evidence,

a new trial was ordered.

* * * * *

* R. v. Combo (1977) 35 C.C.C. (2d) 85

MIXING CIVIL AND CRIMINAL LAW
ABUSE OF THE PROCESS OF THE COURT

Regina v. Sparks 65 C.C.C. (2d) 476
Ontario County Court

Someone else's $600 deposit ended, due to a bank error, in the accused's account which registered $10 to his credit. The accused withdrew the $610 a few days after this windfall error in his favor and eventually found himself charged with theft.

The evidence revealed that the bank had tried for a period of 8 months to collect by means of phone calls and registered letters demanding return of the $600 within 10 days. The accused's failure to comply led to the bank reporting the matter to the police at the end of that 8 months period.

At his trial the judge found that the accused committed the crime of theft. The accused however, argued that the criminal proceedings against him were an abuse of the process of the Court as the bank had initially considered the matter only civil in nature and now used the criminal process to remedy this dispute between them and the accused.

Civil proceedings are to resolve disputes between individuals while criminal proceedings are designed to do so between an individual and the state if an offence has allegedly been committed. For the victim of a crime to seek restitution is not an abuse of the criminal process and he can do so when the perpetrator is sentenced[1] or may proceed civilly against him, even simultaneously to criminal proceedings[2] related to the same matter. However, to bring criminal prosecution to compel a civil claim is an abuse of the process of the Court which may result in a judicially imposed stay of proceedings.

The Courts have held that in some circumstances, making a deal in lieu of criminal proceedings being commenced may well amount to compounding a felony.

The bank frankly admitted that had the accused returned the money, then in spite of the theft, they would not have initiated criminal proceedings. In addition, it follows that if one can afford to pay the civil context of a dispute like this you can avoid criminal proceedings against you.

The bank's objective was to collect and not to deal with a person who offended society's law.

Proceedings against the accused were ordered stayed.

* * * * *

[1] Section 653 Criminal Code
[2] Section 10 Criminal Code and British Acceptance Corporation Ltd. v. Belzberg (1962) 36 D.L.R. (2d) 587.

THE DEFENCE OF ENTRAPMENT

R. v. Rippley 65 C.C.C. (2d) 158 Nova Scotia District Court

Courts of Appeal in Canada have never recognized the defence of entrapment. However, some of those courts and the Supreme Court of Canada have defined it. In Nova Scotia some trial Courts have recognized the defence of entrapment* and the Court either stayed the proceedings to prevent an abuse of the process of the Court or registered an acquittal. In some Canadian cases the defence was considered but no acquittals resulted as the facts failed to support the defence. Merely soliciting a person to commit an offence or giving him the opportunity to commit it is not entrapment provided the accused had a predisposition to the crime. Entrapment has been defined as: "a police concocted plan to ensnare the accused going beyond mere solicitation". . . ." calculated inveigling or persistent importuning". In this case an undercover officer encountered the 18 year old accused smoking a joint on the street. The officer purchased three marijuana cigarettes from the accused for $5 - as a result of which he was charged with trafficking. The accused raised the defence of entrapment.

It was found as a fact that the accused and his two companions were amateurishly experimenting with marijuana when encountered by the officer. The officer insisted they go with him in his car to find someone who had marijuana for sale. The accused indicated he wanted no part of it. Attempts to get out of the car and get dropped off were to no avail as the officer would not stop the car. Finally the accused suggested to be let off at a diner where he offered to attempt to get the officer the "joints" he wanted. The accused asked for and found someone in the diner who sold him three joints which he sold again to the officer without profit. The only reason that he did so, testified the accused, was to get rid of the officer who was "a pain" and to get his buddies free from him. Said the Nova Scotia County Court Judge in his reasons for judgment:

> "I am prepared to accept his (the accused's) contention that he was merely trying to get rid of an individual who had attached himself to the accused and his friend and that he regarded his actions solely from the point of view of relieving himself from what had become an embarrassing situation".

In view of the accused's inexperience, lack of being "world-wise" to the ways of "drug pushers" the Court found there was no predisposition to the crime, that the defence of entrapment was available and the accused was acquitted.

* R. v. MacDonald (1971) 15 CRNS 122

This judgment was handed down in December of 1981 but on August 9, 1982 the Supreme Court of Canada gave reasons for judgment in Amato v. The Queen which is a B. C. case*.

Amato was 'persuaded' by his employer to obtain some cocaine for a third party. He complied reluctantly. Shortly after a police informer asked Amato to purchase cocaine for him. He told the informer that he was not interested and refused to perform. However, persistent persuasion changed Amato's mind. The third time Amato was approached by a police undercover officer who told Amato that his clients were dangerous and would use violence if he did not provide cocaine for them. Amato did purchase and provide the cocaine as ordered, and was charged with trafficking in regards to the second and last transaction. He claimed to have been entrapped, but his defence was rejected. The trial judge, as well as the B. C. Court of Appeal, held that there had been no more than "persistent solicitation". Amato appealed to the Supreme Court of Canada, which made a majority decision (5 concurring and 4 dissenting):

> ". . . that a crime committed at the 'solicitation' of an agent provocateur does not, standing alone, support a defence of entrapment".

The kernel of the majority judgement is contained in the following statement by the five Justices of the Supreme Court of Canada:

> "In my view, it is only where police tactics are such as to leave no room for the formation of independent criminal intent by the accused that the question of entrapment can enter into the determination of his guilt or innocence".

What is significant about this case is that the Supreme Court of Canada did not say that in Canada the defence of entrapment does not exist or is not recognized. It has, in the past defined entrapment and now has indicated that the actions of the authority by which they "actively organized a scheme of ensnarement, of entrapment, in order to prosecute the person so caught" must be such that it "leaves no room for the entrapped person to form a criminal intent.

* * * * *

* See page 34 of Issues of Interest Volume 1.

TID BITS

Nudity

The accused performed three dances in a restaurant/tavern before an audience of approximately 120 persons, the great majority of which were male "blue collar workers". Although she revealed a great deal of herself in the first two dances, the last one was performed bottomless. The crowd yelled, cheered, and had a good time and there was no evidence that anyone left during the performance. The Provincial Court Judge held that the performance was contrary to the standard of public decency and convicted the accused for being nude in a public place. Upon appeal the Ontario High Court of Justice observed that the trial judge had found that the performance was not done in an immoral manner. This coupled with evidence supporting that the accused's performance "did not offend public decency and was tolerated in the milieu in which it occurred "caused the Justice to conclude that the average adult in the community would not object to the performance at the time and place where it was staged".

The accused was found not guilty.

(R. v. Gray 65 C.C.C. (2d) 353)

* * * * *

Cultivating Marihuana

Police raided the accused's home and found marihuaua plants hanging from the ceiling to be dried. They had been there approximately 3 weeks according to the accused who was charged that he, on the date of the raid, was cultivating marihuana. In addition, police found the necessary items to grow marihuaua and literature on how to do this. The trial judge acquitted the accused holding that what the police found the accused doing was processing the plants after harvest. Drying and curing of the plants is not included in cultivating them. The Crown appealed unsuccessfully to the Ontario Court of Appeal which agreed with the views of the trial judge and upheld the acquittal.

R. v. Gaurreau 65 C.C.C. (2d) 316

* * * * *

Failing to Assist Police in Execution of Duty

After a chase by car and then on foot, a police officer arrested a young man for dangerous driving. The officer struggled with his prisoner and was unable to get him back to the police car. The prisoner's father arrived at the scene and the officer told the father to assist him to get the young man to the car. The father told his son to go with the officer to get the matter cleared up. When the young man failed to comply the officer repeated his demand for assistance to which the father replied, "No way". This resulted in a charge against the father of failure to assist a peace officer in the execution of his duty of which he was convicted. Upon appeal, the Alberta Court of Queen's Bench had to determine if the verbal assistance the father gave was adequate to hold he had complied with the law (section 118(b) C.C.).

The Court held that when the verbal assistance failed it was incumbent on the father to assist the officer physically. If this was not so the Court said, then Parliament would have considered it adequate for someone who is requested to assist a peace officer who is being assaulted, to say "Stop it" and blissfully walk away. Even if the father had been afraid of his son, that would have afforded him no excuse.

Conviction was upheld.

R. v. Foster 65 C.C.C. (2d) 388.

* * * * *

Theft of Marijuana

The accused was found to have broken into a home and to have stolen $385 worth of marijuana. He was aquitted of a break, enter and theft charge because the trial judge was of the opinion that you can only commit theft of something the victim legally owns. Upon appeal, the Nova Scotia Supreme Court held that though the accused held the marijuana in defiance of the law, he did have a special property or interest in it. The Court reiterated that it is immaterial for the purpose of theft whether the victim had any right to the the property stolen. One thief can even steal stolen goods from another. The accused was found guilty.

R. v. Grassex 64 C.C.C. (2d) 520

* * * * *

Section 236(1) and 236.1 of the Criminal Code provides for mandatory jail sentences for second and subsequent drinking/driving offences; prison terms not less of fourteen days for the former and at least three months for each of the latter.

A Mr. Skolnick was convicted of impaired driving and refusing to give a breath sample in 1976. The two charges arose from one incident of driving and were tried simultaneously. In 1979 Mr. Skolnick was convicted of "over .08%", and the trial judge considered this the third drinking/driving offence and felt obliged by law to sentence him to at least three months in gaol.

This issue reached the Supreme Court of Canada which held that the last conviction was, for the purpose of sentencing, the accused's second offence. It held unanimously that where two offences are tied together by arising from the same incident and are tried together, then if convictions flow from them, they are, for the purpose of laws dictating severer penalties for second and subsequent offences, to be treated as one conviction. If that was not so, Mr. Skolnick should have received a jail sentence for the "refusing" in 1976. After all, that was his second drinking/driving offence, the first one being the impaired driving.

(The Queen v. Skolnick Supreme Court of Canada July 22, 1982)

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A police officer issued the accused an appearance notice for "hit and run", impaired driving and refusing to give a sample of breath. Although the notice told the accused when to appear it did not tell him where, and the failed to show. He was struck from the Court list and the Justice of the Peace issued a summons. The accused appeared in compliance with the summons but protested the validity of the process followed, and he claimed the Court had lost jurisdiction over the information. The B. C. Supreme Court decided on this issue and found that the information alleging the offences was received under section 455.4 C.C. and that the appearance notice had been properly confirmed. However, when the accused failed to appear the only process open to the Justice of the Peace was to issue a warrant in compliance with section 456.1(2)(b) C.C., but not a summons. Therefore, by failing to do as the law dictates, the information, became a nullity and the Provincial Court had no longer jurisdiction over it.

(Mark Mitchell Kennedy's application for an order of prohibition. B. C. Supreme Court. Penticton 125/K/82. June 10, 1982).

Note: If the Court, due to a procedural error, would have lost jurisdiction over the accused only, the accused's appearance would have revived that jurisdiction.

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