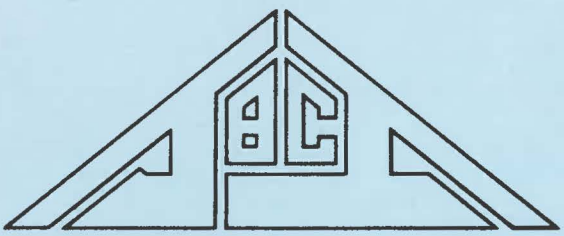
ISSUES OF INTEREST

VOLUME NO. 10



Justice Institute of British Columbia

POLICE ACADEMY

Written by John M. Post

ISSUES OF INTEREST

(VOLUME NO. 10)

Written by John M. Post
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SIMULATION OF EVENING OF DRINKING INTRODUCED AS "EVIDENCE TO THE CONTRARY"

R. v. Hughes 5 W.W.R. [1982] 673 Alberta Court of Appeal

A demand for samples of breath was made of the accused and the lowest of the analyses showed 15 milligrams.

Eighteen months later (in preparation for his jury trial for "over 80 milligrams") the accused and a former R.C.M.P. officer, now in private security, simulated the entire day of the alleged offence. The ex-officer (a qualified technician with his own breathalyzer) supervised the accused's drinking and took the tests at exactly the same time and after as much drinking as on that day. The lowest reading was 30 milligrams. This, the accused claimed, "was evidence to the contrary" that the readings on the night of the alleged offence were inaccurate. The Judge instructed the Jury that this was not so and the accused was convicted. The accused appealed this conviction to the Alberta Court of Appeal.

The quantities and the times of the accused's consumption of alcoholic beverages on the date of the offence was given by the accused and a friend who had been keeping him company that night. The reason for rejecting that evidence and the testimony of the ex-officer was because it relied entirely on evidence of the accused and as "we don't know what condition might have varied in between the two dates in question".

The Court of Appeal held that in other cases evidence of witnesses in regards to drinking and expert testimony has been capable of being "evidence to the contrary". Whether or not it was capable of being such evidence was for the Judge to decide; whether or not it was, was for the Jury to consider. When the Judge instructed the Jury that the evidence was incapable of being evidence to the contrary, he was wrong. Consequently, the Jury never got to decide if there was a reasonable doubt

New Trial Ordered

* * * * *

WRONG DIAGNOSIS - FRAUD

Detering v. The Queen Supreme Court of Canada November 1982

A lady investigator with the Ontario Ministry of Consumer and Commercial Relations had the transmission of a car slightly tampered with and took it to the accused who manages an engine and transmission "rebuilding" shop. The accused test drove the car, examined it and said that the transmission required an overhaul. The car was picked up some time later and the investigator paid a bill for a complete transmission rebuild.

The repair required was a minor adjustment only. The transmission was examined by mechanics and it was found that the repairs paid for were not done.

The accused was convicted of fraud. The Ontario Court of Appeal held that the investigator (in view of her previous knowledge of the transmission's condition) was never deceived. The accused had only tried to deceive her. The Court of Appeal substituted, therefore, a conviction of attempted fraud. The accused appealed the conviction to the Supreme Court of Canada.

Defence counsel raised an interesting argument. He submitted that to show fraud as in this case there must be a "concurrence" between the representation and the intent to commit fraud. In other words, the Crown must show that when the accused told the investigator that the transmission needed to be rebuilt, he knew that this was not true, intended to make the minor adjustment only and charge for the overhaul.

If the accused really believed that the transmission needed the major repair and found, when he did the work, that this was not so, but still charged for repair not carried out, then his action does not amount to attempted fraud. Defence counsel argued that to attempt an offence (s. 24 C.C.) one must intend to commit the full offence. When the accused made his diagnosis, the lady was not deceived. Deception is an essential ingredient to fraud. Hence no conviction of fraud or attempt fraud was proper.

The Supreme Court of Canada held that the accused's actions were carried beyond mere intention. They amounted to "a reaffirmation" or a continuation of what the accused really intended. He did not attain

that goal and, therefore, his actions amounted to an attempt to commit the fraud.

Conviction upheld.

In the County Court of Vancouver a party by the name of Viznei* was tried for attempted fraud. He was attempting to peddle two paintings by Picasso and Turner misrepresenting the original ownership and value of the paintings. The prospective purchaser became suspicious and called police. A Police officer played the role of a wealthy businessman who was looking to invest "black" money to escape paying taxes.

The officer was also aware of the misrepresentations the accused made and was not deceived by them. However, this was not raised by the defence or observed by the Court. The accused was convicted on both counts of attempt fraud.

* * * * *

* R. v. Visnei No. CC821024 Vancouver Registry

DELIBERATE AND PLANNED MURDER

R. v. Ruptash 68 C.C.C. (2d) 182
Alberta Court of Appeal May 1982

Ruptash was convicted of murder in the first degree. The victim, a woman, was found to have been strangled from behind with what was believed to be an electrical cord. The evidence revealed that the perpetrator had taken a lot of pain to cover up traces of evidence. The medical testimony proved that strangulation must be applied for four to five minutes to cause death. This, the trial judge said, disqualified the act from being impulsive or on the spur of the moment. Therefore, it was planned and murder in the first degree.

The Alberta Court of Appeal which reconsidered the conviction, reiterated that the deliberation requisite for a murder to be one in the first degree, "must occur before the act of murder commences".

There had been no evidence adduced which showed or from which it even could be inferred that the murderer had intentions or a plan to kill prior to his arrival; neither was there any evidence of what occurred while he was at the victim's home. Said the Court of Appeal: "One cannot say that every killer who takes a weapon in hand has deliberated on a plan, especially where a weapon is at the ready". This meant that the conviction of murder in the first degree could not stand.

In addition, the accused had appealed claiming that "he was not the culprit". However, the Court of Appeal held that if all evidence adduced at trial was believed, it is capable of leading to a verdict of guilty.

New trial for murder in the second degree ordered.

* * * * *

VOLUNTARINESS OF A STATEMENT

Hobbins v. The Queen 66 C.C.C. (2d) 289
Supreme Court of Canada

The accused, a 16 year old youth with a criminal record, was questioned in regards to arson on November 24. On January the 18th he was questioned again by the same officers who in the meantime had discovered more information.

In both incidents, the accused had been unwilling to accompany police but had little choice as he was already in jail serving a sentence for another and unrelated offence. The statements the accused made were referred to by the Court as confessions. In any event, both statements must have been important to the Crown's case as both were adduced in evidence at the accused's trial by a judge and jury. The trial Court Judge had not allowed the first statement in evidence as he was not satisfied beyond a reasonable doubt that it was given voluntarily. The second statement was admitted, and the accused was convicted. He unsuccessfully appealed to the Ontario Court of Appeal and turned to the Supreme Court of Canada to have his plight considered.

The reason for the trial judge disallowing the first statement in evidence was due to the "oppressive treatment of the accused or police conduct which had effect upon him". This, the defence claimed, tainted the second statement. If the accused was treated in such a manner when questioned in November, that it caused him to fear the officers or police in general, then he can be expected to have had as much fear when he was interviewed by the same officers in January.

The Supreme Court of Canada said that there is no doubt that the state of mind of the accused is important and relevant to the admissibility of a statement*. However, fear on the part of the accused or apprehension when interviewed by police will not prevent a statement from being admitted in evidence. Said the Court:

> "An atmosphere of oppression may be created in the circumstances surrounding the taking of a statement, although there be no inducement held out of hope of advantage or fear of prejudice and absent any threats of violence or actual violence. However, . . .an accused's own timidity or subjective fear of the police will not avail to avoid the

* Horvath v. The Queen (1979) 44 C.C.C. (2d) 385 (page 22 of Volume 7 of this publication.

> admissibility of a statement or confession unless there are external circumstances brought about by the conduct of the police that can be said to cast doubt on the voluntariness of a statement. . ."

In addition to this, there may, of course, be circumstances that may affect the accused which are capable of creating doubt that a statement was voluntarily given. These are often not caused by any illegalities committed by polic but possibly relate to other circumstances, eg., time, place or length of interrogation.

Dealing with the common law presumption that the circumstances surrounding an interview which render a statement inadmissible may similarly taint a statement made during a subsequent interview, the Supreme Court of Canada unanimously decided:

> "Certainly, here there was a considerable time lag, enough to dissipate any lingering effect of the first statement . . . There was no advertence to the first statement when the second one was taken".

Accused's Appeal dismissed
Conviction upheld.

* * * * *

CRIMINAL LIABILITIES - CATAGORIES OF OFFENCE
DRIVING WHILE HONESTLY BELIEVING YOUR DRIVER'S LICENCE IS NOT SUSPENDED

The Queen v. MacDougall - Supreme Court of Canada, November 23, 1982

The accused was acquitted of driving while his driver's licence was cancelled. The offence is one created under the Nova Scotia Motor Vehicle Act. The Crown took the case via the Nova Scotia Court of Appeal to the Supreme Court of Canada.

The issue was whether the accused's claimed lack of knowledge of the cancellation rendered him innocent while driving during the period of cancellation.

The circumstances are interesting and as follows:

March 6, 1979 - the accused was convicted of "fail in duty at scene of accident" under the Criminal Code;

April 10, 1979 - the accused was sent an order of revocation of licence by the Registrar of Motor Vehicles;

The accused appealed his conviction;

May 1, 1979 - a notice of re-instatement of driving privilege pending the outcome of the appeal was sent to the accused;

Dec. 21, 1979 the appeal was dismissed;

Sometime in January 1980 the accused was informed by his lawyer of the appeal results;

Jan. 25, 1980 - the accused drove to his work and was stopped by police; when arriving home that evening, "Notice of Revocation of Licence" by the Registrar had arrived in the mail.

The Nova Scotia Motor Vehicle Act is similar to legislation in other provinces. It compels "the Registrar of Motor Vehicles" to revoke the licence of a person convicted of Hit and Run. The Act also provides that if a person appeals the conviction "he shall be deemed not to be convicted" for the purpose of the revocation of licence provisions. However, if the appeal is dismissed, "the driver's licence shall be thereupon and thereby revoked and remain revoked".

For all intents and purposes then, the accused's licence was cancelled again upon the dismissal of his appeal on December 21, 1979. It was

proved that the accused had, when stopped, knowledge that his appeal was dismissed. However, he claimed to be ignorant of the provision that his licenc was automatically revoked when his appeal was disissed. He was under the impression that he would receive a revocation order and that his licence was valid until then. When he drove and was stopped he had not received the notice yet. Did the honest impressions the accused had in regards to the status of his licence give him a defence? In other words, does "mistake of fact" on the part of the accused render him innocent? Were the misconceptions not a mistake of law rather than a mistake of fact?

There are basically three different categories of offences. If something provides a defence for an offence in one category, it does not necessarily follow that that is also a defence for offence in the other categories.

In offences of a true criminal nature, the Crown is obliged to prove mens rea. This consists of a positive state of mind, "such as intent knowledge or recklessness". Then there is the category known as "strict liability offences". Most provincially created offences belong to this category. Once the Crown has proved that the prohibited act was committed, the accused is liable. If the defence can show that every reasonable care was taken, liability may be avoided.

> "This involves what a reasonable man would have done in the circumstances. The defence is available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event".

The third category is offences of absolute liability. These are usually offences involving provisions, regulations and imposed duties which affect, for instance, health, safety and general public welfare which the legal system simply cannot afford to forgive a person for because he is free of fault. Sometimes proof that the event took place, coupled with statutory provisions that the accused is liable is sufficient. The offence can even be committed without a wrongful act (actus reus) on the part of the accused*.

* R. v. Pierce Fisheries Ltd. [1970] 5 C.C.C. 193 is a perfect example of this liability. The accused had 60,000 pounds of lobster delivered to his plant. Inspectors arrived and found 26 lobsters to be undersize. The accused had no intent and no one in the plant knew of the undersized fish.

The Supreme Court of Canada held that driving while suspended or while one's licence is cancelled is an offence of strict liability. In view of the clear and unambiguous provision in the N.S. Motor Vehicle Act, the accused's misconceptions were mistakes of law and not a mistake of fact. Ignorance of the law is no excuse and "the failure to appreciate the legal duty imposed by that law (that the licence was revoked when the appeal was dismissed) is of no solace to the appellant".

Crown's appeal allowed and new trial ordered.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS

Can one Person Separately Charged with the Same Offence as the Accused (Arising from the Same Circumstances) be Compelled to Testify at the Accused's Trial?

Chase and B. C. Attorney General Supreme Court of B. C. - Vancouver, September 1982 No. A822615.

Section 11 of the Charter of Rights and Freedoms assures the Right that someone charged with an offence not be "compelled to be a witness in proceedings against that person in respect of the offence".

Section 13 of the Charter guarantees that incriminating testimony cannot be used to incriminate the witness in any other subsequent proceedings except for perjury and giving contradictory evidence.

The Crown has taken the position that these sections constitutionalized the law as it was before the Charter became effective. The exception is that now a witness no longer has to ask the court for protection as he had to previously under the Canada Evidence Act. Now the protection is automatic. In other words, "there is nothing new under the legal sun".

It was also feared that the Charter would cause some legal "side tracking". Interruptions of trials were predicted so applications for remedies respecting every conceivable issue in the Charter could be taken to the superior courts. Although the system in the U. S. is different from ours, a somewhat similar "side tracking" process is a legal means to procrastinate and frustrate the legal system. To exercise the ultimate rights and freedoms the democratic system and the constitution provides. It was also feared that on account of the Charter, we would adopt "the pre-trial motions of exclusion procedures of the U. S.

However, our Courts seem to prevent this. In several cases it was held that the extra ordinary remedies do not apply. If a Charter issue is to be decided, the trial Courts, having jurisdiction over the offence, are competent to rule on these issues. The party who feels that the ruling contributed to a verdict adverse to him, can appeal and raise the Charter issue again. This at least seems the trend of the judgments of our superior Courts.

In his case the Crown proceeded against three persons with arson and wilful damage in respect to a building fire. One party (A) was charged separately and B (Mr. Chase) and C jointly. When A was to be tried B was subpoened by the Crown. As the law was, prior to the Charter, this could be done. However, B immediately petitioned the Supreme Court to, in essence, quash the subpoena. B claimed that by virtue of sections 11 and 13 of the Charter she was not compellable to testify at A's trial. Being charged herself with identical offences arising from the same circumstances, would mean that she would be compelled to incriminate herself.

The Supreme Court Justice declined to intervene. The Court commented that the issue was one in respect to the admissibility of evidence in which the trial courts have jurisdiction. He said that B should raise her objections during the trial. It is up to the trial judge to determine if B's evidence is receivable at A's trial, held the Court and included in the reasons for judgment:

> "If it was otherwise there would be interminable and intollerable delays in the trial process in those courts subject to the supervision of superior courts".

AMEN!

* * * * *

UNLAWFUL POSSESSION OF MUSHROOMS

The Queen v. Dunn, Supreme Court of Canada, November 23, 1982

Mushrooms containing psilocybin in their natural form, have become a problem from legal and other viewpoints. For instance, is the owner of land (who knows that such mushrooms grow on his land) guilty of an offence under the Food and Drugs Act which prohibits possession of psilocybin? Should perhaps possession of a natural plant (the integral part of which contains an illegal drug) whether harvested or not, be excluded from the offence of possessing a restricted drug?

Parliament did not name the mushroom but only the drug (psilocybin) in its prohibiting legislation; should therefore a person only be punishable when he is in possession of the extracted drug only? The B. C. Court of Appeal and its Alberta counterpart found in 1979[1] and 1980[2] respectively, that "mere possession of the substance known as psilocybin, as an integral part of the plant in which it is found in nature, cannot support a conviction for possession of a restricted drug . . .". Because of these precedents the accused Dunn was acquitted of a charge that he did traffic in psilocybin by selling the mushrooms which contained the drug in their natural state. The Crown took the case to the Supreme Court of Canada.

The defence argued that if Parliament had intended to create an offence for possession of the plant (mushroom) as well as the drug, it would have enacted provisions similar to those in the Narcotic Control Act where possession of certain plants as well as the substance they contain is prohibited.

The Supreme Court of Canada however, concluded:

> ". . . that the actual compound known as Psilocybin, not merely the constituent elements from which it could be chemically produced, exists in the mushrooms, and that its hallucinogenic effects may be obtained by chewing or eating the mushrooms".

This left the Court to decide if "Psilocybin, naturally occurring in a mushroom is listed in Schedule H..." and if the accused, by selling the mushrooms, did traffic in that drug.

[1] R. v. Parnell (1979) 51 CCC (2d) 413
[2] R. v. Cartier (1980) 54 CCC (2d) 32

The accused had agreed to sell to an undercover officer one pound of mushrooms that contained psilocybin. The conversation between the constable and the accused as well as the $3,000 price tag showed that the psilocybin was the object of the sale and the mushrooms were merely incidental to it. The Constable, while examining the mushrooms, said: "So this is the Psilocybin shit, eh. The accused had replied, "Yeah, that's the stuff. Why don't you try a chew".

This and the accused's assessment of his merchandise (he told the undercover officer that it was "good stuff") excluded the possibility that the mushrooms were sold for food value, "and any other conclusion is impossible".

The Court said on the issue whether the mushrooms as a plant are a restricted drug under Schedule H.

> "... the fact that psilocybin may be contained within a mushroom does not destroy its character as a restricted drug under Schedule H of the Food and Drugs Act"

The Supreme Court of Canada said that with the greatest respect for the learned judges of the Courts of Appeal, that they wrongly decided the cases on this issue. The farmer who may unknowingly have such mushrooms on his land is in mere physical possession of the drug but not in unlawful possession as is stipulated in the Act.

> ". . . reason and common sense on the part of the authorities would protect him if on discovery of the nature of the mushrooms he took the necessary steps to have them destroyed".

Crown's appeal allowed.
Case referred back to the trial court for completion.

* * * * *

POSSESSION OF A WEAPON DANGEROUS TO THE PUBLIC PEACE
SELF PROTECTION

Sulland v. The Queen B. C. Court of Appeal CA820276 November 1982

The accused was seen walking alone in an area "in which trouble could be anticipated". The accused was seen to carry something under his jacket and police stopped hm. As it turned out the item was a part can of beer. However, the accused also wore a large jack-knife (3.5" blade) in a sheath and when questioned about this, he said he carried it "For protection. To use if I get jumped on or someone comes on to me".

When tried for possession of a weapon dangerous to the public peace, the trial judge concluded that although the accused showed he also used the knife for useful purposes, it was improper in our present society for a person to arm themselves to walk the streets.

The accused appealed his conviction claiming that the trial judge erred when he equated self protection with a purpose dangerous to the public peace.

In Ontario* a man carried a concealed knife with an 18 inch blade into a bar. In a confrontation which he had anticipated, he injured several persons. The Ontario Court of Appeal said that "not withstanding" the accused's explanation of self defence, a person who possesses a weapon for such a purpose can still do so endangering the public peace. The circumstances, including the nature of the weapon, the situation in which the accused has it in his possession, his explanation, and the use to which he actually puts it, will determine whether the object carried was for a purpose dangerous to the public peace.

The questions in this Sulland case are whether the knife was a weapon and if carried for purposes and in circumstances as described, it was dangerous to the public peace.

Firstly, the Court held that the knife was not designed to be a weapon, therefore only the accused's intent could make it such (section 2 Criminal Code). The Court concluded that section 85 C.C. (possession of a weapon dangerous to the public peace) does not prohibit a person from arming himself for self protection. The B. C. Court of Appeal reasoned that as long as a person's conduct does not provoke an attack, carrying something in a lawful manner for the purpose of self-defence, with the intent to use it responsibly, is not an offence. Although the Court recognized that it may well be unwise to prepare to defend oneself and

* R. v. Nelson

that the presence of a weapon is likely to result in greater injury, the Justices said:

> "In the secure surroundings of a court house we might think it better that people be beaten or raped than that they, or their assailant, be injured with a weapon. But those who must walk unsafe streets and who are not robust might feel quite differently. They might not be prepared to accept a beating. Some might choose to defend themselves. A woman might have a hat pin and no hat. Is she, without more, guilty of this crime? Surely not".

The accused walked alone in an area where trouble may be expected. The knife was closed, in a case and unconcealed. Besides the tool it was to him, he said not to hesitate to use it if attacked. That does not constitute the offence of carrying a weapon dangerous to the public peace and made this case distinct from the Ontario case).

Appeal allowed
Conviction set aside and acquittal entered.

* * * * *

RIGHT OF POLICE OFFICERS TO BE REPRESENTED BY COUNSEL AT DISCIPLINARY HEARINGS

Between the petitioner Constable J and the respondents, the Vancouver Chief Constable and the Attorney General of B. C.
The Supreme Court of B. C., November 1982, No. A822132 Vancouver Registry

Constable J allegedly ordered a citizen to "get in the . . . car". The omitted adjective was not complimentary to the car nor was it considered courteous or civil by the recipient of the constable's order. The citizen lodged a formal complaint against the constable, a 13 year veteran with an "unblemished" record and reputation.

The mandatory investigation resulted in the Chief's delegate completing a Form 3 alleging that Constable J committed a disciplinary default, to wit, "Abuse of Authority" contrary to section 7(c) of the Police Disciplinary Code under the Regulations to the Police Act*.

The maximum penalty recommended by the investigating officer was an eight hour (one day) suspension without pay. The Disciplinary Code stipulates that a police officer is only entitled to be represented by a member of the Law Society at a disciplinary hearing if the maximum penalty recommended is dismissal, resignation or a reduction in rank. In spite of this, Constable J appeared before the hearing officer accompanied by a lawyer. The constable was not allowed the representation. The hearing was then adjourned so Constable J could petition the B. C. Supreme Court on this issue.

Counsel for Constable J. contended that the new Charter of Rights and Freedoms renders the Disciplinary Regulation that deprived her client of his right to counsel, ultra vires the Lieutenant Governor in Council (the Provincial Cabinet which passed the Disciplinary Code as a Regulation to the Police Act). In other words, in view of our guaranteed Rights, the provision that a police officer could not be represented by professional counsel at a disciplinary hearing was claimed to be excessive from a constitutional standpoint.

Constable J's counsel argued that her submission was supported by section 7 of the Charter, which provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

* Consult Police Disciplinary Code for procedural options.

Constable J's life or liberty was not jeopardized by the disciplinary hearing, but, it was claimed, the security of his person is. "Losing an unblemished record and reputation and other potential losses consequent thereon are included within 'security of the person'" argued the constable's lawyer.

The Supreme Court's Chief Justice who considered J's petition held that the argument was interesting. However, he concluded that it was not necessary to decide whether 'security of the person' should be given the broad interpretation suggested by Constable J's counsel or the restricted one that only "a risk of loss of some personal physical amenity" engages the Right. Hence, the Charter was of no assistance. (Section 10 of the Charter was of no assistance either as the Right to Counsel it guarantees only applies to an arrested or detained person).

The Chief Justice gave his reasons based on the common law concept of "fundamental justice" which is "justice and fairness, nothing more and nothing less". He said this made it necessary for him to also consider if Constable J has an "absolute right to be represented by counsel" before a tribunal such as the one which conducts hearings under the Disciplinary Code.

Many of the cases reviewed by the Court were dealing with a variety of tribunals. Some had jurisdiction over licences prerequisite to practising a certain occupation or profitable activity; another was a "domestic tribunal" (in-house association trial committee) and others had jurisdiction over disciplinary proceedings in "disciplined forces" such as police and armed services. All of these tribunals had power to affect the livelihood and reputation of the persons they try. Precedents seem to have created categories of tribunals which are distinct from one another in relation to the question put here. Courts have been inclined to hold that a person has a right to professional counsel if the tribunal has jurisdiction to impose anything that is adverse to his reputation or livelihood, but has not been inclined to do so where the tribunal is one having jurisdiction within a disciplined force. In any event, the common law does not seem to provide an absolute right to counsel at a disciplinary hearing.

In recently decided cases, there is an obvious departure from this thinking. Regardless of provisions in disciplinary regulations or the R.C.M.P. Act, courts have held that members of disciplined forces have a common law right to be represented by professional counsel. In the Discipline Code applicable to the Calgary Police Service, accused members were, according to regulations, only entitled to be represented by counsel before the Law Enforcement Appeal Board but not when tried by a hearing officer. Recognizing that the right to counsel before quasi judicial tribunals is "not yet" absolute, the Alberta Supreme Court held in 1974[1] that the procedures to be followed were similar to Court

procedures and the charges were serious and could affect reputation and livelihood. Therefore it was essential to fairness that the officers "should have trained and independent representation". In the circumstances, denial would be akin to denying natural justice said the Court.

In 1981 the Federal Court dealt with a similar issue arising from Service Court procedures established under the R.C.M.P. Act[2]. Two members charged with "major service offences" had been denied representation by professional counsel. The penalties provided ranged from a reprimand to one year in jail with some fairly severe ones in between. Yet the regulations under the R.C.M.P. Act did specifically provide that accused members are not entitled to professional counsel (at best they may be represented or assisted by another member). Finding the arguments advanced by counsel for the Force "nothing short of ludicrous" and concluding that Parliament (when enacting the R.C.M.P. Act) could not have intended the Federal Cabinet to make regulations that would deprive members of the Force of a basic right to counsel, the Federal Court held that the regulations prohibiting legal representation in the Service Court were excessive. Therefore, that regulatory provision was found to be "ultra vires and of no effect, at least in so far as a trial for a major service offence under the Act is concerned".

This left the Chief Justice of the B. C. Supreme Court to decide from what direction to approach Constable J's petition. Should he consider the vires of Regulation 18(2) of the Police Discipline Code (whether the regulation was excessive and therefore not within the jurisdiction of the Provincial Cabinet to make) or should this case be decided on its specific circumstances? The Court decided to only do the former and concluded that if right thinking citizens would objectively conclude that Constable J, who stood to lose one day's pay and have the conviction noted in his personnel record, could fairly be denied counsel at the hearing, then the regulation would be valid. Being in agreement that this was the appropriate test, counsel, opposing Constable J's petition, urged that denying counsel "in cases which are not serious" is fair.

The Court responded that only disciplinary cases conducted formally on a "man to man" basis where no entry is made in an officer's record, will belong to that "not so serious" category. Said the Chief Justice:

> "In today's society, where career decisions must be made at an early age, and many of our citizens do not have a second chance and where all policemen are assumed to be career officers, and where good conduct is obviously an important factor in promition and

[1] Bachinsky and Cantelon v. Sawyer [1974] 1 W.W.R. 295
[2] Re Husted and Ridley and The Queen (1981) 58 C.C.C. (2d) 156

> therefore in salary, and where pension and other benefits depend in part upon salary in the closing years of a career, it is clearly untenable to argue that a recorded conviction for a disciplinary default . . . even for using one naughty participle . . . is not serious".

The Supreme Court obviously considered all complaints which result in formal hearings and notations on personnel records per se serious.

The Court

(a) declined to "indulge in an exercise of classification to determine what is serious and what is not";

(b) rejected the "disciplined force" exception to the right to counsel because a police officer has as much right to protection of livelihood as persons in any other career or occupation; and

(c) refused to accept and labelled as an anachronism the proposition that there is a "national contractual acceptance" of unfair disciplinary procedures when joining a military or semi military force.

Apparently it was also suggested to the Court that police officers were sufficiently familiar with criminal procedures and the law of evidence that they could effectively act on their own behalf when charged with a "not so serious" disciplinary default. The Court rejected also this suggestion and said that even in respect to a lawyer who defends himself, it is a "powerful wisdom" to say that he has a fool for a lawyer and a fool for a client.

Stopping short of saying that Constable J had an absolute right to be represented by counsel the Supreme Court concluded that a denial of Counsel in these circumstances amounts to a breach of the principles of justice and that by creating s. 18(2) of the Police Discipline Code the Cabinet (Lieutenant Governor in Council) had exceeded its authority. Accordingly, the section is ultra vires and of no force or effect.

Constable J's petition was granted, and the Chief Justice did prohibit the hearing officer or any other hearing officer from proceeding with the charge "unless the Petitioner is allowed to be represented by counsel, if he wishes".

* * * * *

CREATING A DISTURBANCE - SHOUTING OBSCENITIES AT POLICE

Mysak v. R. [1982] 6 W.W.R. 563
Saskatchewan Queen's Bench

Although decisions by Courts of other provinces are not binding on B. C. Courts, the Justice in this case relied on a recent decision by the B. C. Court of Appeal*.

The accused was a passenger in a pick-up truck occupied by three men. A police officer pulled the truck over and gave the driver a roadside test which he passed. During the test and again at the conclusion of it, the accused wanted to talk to the constable about an incident that occurred a few days earlier involving the accused's father. When the constable refused to discuss the matter, the accused became very angry and shouted: "You're not even a cop. You're nothing but a fucking pig". This assessment of the officer was shouted several times along with other uncomplimentary remarks which could be considered obscene in certain circles.

The scene occurred at 1:30 with no one around other than the accused's two companions who testified not to have heard the utterings. In any event, they were not affected or disturbed.

At trial, the Crown proved all elements to the offence and the Judge convicted the accused holding that the words, "fucking pig" were offending. The accused appealed.

The evidence showed that the constable was affected in that it had disturbed his emotional peace. However, that was not enough; "without more" than shouting alleged obscenities there was no disturbance caused. This made it unnecessary to determine if the words spoken are in fact obscene.

The Court did not appear to reject the claim that no disturbance was caused on the basis that the person affected was a peace officer.

Appeal allowed
Conviction quashed

Comment: The judicial opinion is somewhat vague on some of the issues involved in this question. Basically, what the Courts have struggled

* R. v. Peters [1982] 2 W.W.R. 520

with, particularly in marginal cases, is whether the disturbance has to have the nature of a public disturbance. The courts are, no doubt, reluctant to hold that one disturbed citizen is adequate to render another citizen criminally liable. An orthodox pastor may walk by a road construction site and overhear an unsavory comment; is the construction worker now criminally liable because the pastor is disturbed? Should utterances directed at one person only in a public place be adequate to legally find that they caused a disturbance because the addressee was affected by what was said? Must the perpetrator of this crime randomly have done the things mentioned in the section and thereby disturbed the public? In other words, must the disturbance be a public disturbance?

Holding that the section only prohibits a public disturbance from being caused may well go beyond the protective intent of the section; giving it an interpretation that evidence of a disturbed citizen is adequate to convict, is also an intollerable extreme. What would have been an interesting question in this case too, is whether the language used is obscene.

The Justice did recognize the conflicting interpretations of this section and saw the distinction as follows:

> "All that the section requires is that one of the acts specified in the section, that is, fighting, swearing, etc. be done in circumstances where it disturbed a person or where such disturbance might be inferred.
>
> The other view is that the section requires that the specified acts, i.e., fighting, swearing, etc. must cause a disturbance and it must be in the nature of a disturbance itself."

* * * * *

DRIVING OVER A SOLID LINE DIVIDING A LANE AND THE PAVED SHOULDER OF A ROAD.

R. v. Argast Vancouver County Court Vancouver Registry No. CC820097

The accused, riding a motorcycle, passed a line of traffic in the lane nearest the shoulder of the road by crossing a single solid line dividing the travelled lane and the paved shoulder of the road. In other words, he passed on the right by driving on the shoulder of the road. The accused was charged with disobeying a traffic control device under section 130 of the B. C. Motor Vehicle Act. A Justice of the Peace convicted the accused but he appealed claiming that the passing by crossing the single solid line that divides the shoulder of the road from a travelled lane is not against the law.

On appeal, the Vancouver County Court held that the combination of the definition of 'roadway' and that of 'traffic control device' coupled with section 130 M.V.A. does not lead to finding that the accused committed an offence. In essence, the Court found that the law was clear on single solid lines which divide lanes of a highway. The single solid line the accused crossed marked the boundary of the roadway but was not dividing two roadway lanes designated for traffic travelling in the same direction. The Court found no section that specifically prohibits the driving over a solid line that divides the shoulder of a roadway from the travelled portion. As a matter of fact, there is no mention of such a line (traffic control device)

Accused's appeal allowed
Verdict of 'not guilty' recorded.

* * * * *

SEARCH AND SEIZURE OF MONEY - INTEREST OF REVENUE CANADA

Slainberg v. Sgt. B. (R.C.M.P.) Supreme Court of B. C. December 10, 1982 Kamloops Registry No. 6659

R. C. M. Police Officers obtained a search warrant for the residence of Mr. L. upon reasonable and probable grounds for believing that . . . "unregistered restricted firearms are unlawfully being kept contrary to s. 89(1) Criminal Code of Canada. . . ". The warrant was executed and besides Mr. L's residence, outbuildings on his property were also searched. These buildings, however, were used by Mr. L's tenant, Mr. Steinberg (the petitioner) who lived on the property in a converted schoolbus. Mr. L. was present during the search but Mr. Steinberg was not home at the time.

No firearms were discovered, but in a grain bin, in a building used by Mr. Steinberg $2,600 in U. S. traveller's cheques and $16,200 in cash were found. Police took the cheques and the money and when Steinberg claimed it back it was refused although no charges were laid.

The Police at first suspected that the funds were the proceeds of the crime of cultivating and trafficking in marihuana. Paraphernalia believed to be used in cultivating the narcotic had been found. As no evidence was found to connect the funds with any crime, Revenue Canada was alerted and they commenced an investigation. Steinberg had reported an annual income of ± $4,000 for the last three years and the tax department ordered that the funds not be returned to Steinberg until they had completed a 'jeopardy assessment' as provided under the "Income Tax Act". Steinberg's counsel could not receive any satisfaction as to the intentions of the tax people.

Mr. Steinberg then petitioned the Supreme Court to quash the search warrant and to order that the money taken on the strength of it be returned to him.

The tax dispute between Mr. Steinberg and the Federal Crown is, of course, not within the Provincial Supreme Court's jurisdiction but within that of the Federal Court. The tax department filed a certificate in the Federal Court which, by reason of the Income Tax Act, has the same force as a judgment of that Court. Steinberger was, according to this document, assessed $21,000 and Sgt. B was, as a third party, ordered to turn the funds he held over to Revenue Canada as a part payment towards

the taxes owed. The latter is authorized by the Income Tax Act which provides that the Minister may order a person who is or is about to become indebted to someone who owes taxes, to pay the Receiver General the amount instead of the tax debtor. Sgt. B. was now confronted with conflicting claims, one by Revenue Canada and on the other by Steinberg, and he sought relief by way of interpleader as provided for under the Supreme Court Rules. After all, Sgt. B. had personally no interest in the dispute between Steinberg and Revenue Canada.

Since Steinberg petitioned the Supreme Court, a number of things accurred which changed the legal picture from what it was at the time he filed. An adjournment was granted to enable the lawyer for Sgt. B. to collect all relevant facts as the notice of hearing was served on B. only two days before the hearing. Revenue Canada had used this period to "invent or perfect some new legal position" by filing the certificate in the Federal Court and serving Sgt. B. with the order. This, the Supreme Court Justice said, was "an abuse of court process". The adjournment was granted for a different purpose. "No court will tolerate such misuse of an adjournment". Therefore, whatever the 'revenuers' manipulated in the meantime was ignored and Steinberg's position was considered in respect to its standing when he filed the petition.

The Court found that at the conclusion of the investigation to determine if the funds were the proceeds of cultivating marihuana, the money was the property of Steinberg and it should have been returned to him forthwith. From that time on, the R. C. M. Police had no claim to the money under any pretext and held it illegally. On the day Sgt. B. was served with the Federal Court order, he had the money without any colour of right and it should have been then in the hands of its rightful owner, Mr. Steinberg. Therefore, the order had no effect.

When police seize money, they may advise Revenue Canada, but that does not confer any authority not to return it to its owner. His right to ownership supercedes at that stage the interest of the tax people.

If Revenue Canada advises the police to retain the money, they counsel an unlawful detention of property and may also be subject to liability.

Money was ordered to be returned to Mr. Steinberg.

Note: In the reasons for judgement the Supreme Court Justice quoted from a well-known Manitoba case* which addresses itself generally to the

* Welch v. Gilmour and Blackstock [1955] C.C.C. 221

police being the conscience of a prisoner or the arbitrators in his personal indebtedness.

> "Police have no right to seize money found on a prisoner where there is no ground for believing that it was connected with the offence charged. Such money must be returned directly to a prisoner and cannot be the subject matter of garnishment proceedings".

* * * * *

ADEQUACY OF A TRAFFIC VIOLATION REPORT

The Queen and Senft Supreme Court of B. C. December 14, 1982 Prince George Registry No. 133/82.

In 1975, a police constable issued a Traffic Violation Report to a person[1] for speeding. The officer wrote to describe the violation:

> "Violation - Section 140(3) Speed - 50.
> Legal speed - 40. Conditions at time of violation
> - speeding."

The B. C. Supreme Court found this to be an inadequate description of the violation.

Recently a constable wrote on the Traffic Violation Report he issued Mr. Senft:

> "Section 150(3) Speeding".

The Judge who heard the case dismissed the allegation as the Report was insufficient in describing the violation. The Court had done so on account of the precedent given above.

The Crown appealed claiming that the precedent has been negated by rulings of the Supreme Court of Canada[2] that make it plain

> "... that objections to indictments, and other initiating process, which are based on technicalities as opposed to defects of substance, can no longer prevail"

The B. C. Supreme Court Justice agreed with the Crown's submission and held:

> ". . . I conclude that the objection taken is not one of substance, but relates only to form".

Finding that it was clear that it was alleged that the accused drove at a higher speed than what was permitted by law, the description of the violation was sufficient.

[1] R. v. Boyer (Vancouver Registry No. 0064/75 August 29, 1975)
[2] R. v. Cote (1977) 33 C.C.C. (2d) 353
R. v. Sault Ste. Marie (1978) 3 C.R. (3rd) 30.

ARSON - CIRCUMSTANTIAL EVIDENCE - SIMILAR FACT EVIDENCE

The Queen v. Whittaker - The County Court of Vancouver - December 1982. No. CC821382 Vancouver Registry

The accused lived in an apartment building. On the day of the alleged offence (arson), the accused alerted his landlady of a fire in a hallway around the entrance door of a recreation room. The accused had used the fire extinguisher to put it out. After all the excitement was over the accused went to a bar and was followed by police who found him back again at the scene of the fire examining the extinguisher.

The accused gave versions of his involvement to the landlady, an insurance adjuster the police and in testimony to the Court. They were to tally inconsistent with one another and found not worthy of belief and rejected by the Court as 'not being credible' and complete fabrications.

The Crown sought a conviction based on circumstantial evidence comprised mostly of similar fact evidence of arson fires in which the accused was involved and the false statements made by the accused.

It is only natural for police to concentrate on persons they know to be predispositioned to commit the crime that is under investigation. Particularly were the belief for such predisposition is based on previous convictions for similar offences.

However, "no number of similar offences can connect a particular person with a particular crime . . .". Therefore, before similar fact evidence is admissible, it must be shown to be relevant and have some probative value. It simply cannot be admitted to show bad character on the part of the accused and/or that because of previous similar acts he is likely to have committed the offence for which he is tried. The prejudice created by admission of such evidence without such relevance or value would by far outweigh its evidentiary value.

Then what can it be used for? The Courts have permitted it in evidence where the evidence ...

> ..."may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or

> accidental, or to rebut a defence which would otherwise be open to the accused" or for "other relevant, probative purpose...".

In other words, if there is nothing to connect the accused with the crime charged other than evidence of bad character and of having committed similar crimes before, the similar fact evidence must be rejected.

The Court gave an example of the use of similar fact evidence. If in a rape case the perpetrator had, during the act, done something bizarre in the circumstances such as reciting a poem, for instance, then, if he had done this before while having sexual intercourse and if the issue is one of identity, the similar fact evidence of that unusual behaviour is admissible. Of course the purpose is not to show that he raped before but to prove his habit of reciting poetry while having sexual intercourse.

In this case, the circumstantial evidence adduced by the Crown shows either remarkable coincidences of the accused's presence at mysterious fires or it proved that the accused has a severe problem and suffers of pyromania. The Crown showed that within 8 months several fires broke out in the immediate presence of the accused.

1. A fire broke out in a large garbage container in a basement room of the apartment building in which the accused resided. Despite the early morning hour, the accused was at the scene advising on the sprinkler system.

2. A few weeks later, the fire occurred which is subject to the charge of arson against the accused. Besides the accused's involvement outlined above, the police who followed him from the bar to the apartment block lost sight of him for a few minutes. During these minutes a fire was started in a breezeway between two buildings. The location was in the path of the accused. Although the accused's connection is tenuous, the evidence has some weight.

3. Approximately one week later a car was deliberately set on fire in the underground garage of the accused's apartment building. Again, he was at the scene.

4. Two months later, and two weeks after the accused moved into another apartment building, a car was deliberately set on fire in the underground parking lot. The accused who shared his new apartment with a girl friend was, according to the friend, completely dressed when he awakened her to evacuate the apartment. The car that was burned was known to the accused as he received a ride in it the previous day; yet he inquired of his friend if she knew anyone who had a car like the one that burned in the underground garage.

5. Two weeks later the accused partied with another girlfriend (the fire chief's daughter) in the girl's apartment. He had quite a bit to drink and walked the four blocks to his own apartment in the early morning hours. After the accused's departure, two vehicles in the underground parking lot were set afire. The girlfriend had urged the accused to use a side entrance to leave. She had watched out for him but he had not used that exit. While on his way home and in the normal path of travel between the two apartment buildings, a fire was set to a news paper building, and the sauna area in the accused's building went up in smoke. The latter was also deliberately set. The accused helped to evacuate the building and pulled the fire alarm. In regards to the newspaper building, he phoned the fire department to report the fire.

All this evidence implicates the accused and shows opportunity. This, coupled with the accused's false statements, was sufficient to find that the burden of proof had been met. However, the Court held that the lies must not receive separate consideration and are part of the circumstantial evidence.

> "To conclude the accused is simply the victim of a hugh set of unhappy coincidences, 'a run of bad luck' as the accused puts it, is two shocking to common sense to prove an overall rational conclusion contrary to that of guilt".

The only rational conclusion was the guilt of the accused.

* * * * *

TID-BITS

House Party - Breach of the Peace

Police attended to a complaint of a noisy and wild house party. They were met by abusive language and revolting attitude. A sweep was made through the house and the guests were evicted via the front and back door. The accused belonged to the group which exited the rear and was forced to continue on his way through a back alley as the officer walked four abreast behind them. The accused broke away from the group and attempted to return to the house by some other route. An officer placed the accused under arrest for breach of the peace. The accused responded by means of a vigorous struggle and found himself charged with resisting a peace officer in the lawful performance of his duty.

With the greatest of sympathy for the predicaments encountered by police when called to these house parties (which no doubt are sociologically problematic) the trial judge found that the arrest was unlawful. A breach of the peace is not a mere annoyance or insult to an individual. It is the commission of assault, an affray, a matter of public alarm or excitement. The Judge went as far as to say that any arrest other than those for a specific criminal offence are unlawful.

The house party problem was recognized but considered to be one to be resolved by the legislators.

Accused was acquitted.

R. v. Lefebre 67 C.C.C. (2d) 466. B.C. Provincial Court February 1982

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Self Crimination - Charter of Rights

Section 13 of the Charter of Rights which probably replaces s. 5 of the Canada Evidence Act states:

> "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence".

The accused testified at his trial for robbery which ended up in a hung jury. The accused was tried again. The Crown applied to adduce the accused's testimony during the first trial. This was not allowed. When the accused testified at his second trial, the Crown wanted to use the transcript of the accused's testimony at the first trial for the purpose of cross examination. Based on section 13 of the Charter, the Court held that the accused's testimony during the first trial could not be used against him in the second trial.

R. v. Wilson Ontario County Court 67 C.C.C. (2d) 481

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Charter of Right - Presumptions of Guilt

On page 9 of Volume 7 of this publication, you find R. v. Anson which is the answer of a B. C. County Court Judge to the question whether section 8 of the Narcotic Control Act is in violation of the presumption of innocence under the Charter. (Since then the B. C. Supreme Court has refused to intervene in this ruling and in essence advised defence counsel to raise the issue in an appeal in the event Anson is convicted). In Saskatchewan the validity of section 8 of the Narcotic Control Act was also questioned in view of the Charter, during a trial for trafficking in marihuana. The Saskatchewan Court of the Queen's Bench Justice observed that the wording of the Bill of Rights of 1960 in regards to the presumption of innocence is very similar to that used in the Charter of Rights and Freedoms of 1982. The Supreme Court of Canada held in 1971* that the statutory presumptions were not contrary to the presumtion of innocence but simply cast on the accused a burden "to adduce negating evidence that would carry proof on a balance of probabilities". This is not an ultimate burden to prove his innocence with respect to any element of the offence charged.

The Saskatchewan Court held that section 8 N.C.A. is reasonable and necessary to give law enforcement officers the tools to enforce the Act. Without the onus section 8 put on the accused the Crown would be in a position which is as impossible to proving a negative or an exception.

> "Who better than the party in possession of the substance can explain the purpose other by his own evidence or the evidence of others"?

The Court concluded the s. 8 N.C.A. is in full force and effect.

R. v. Fraser 68 CCC (2d) 433 June 1982, Saskatchewan Court of Queen's Bench

Note: In Alberta the Supreme Court has also held that statutory presumptions in the Criminal Code are not disposed by the Charter of Rights.

* * * * *

* R. v. Appleby (1971) 3 CCC (2d) 354

The accused was charged with impaired driving and the Crown proceeded by summary conviction. The accused pleaded not guilty and the case was adjourned and adjourned and etc. . . Finally, eight months later the Crown and defence were all set for trial. However, the provincial court judge dismissed the case without hearing evidence or considering any submissions. The Judge gave as a reason not being aware that the accused had consented to all the adjournments and, therefore, he felt he had lost jurisdiction over the case.

Considering this to be legal balderdash, the Crown proceeded with a new information but was forced to proceed by indictment as the six months' limit for proceeding by summary conviction had expired. The accused pleaded autrefois acquit. The validity of the plea that he could not be charged with the very offence of which he was acquitted previously became an issue. The Court of Appeal said the erroneous reason for which the trial judge dismissed the first information invalidated the acquittal and, therefore, the plea of autrefois acquit was not available to the accused. The Supreme Court of Canada reversed that decision and said that whether or not the trial judge was wrong, the acquittal prevented the Crown from relaying the charge.

If the Crown had wanted a remedy to the judicial error, it should have appealed the dismissal rather than proceeding with a new information.

(Petersen v. The Queen, Supreme Court of Canada, September 28, 1982.)

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