ISSUES OF INTEREST

VOLUME NO. 13

Written by John M. Post

September 1983

ISSUES OF INTEREST

VOLUME NO. 13

Written by John M. Post
September 1983

TABLE OF CONTENTS

WARNING!

Decisions made by the courts of a province regardless of their level, are not binding on courts of another province. However, when a decision is to be made in regards to an issue where no precedent exists within the province, then indistinguishable rulings by courts of other provinces are influential, particularly when made by a Court of superior jurisdiction. Decisions by the Supreme Court of Canada are, of course, binding on all Courts in Canada.

This system of law making by our judiciary is known as stare decisis. It simply means that once a Court has created a principle (for instance to be applied to a certain set of facts) it must consistently apply to all future cases where the circumstances or the law are not distinguishable. Our judges are ethically obligated to strive for a consistent and equitable application of the law regardless where in our nation one is being judged. For this reason rulings made by Courts in other provinces are pursuasive and ought to be followed unless a judge disagrees quite strongly with the correctness of these decisions.

When a decision on an issue has been made, then, of course, it is a binding precedent on all the Courts in that province, inferior to the one in which the decision was made.

This explanation is placed in this Volume as it contains synopses and explanations of reasons for judgment made by courts in provinces other than British Columbia. Most of those cases are selected because to the best of the author's knowledge, no binding precedent exists on that issue in B. C.

* * * * *

FRAUDULENTLY USING A CREDIT CARD BEYOND THE CREDIT LIMITS. IS THIS OBTAINING CREDIT, GOODS AND MONEY BY FRAUD?

Re Hanes and The Queen. 69 C.C.C.(2d) 420
Ontario High Court of Justice

The accused, who had a credit line of $3,000 on a credit card, went on a financial binge and spent nearly $26,000 for goods and services in California. She was charged with having defrauded the credit company of money. She agreed that her actions were with the intent to defraud the credit company but argued that although that company is located in Ontario the offence was committed outside the jurisdiction of the Ontario Courts. Secondly, she argued that she obtained credit by fraud but that the credit company was not deprived of any money as was alleged.

The defence had argued that the credit company had been deprived of credit and the Court agreed that the charge against the accused would also have been good if it had alleged fraudulent obtaining of credit. After having heard that funds were transferred to the financial institutions where the California merchants had deposited the credit slips the accused signed, the Court said:

> "Such payment of course, is not made in banknotes or coins, but is, I presume, made by the transfer of funds between the financial institutions using their instruments for effecting such transfers. In my judgment, such payments constitute the payment of money within the meaning of section 338."

In respect to the Court's jurisdiction, the Justice had plenty of law to refer to. It is widely accepted that where a person is charged with having committed acts at a location outside the Court's geographical jurisdiction, then if the harmful consequences are within that jurisdiction the person can be tried by that Court.

In this case the credit company locate within the Court's jurisdiction was the victim of the accused's acts in that it was called upon and did make payments to the merchants.

The accused had been committed for trial upon a preliminary hearing. These arguments were raised in the High Court of Justice in an attempt to have that committal quashed.

> Application to quash committal for trial was dismissed.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS

EXTRADITION LAWS - RIGHT OF A CITIZEN TO REMAIN IN CANADA

The Matter of the Extradition Act and in the Matter of Gunther Voss - B. C. Supreme Court. Vancouver May 1983. Registry No. CC821424.

The State of Michigan, U.S.A. was seeking Voss' extradition. Voss is a Canadian citizen who allegedly committed fraud in Michigan. Voss claimed that section 6(1) of the Charter supersedes anything the Extradition Act stipulates. The section guarantees Voss that he, being a citizen of Canada, "has the right to enter, remain in and leave Canada". No doubt, the Extradition Act places some limitations on the assurance of remaining at least.

The Court brought section 1 of the Charter into the dispute. This section in essence says that the Courts must not go too far afield on these rights and freedoms, at least not on this side of the Pearly Gates. The entrenched enactment states that the rights and freedoms are guaranteed but "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Such a society may well be heaven compared to those with different philosophies about governing, but it can only afford so much legal luxery. Therefore, the Court had to decide whether the provisions in the Extradition Act which were straining Voss' rights, were reasonable limitations on his right to stay home.

The Court weighed Voss' argument and found it wanting. Said the Court:

> "Were it otherwise, a Canadian could commit any crime with impunity as long as he committed it in somebody else's country" and
> "Being subject to extradition, then, is a reasonable limitation of the citizen's right to remain in Canada".

* * * * *

CREATING A DISTURBANCE

DISTURBING PERSONS IN A DWELLING HOUSE

Regina v. Woniandy - Saskatchewan Court of Queen's Bench August 1982 (No. 19)

The accused had a problem with her 14 year old son about where he was to spend the evening. The accused "was under the influence of alcohol" at the time. The boy sought refuge at his grandparents' place. The accused followed her son there and a scolding and argument resulted in the boy receiving a bloody nose.

Two hours later the accused came around again to retrieve her son. She banged on the door, screamed and shouted. The occupants of the house were genuinly afraid of the accused and phoned the police. The accused was arrested and tried for creating a disturbance (section 171(1)(a)(i) of the Criminal Code). The trial judge found that there was indeed a disturbance but because the only people disturbed were in a dwelling house he acquitted the accused.

The Justice of the Queen's Bench (Saskatchewan counterpart of the Supreme Court in B.C.) held:

1. The offence cannot be committed by a person in a dwelling house;
2. The offence can be committed near a public place;
3. The offence can only be committed if there is a disturbance caused in the four ways the section stipulates; and
4. It does not matter if the persons disturbed are in a private or public place.

Therefore the trial judge had erred in law.

Crown's appeal allowed.
Accused convicted.

* * * * *

IMPATIENT CUSTOMER DRIVING OFF WITHOUT PAYING FOR GASOLINE

THEFT?

Regina v. Badger Saskatchewan Court of Queen's Bench October 1982

The accused told the service station attendant to "fill it up". The attendant put the nozzle in the tank and set it so it filled the gas tank of the accused's car automatically. When the tank was full the attendant was busy with other matters and although he heard the accused honk his horn several times, he did not go out until he was finished with whatever he was doing only to find that the accused had left and that $17.50 of fuel had been transferred

The attendant's version of what happened and that of the accused jibed. When questioned the accused said he was in a hurry to attent "a feast" and as there appeared little interest on the part of the attendant to complete the transaction he had left. The accused was acquitted on a charge of theft and the Crown appealed.

The trial judge had held that the accused in the circumstances became, in fact, the legitimate owner of the gasoline when it was pumped in his car. "Once appropriated it may well be that the property in the gasoline passes to the purchaser, leaving the vendor with a contractual right to receive the purchasing price" had the trial judge said.

The appeal court Justice did not disagree with this opinion.

Crown's Appeal dismissed
Acquittal upheld

Comment: This is a case that dangles in between theft and "theft by trick". The latter includes fraud and false pretences. The basic distinction between these two is that in the case of theft the owner did not wish to part with the property where in theft by trick he does. The owner, in the case of fraud or false pretences is simply tricked by some misrepresentation in ability or intent to pay to part with his property.

The way the trial judge had reasoned it seems not unlikely that he would have convicted the accused if a charge of false pretence had been preferred.

* * * * *

ATTEMPTED THEFT

DESCRIPTION OF ITEMS ACCUSED INTENDED TO STEAL

Between Attorney General of B.C. petitioner and His Honour Judge Cronin, Provincial Court Judge and Henry McBryan

McBryan was charged that he "did attempt to steal something from a motor vehicle bearing B. C. Licence #_ _ _ _ _ _". Defence objected to proceed on that charge claiming that it contained insufficient details of what he was to meet. Apparently the accused did not say why he did break into the car but it was inferred that he did so to steal something from its content or a part of the car. The Provincial Court Judge was persuaded and refused to proceed.

The Crown applied to the Supreme Court for an order directing Judge Cronin to proceed with the trial (an order of mandamus).

The Supreme Court Justice held that the Crown is not obliged to allege specifically what it was the accused tried to steal.

Provincial Judge ordered to proceed.

* * * * *

PERSONATION

GIVING FICTITIOUS NAME TO POLICE TO AVOID EXECUTION OF WARRANT

Regina v. Northrup 41 N.B.R. (2d) 610
Nova Scotia Court of Appeal

The accused was arrested for the commission of an offence and gave police a fictitious name. He knew there were Canada wide warrants outstanding for his arrest and he wanted to avoid those documents from being executed.

When police checked his fingerprints the next day they discovered the accused's true identity. Consequently, the accused was convicted under section 361(a) of the Criminal Code which states that:

> "Every one who fraudulently personates any person, living or dead, with the intent to gain advantage for himself or another person, is guilty of an indictable offence".

The accused appealed the conviction.

Firstly the name used by the accused was randomly selected. There may well be a person by that name, living or dead, but that was meaningless to the accused or the circumstances.

Section 361 refers to a "person" and that is either a natural or a legal person (corporate entity). A person is therefore a real person, not a fictitious one. If, for instance, Joe Blotch is entitled to a benefit and someone else presents himself as Joe Blotch to reap those benefits, then that person committed the fraudulent personation the section speaks of. In this case the accused's efforts were in pseudonymity and not in personation. Furthermore, section 361 is under Part VIII of the Criminal Code which addresses itself to "fraudulent transactions relating to contracts". This implies that the personation must be fraudulent and for the purpose of gaining proprietary rights or avoid contractual obligations or liabilities.

Appeal allowed.
Acquittal ordered.

* * * * *

INJURING A DOG

POLICE DOG INJURED BY A FLEEING SUSPECT

Regina v. Barr 1 C.C.C. (3d) 47
Provincial Court of Alberta

In the early morning hours police saw two men fleeing from the rear of a building. As commands to stop were of no avail the first constable on the scene sent his dog after the accused. After the accused failed to stop when told "stop, police", the command "take him" was given to the dog. The accused who carried a 2.5 ft. crowbar turned and struck the dog on the shoulder and when the animal backed off and yelped he struck it again. Although the dog continued to limp after the accused it cowered away every time the accused raised the crow bar. Another dog arrived at the scene. The accused attempted to strike it too but missed. The dog grabbed the accused by the arm, the crow bar dropped and the accused was apprehended.

Subsequent to these events it was discovered that the building the accused was seen coming from had been broken into. The other man who had been apprehended also, implicated the accused, and pleaded guilty to "break and enter". (The dog had recovered from flesh wounds in the shoulder area).

The accused maintained that he was high on alcohol and valium at the time. All he could remember he told the Court when being tried for injuring an animal, was that he was bitten by a dog and that he had swung at it to stop it from hurting him.

The charge against the accused was under section 401(a) of the Criminal Code which prohibits the injuring, killing, maiming, wounding or poisoning of dogs, birds or animals that are not cattle and which are kept for a lawful purpose. Section 386(2) provides that no one can be convicted of the above offence where he proves that he acted with legal justification or excuse and with colour of right. The accused claimed that the force used by police via the dogs was excessive and that he was at least justified in defending himself as he did.

In addition, the accused raised the defence of self defence. The Court immediately rejected that suggestion and held that sections 34 to 37 speak of defending oneself from an "assailant". This implies that your assailant must be a person.

The Court also rejected a submission by the Crown that a policeman and his dog should be seen as one unit; and that the dog was assisting the officer. Although the proposal was attractive, it simply had no countenance in law. The dog was the "property" of the City which employed the officer (a mischief charge would be possible) and it was a weapon of the policeman the same as his gun or any other weapon. It then follows that if the dog attacks or apprehends a suspect in a manner that is excessive in the circumstances then the officer is criminally liable. If, however, the application of force is lawful and it is not excessive, then when the suspect injures the dog in warding off the attack, or making good his escape, then section 386(2) C.C. contains nothing that is of comfort to him. In other words the police dog is protected by section 401(a) C.C. only if its master acts in accordance to law.

To determine if the officer so acted it had to be found that he had the power to arrest the accused in the circumstances and that the force used to effect that lawful arrest was not excessive.

The desire on the part of police to speak to someone they find in certain circumstances does by itself not justify the making of an arrest unless the circumstances which give rise to that desire, amount to more than suspicion, and in fact add up to the reasonable and probable grounds prerequisite to a lawful arrest.

In this case there were ample grounds to justify the arrest

The dog, "very large and with big teeth" was sent to fetch the accused. It was like the cat plays with the mouse: "You won't get away from me, one swipe of my paw and I'll have you". The question is whether the running away from a scene such as this justified the big teeth, the biting etc. Could the constable not have overtaken the accused himself?

The Provincial Court Judge replied that the accused should have thought of the large dog and the big teeth before he ran. He knew the officer and the dog were there; he turned when the command to attack was given and delivered the blow for which he was put on trial. He knew the risk and he exposed himself to all the things that he now claims amount to excessive force. In short, the force used with a trained dog which does not chew after stopping the suspect and will release his charge when there is no resistance is simply not excessive in the circumstances as they presented themselves

Accused convicted.

* * * * *

PROVING A PREVIOUS CONVICTON

CERTIFIED EXTRACT OF MOTOR VEHICLE RECORDS TO PROVE PREVIOUS CRIMINAL DRIVING OFFENCE

Regina v. Williams County Court of Vancouver Island Duncan Registry No. 05878

The accused was convicted of a drinking/driving offence and the Crown sought a greater penalty due to a previous conviction the accused did not admit to. To prove the previous conviction the Crown tendered a certified extract issued under section 75 of the B. C. Motor Vehicle Act instead of using provisions under the Criminal Code (sections 740 and 594) for this purpose. The trial judge refused to accept the extract and sentenced the accused as though this was his first offence. The Crown appealed.

The County Court Judge held firstly that the extract is proof of its content and not merely proof that a record exists. Then on the issue whether the extract is only such proof in cases where provincial offences are tried the Court reviewed a number of cases and drew the attention to section 37 of the Canada Evidence Act which states that in proceedings involving Federal law the laws of evidence in the province in which the proceedings take place apply. Just because there are alternate means (Criminal Code provisions) to prove the previous conviction, that does not mean that methods provided by provincial law do not apply.

Appeal allowed.
Referred back to Provincial Court for Sentencing.

* * * * *

DRIVING WHILE DRIVER'S LICENCE SUSPENDED

MOTOR VEHICLE ACT - DEFENCE OF LACK OF INTENT

Regina v. Jack B. C. Supreme Court. No. CR 83023 Kelowna Registry

The accused was convicted of impaired driving and his driver's licence was automatically suspended by the B. C. Superintendent of Motor Vehicles. Prior to reinstatement the accused was found driving and charged under section 94.1 of the Motor Vehicle Act, as it then was in June of 1982

The Crown did not adduce any evidence at trial to show that the accused had any knowledge that his licence was suspended. This caused the Provincial Court Judge to dismiss the information. The Crown appealed the dismissal by stated case.

The Court observed that the section under which the accused was charged and the way Section 94 M.V.A. reads now (since September of 1982) is, for the purposes of the question raised here (is mens rea a prerequisite to conviction?), essentially the same in content.

The reason why the Provincial Court Judge dismissed the information last April is in all likelihood the decision the B. C. Court of Appeal[1] made the month before when it, by reference, was asked if section 94(3) M.V.A. was constitutionally kosher. The subsection states (and stated under the old section) that the offence of driving while under suspension is an offence of "absolute liability". This means that knowledge on the part of the accused is not an essential ingredient to the offence, and all the Crown has to prove is that the licence was suspended and that the accused drove. This the Court of Appeal held is contrary to section 7 of the Charter of Rights and subsection (3) was invalidated.

However, a Nova Scotia case of driving while under suspension reached the Supreme Court of Canada recently[2]. The Motor Vehicle Act of that Province does not identify the liability category. If the Court holds or the law dictates that an offence is a mens rea offence it has to be proven that there was intent on the part of the accused, which of course includes knowledge. It can also declare it to be a strict liability offence (as most offences under provincial statutes are) which means that when the Crown proved that the driver's licence was suspended when the accused drove his car, the accused would be convicted unless he shows "mistake of fact" (a mistaken belief in a set of facts that if they had existed would render the accused innocent).

1 B. C. Court of Appeal CA #821013. See page 22 of Volume 11 of this publication.

2 R. v. MacDougall (1983) 1 C.C.C. (3d) 65

The Supreme Court of Canada held that driving while under suspension is an offence concerning the public welfare and held that it therefore is an offence of strict liability.

The B. C. Court of Appeal held that absolute liability for this offence is contrary to the Charter of Rights and it invalidated the subsection that made it so. That means that section 94 M.V.A. is now like the section in the Nova Scotia Motor Vehicle Act where the Courts must identify the liability catagory for the offence. In view of what the Supreme Court of Canada ruled, the B. C. "Driving while under suspension" offence is a strict liability offence also, held this B. C. Supreme Court Justice. Therefore the Provincial Court Judge erred in law when he held that knowledge of the suspension had to be proved to convict.

Crown's appeal allowed.
Case referred back to Provincial Court.

* * * * *

CHARTER OF RIGHTS & FREEDOMS

IDENTIFICATION OF CRIMINALS ACT - RETURN OF RECORDS TO ACQUITTED PERSON

LaPlante v. Attorney General of Quebec 31 C.R.(3) 94.
Quebec Superior Court

LaPlante was acquitted of a criminal charge and applied to the Supreme Courts to have all records turned over to him that pertained to his identification.

The Superior Court granted the order holding that the very title of the Identification of Criminals Act reveals parliament's intent. It is to identify criminal and not innocent persons. To leave LaPlante's records with police would be contrary to the spirit of the Charter of Rights, said the Court.

* * * * *

HYPNOSIS AS AN INVESTIGATIVE AID

To use hypnosis to refresh the memory of persons who have likely valuable information stored somewhere in that human memory bank is something many personnel in the criminal justice system find somewhat questionable. It is like bringing some sort of witch craft into the traditional and conservative Anglo-Canadian jurisprudence. Common sense tells us that this sort of sorcery-like methods are not acceptable in our Courts. Closer examination produces reasons that support these first-blush opinions. A witness who testifies to what was previously remembered by him through hypnosis is likely telling what was suggested to him and cannot vouch for the truth of his evidence. At one time he could not remember but after someone fooled around with his mind while it was in a state susceptible to suggestions, he recalls the minutest details. It seems unlikely that even if such "hypnotically developed testimony" is admitted in evidence the judge of the facts will lend much credence to it. If the witness was the victim of a crime that created trauma, anxiety and mental stress, it could well be that the failure to remember is nature's way of making that person cope with that trauma. Inasmuch as unconsciousness is a natural anesthetic for physical pain, so is repression of memory a psychological anesthetic for mental agony. If hypnosis can make that person remember, recalling the details may cause the memory to be tainted with the anxiety the event caused.

A bad Canadian experience with a person questioned while in an hypnotic state[3] caused our highest Court to say that there was not a greater trespass on and invasion of privacy than to gain unconsented access to that which is the utmost of privacy of any individual, the mind. Of course, Horvath was a suspect and not a witness. The highly skilled interrogator who received the Court's praise, had inadvertently caused the semi-hypnotic state by his psychological superiority over the 17 year old Horvath.

This has caused a misguided belief that any investigator who is a trained police hypnotist will be rendered ineligible to question suspects. It is thought that his credibility will suffer as his skill will cause inadvertent or possibly advertent hypnotic states of mind on the part of the suspect.

[3] Horvath v. The Queen 3 W.W.R. 1979 1. Supreme Court of Canada. See also page 22 of Volume 7 of this publication.

It is also questioned, what police investigators are doing probing the human mind. Physical as well as psychological reactions are possible. They are not trained to make a prognosis nor are they competent to render any form of treatment when reactions occur. The liability for lasting consequences could be enormous.

These and many other sincere observations have caused an apparently valid resistance to this new concept in forensic science. If not resistance, then at least there is a sphere of suspicion about this practice that seems so out of character with and so "hocus-pocus" in our stuffy juristics.

These are all good reasons to be cautious but not necessarily to be cynical or even skeptical. The history of hypnotically developed testimony is very recent in Canada but not so in the United States and practically all are related to witnesses and not accused persons. In Canada there are in essence two recorded cases. The first was R. v. K[4] and the second R. v. Zubot[5].

In R. v. K. the Court would not allow the testimony which was developed by hypnosis. The Court thought it too risky as (1) the police may have influenced the witness; (2) hypnosis does not guarantee that a witness speaks the truth; (3) it is an uncontrolled science etc.

In the second case the Crown did much better and a land mark decision was made by the Justice of this superior Court. It was argued that nothing guarantees that the truth is spoken by witnesses. Their minds have been contaminated by the media, by what they heard from others, and suggestions by police or by other persons influential on the witness, however veil, have an effect. Therefore, argued the Crown, the hypnosis is no more than refreshing the mind like reading notes made when the mind still remembered the details. In any event the Alberta Queen's Bench held in regards to testimony developed under hypnosis the question is not one of admissibility but credibiity.

In the United States, a lot more cases involving hypnosis have been decided on over the last 20 years. It seems that that nation's judiciary is also proceeding in this new field with the greatest of caution. Their experience includes hypnosis of the accused. In the early part of this century the Court refused to even recognize hypnotism as a science. Fifty years later when an accused, in his defence testified as to what he remembered since being hypnotised, the evidence was admitted.

[4] R. v. K. (Juvenile). (1979 10 C.R. (3d) 235 Manitoba Provincial Court

[5] R. v. Zubot Alberta Queen's Bench, Not Yet Reported

In respect to witnesses the U. S. Courts have allowed not only evidence developed by hypnosis but also hypnotically adduced evidence. The latter means that the witness testified while in a hypnotic state.

Although many legal and other questions have to be answered yet in regards to hypnosis as part of the forensic sciences, that should not mean that we should shy away from it. Firstly, it does not seem advisable to practice the 'art' on a suspect regardless whether he consents. Although there are circumstances where this may be appropriate and could result in the evidence obtained thereby to be admissible. However, in probably 99% of such cases the defence should experiment with hypnotic developed or adduced evidence.

Hypnotic developed evidence of a witness requires many safeguards and where the witness is the victim of the crime alleged, extra caution is required.

In all circumstances, it should probably be used as a last resort; only in cases where essential details are expected to be locked in or repressed by the mind of a witness.

To avoid the inevitable submission that the hypnotist gave post hypnotic suggestions to the witness he (the hypnotist) should be as ignorant of the details of the crime as possible.

Then there are all the policies that should be in place to avoid civil liabilities.

The argument that a trained police hypnotist is less credible when questioning suspects under normal circumstances because an inadvertent hypnotic state of mind may accrue, seems invalid. It seems that an inadvertent hypnotic state of mind is more likely to result when the interrogator is not a trained hypnotist.

Another matter to be remembered is that "subsequent facts" will inevitably strengthen the credibility of the witness. For instance, where a witness cannot remember a location where certain items were seen, and with hypnosis the location is discovered and the items are found. In many cases what is discovered by hypnosis corroborates other testimony of the witness

It seems that the police must not shy away from using this method in their fact finding missions. However, we must be very aware of the limitations of using hypnosis and of evidentiary and other legal complexities

* * * * *

CHARTER OF RIGHTS AND FREEDOMS

RIGHT TO COUNSEL - WARNING

Regina v. Nelson 3 C.C.C. (3d) 147
Manitoba Court of Queen's Bench

Police attended at the scene of a shooting where the accused made some incriminating statements. He was arrested for attempted murder and told that he could call a lawyer if he wished when they got to a telephone. After having been at the police station for three hours the accused was informed that the victim had died and that he was now charged with murder. He was also told: "I must also advise you that you can call a lawyer to instruct and receive advice from". When asked if he understood, the accused said: "Yup, yup" upon which the questioning immediately began. This resulted in a confession the admissibility of which was opposed by defence counsel for non compliance with the Charter of Rights.

The Justice of the Queen's Bench allowed in evidence the statements the accused made at the scene, but ruled the confession made after being charged with murder inadmissible. This he did on the following grounds:

1. The wording used to inform the accused of his rights was inadequate to convey to him the rights he had under section 10 of the Charter;

2. When the rights have been given, particularly to an uneducated person, then the authorities must wait for a waiver to that right before they question the accused (he either says "Yes" and be given a phone or says "No" which is the equivalent to a waiver of the rights);

3. "Yup, yup" was, in the circumstances, inadequate to show the accused understood what his right was; and

4. A fair minded member of society, if he viewed the circumstances would consider the administration of justice to have been brought into disrepute if the statement was allowed in evidence on the basis that the accused knew his rights and had a reasonable opportunity to exercise them.

Statement ruled inadmissible

* * * * *

OPINION EVIDENCE

Regina v. Bell County Court of Vancouver Island Duncan Registry 06555

> "... I formed the opinion that not only was he impaired, he was, in fact, drunk at the time I was speaking with him".

This is what a 15 year police veteran, who figured he had dealt with at least one thousand impaired drivers, testified to during the accused's trial for impaired driving. This testimony was the only evidence in the case that had impressed the Provincial Court Judge. The other Crown evidence was of little or no value and the Judge had said that he would have no hesitation to acquit the accused if it was not for the officer's opinion evidence of the accused's condition at the "incident scene".

The accused, when arguing his appeal, reminded the County Court Judge of reasons for judgment handed down in December of 1982 by the Supreme Court of Canada in the case of Gratt v. The Queen. The case predominantly dealt with 'opinion evidence' and responded to a complaint that Courts are inclined to let such evidence by police officers overwhelm that of other witnesses.

The Supreme Court said in response:

> "... the fact that a police witness has seen more impaired drivers than a non-police witness is not a reason in itself to prefer the evidence of the police officer" and
>
> "Trial judges should bear in mind that this is non-expert opinion evidence and that the opinion of police officers is not entitled to preference just because they may have extensive experience with impaired drivers".

It is always believed that frequency of exposure to impaired and intoxicated persons leads to a level of expertise that makes a police officer eventually an expert who is allowed to give opinion evidence. The Supreme Court of Canada reminded that there are two exceptions to the hearsay rule that permit the admission of opinion evidence; expert testimony and "compendious statements of facts". The latter is really an expression which is a short and accepted statement of a combination of facts.

When someone observes a number of symptoms he combines them and in a case such as this they result in an opinion that a person is impaired or intoxicated. That opinion is based on a common exposure we all have in society. Chances are pretty good that the person is intoxicated but whether or not he is in fact, requires the opinion of an expert. The Supreme Court of Canada said that police opinions on intoxication are, in most cases, admissible not because they are experts (regardless of exposure) but because they make "a compendious[1] statement of facts", something most witnesses are permitted to do in testimony. That is what caused the Supreme Court to caution that the testimony of one lay witness should not necessarily overwhelm the testimony of another.

Must exposure then, not be taken in consideration when assessing the value of such "compendious statement of facts"? Said the Supreme Court of Canada:

> "The weight of the evidence is entirely a matter for the Judge or Judge and Jury. The value of opinion will depend on the view the court takes in all the circumstances" and
>
> "If the witness lacks the relevant experience, or is otherwise limited in his testimonial capacity, or if the witness is not sure ... this can be brought out in cross examination".

Although the Gnatt judgment is very interesting and may correct a misconception many have about police being "expert witnesses" in the matter of intoxication, it did not assist this accused Bell.

There were no defence witnesses who gave opinions which were overwhelmed by that of the officer. In other words there was no conflict. The Provincial Court Judge had considered the weight of the "compendious statement of facts" given by the experienced officer. It, coupled with "the minor observations" given by others, convinced him beyond a reasonable doubt that the accused's ability to drive was impaired by alcohol.

Appeal dismissed.
Conviction upheld.

* * * * *

1 Comes from the word "compendium" which means a summary or synopsis of facts which is only part of a larger field of knowledge.

CHARTER OF RIGHTS

SELF CRIMINATION - CROSS EXAMINATION ON TESTIMONY GIVEN DURING A VOIR DIRE.

Regina v. Jewitt 3 C.C.C. (3d) 191
County Court Vancouver, B. C.

The Charter of Rights states that incriminating evidence may not be used against the witness who gave that evidence in testimony in other proceedings safe for the purpose of proving perjury. Innovative counsel suggested to the County Court Judge that the Crown was not entitled to cross-examine the accused during the main trial (before a jury) on what he had testified to during a voir dire. He claimed the trial and the voir dire to be separate proceedings for this purpose.

Said the Court in rejecting defence counsel's submission:

> "For if that avenue is not available then it seems to me the accused will be permitted with impunity to tell one story at one stage of the proceedings and a different story at another stage of the proceedings".

* * * * *

REFUSAL - RIGHT TO COUNSEL - CHARTER OF RIGHTS AND FREEDOMS

R. v. Stowe County Court of Vancouver No. CC821358 Vancouver Registry July 22, 1983

The accused was brought to the police station under demand to provide samples of breath. In the interview room he said to the constable: "Dial Information and get Bolton's number". This did not mean anything to the officer and he continued with his investigation. The accused made four sham attempts to give samples and was then told he had "refused to blow". Moments later, outside the breathalyzer room the accused said, "I'll go back and I'll blow". The answer was: "You are too late".

The accused appealed his conviction claiming that he had not been given the opportunity to contact counsel and secondly that his offer to go back and blow negated his refusal.

The County Court Judge held that the offer to blow was not part of the ongoing transactions with the breathalyzer operator and the sham attempts.

> "Sooner or later the police have the right to conclude that a reasonable and fair opportunity has been provided and a refusal made. I find that to have occurred here".

The question remaining was whether the accused had been deprived of his right to counsel. Although "Mr. Bolton" did not mean anything to the officer, it must have been clear that in the circumstances the accused found himself in "it is not likely he wanted to call his dentist or his barber". The officer should have cleared it up what the accused wanted. The accused was refused access to counsel. However, did he in the circumstances have a right to counsel? Was he by simply being under demand detained or arrested?

The officer had not arrested the accused but stated on the stand that he had taken the accused "into custody". And when asked in cross-examination: "But as far as you are concerned he was "detained" for a possible charge of impaired driving?", the officer answered: "Yes".

The Court found the accused was detained and was denied his right to counsel.

Accused Acquitted

* * * * *

CHARTER OF RIGHTS AND FREEDOMS

Regina v. Trudeau and Tait, Vancouver County Court, Vancouver Registry C.C. 821730, April 1983

The Charter of Rights and Freedoms guarantees that we will not be deprived of life, liberty or the security of the person other than in accordance with the principles of fundamental justice. It also assures us to be considered innocent until we are proven guilty. The two accused were charged with possession of a stolen car and the Crown adduced evidence during the trial that the accused were within the previous five years convicted of theft or possession of stolen property. Section 318 of the Criminal Code provides for the admissibility of such evidence to assist in proving that the accused had knowledge that the car they had in their possession was in fact stolen. On the grounds of the above mentioned provisions of the Charter the accused claimed that section 318 C.C. is unconstitutional.

The County Court Judge held that section 318 C.C. does not offend the Charter in respect to the presumption of innocence. He said that the section only provides something that may be considered by the judge of the facts but does not remove the burden of proving what is alleged beyond a reasonable doubt from the Crown.

However, the Court held that section 318 C.C. did not align itself with the principles of fundamental justice. For instance, if a person had shoplifted something less than five years ago what probative value could such evidence have to say that it is now fair to find because of that conviction that the accused had knowledge that the car he drove was stolen. He thought it to be extremely difficult for instance, to instruct a jury on what weight they could and should give to evidence of a previous conviction to determine if he is guilty in this instance. For these reasons the judge could not but conclude that the application of the section would be prejudicial and unfair to an accused. Therefore, it (section 318 C.C.) is not consistent with the principles of fundamental justice.

Section struck down
Evidence of previous conviction not allowed

Comment: It is not unreasonable that the section was found out of step with the Charter or even with our principles of fairness prior to it becoming effective. However, it seems that section 318 C.C. would be struck down for reasons other than those given in the case. Surely we must assume that our juries or judges when they sit alone can fairly assess the relevance and weight of a previous conviction. If a

bottle of after shave lotion was taken from the drug store at the age of seventeen as a free birthday gift for grandpa, and at the age of twenty-two, the perpetrator of that crime is found in possession of the stolen Crown jewels, the worst than can happen is for a jury to think that he started young and small and progressed quickly in the world of crime. Judges in their addresses to juries do explain the law and point out what by the rules of law is capable of being a fact, then the jury decides whether or not it is. That includes a direction if the aggregate of the evidentiary value of what they by law may include in their deliberations, amounts to proof of a fact. If the previous conviction adduced by the Crown is frivolous in respect to the case to be proven, surely the judge can tell the jury so as he does with all the other evidence the jury has to consider.

It would seem more reasonable to fail this obscure and odd "presumption of guilty knowledge" on different grounds. Even where "similar fact" evidence is admissible the theory "he has done it before, therefore he did it again" is taboo. It is only to show similarity in the means by which the crime was committed. Why should in a case like this the proof of a guilty mind be established by showing that the accused committed the crime before? Why is there no such provision for all offences where knowledge and mens rea is a prerequisite to conviction?

Secondly, since the section is, in a way, a presumption of guilt, it could have been tested for excessiveness against the Charter's guarantee to be presumed innocent until proven guilty. Courts of superior jurisdiction have devised a test to do so. If the fact that may be presumed (care or control section 23); knowledge of inadequate funds being on deposit, s. 320(4); knowledge if serial number obliterated, s. 332, etc.) is not a probable consequence of the facts to be proved for the presumption to arise, then the provision in law for that presumption is excessive. Perhaps section 318 C.C. could have survived if a voir dire was ordered to be conducted if the previous conviction and its circumstances were reasonable facts to take into consideration to determine if the accused on this occasion had guilty knowledge. In other words, to determine if in each case it is fair and therefore in compliance with the principles of fundamental justice.

Recently, the presumption of "care or control" was unfairly applied. When the case reached the B. C. Court of Appeal, *it did not invalidate the statutory provision for the presumption but simply held that in the circumstances, it did not apply.

* * * * *

* February 1983. Toews v. The Queen CA 801099 See page 29 of Volume 11 of this publication.

ALLOWING VICIOUS DOGS TO BE AT LARGE
CRIMINAL NEGLIGENCE CAUSING BODILY HARM

Regina v. Manfred and Vera Mayerhofer, County Court of Yale, Kelowna No. CR 81/82 - May 1983

The accused jointly owned two Rottweiler dogs. They were kept in a very inadequate enclosure from which they often escaped. Both accused knew that the dogs were, to say the least, vicious. Mr. Mayerhofer had referred to the dogs as "mean bastards" and was quite proud of the fact that one of them had killed a cow. Mrs. Mayerhofer had made similar claims about the dogs' propensities.

One day the dogs attacked another dog being walked by its owner, a neighbour of the accused. The Rottweilers had escaped from their pen by jumping up against the gate when they spotted the neighbor's dog. The Rottweilers injured the dog badly before being called off by the accused. When the neighbor offered to fix the locking device on the pen to prevent this from happening again, the gesture was rejected by Mrs. Mayerhofer who was of the opinion that nothing needed to be done about her dogs.

Two days later the dogs attacked an eight year old boy. The physician's description of the injuries is capable of causing nausea. Among the severe injuries were torn off scalp, a torn eye lid, and a chewed off arm; ... "the lower part of this arm remained hanging by mangled strands of muscle".

An hour after this incident the dogs attacked a woman and her son right in front of the accused's home. Severe injuries and torn flesh right down to the bone were the results.

As a consequence of these attacks the accused were charged with criminal negligence causing bodily harm (section 204 of the Criminal Code).

To be successful in a prosecution of this kind (as well as in a litigation for damages) when the animal is domesticated, there must be proof that there was knowledge on the part of the accused that hiis animal was predisposed "to do this particular kind of mischief". In this case the Crown had to prove the accused knew the dogs to be vicious. There was ample evidence for such proof, including scars on Mr. Mayerhofer's arm, which he claimed were caused by his own dogs.

There must also be proof of an ommission of duty on the part of the accused. This duty must be a duty imposed by law. A by-law to show a duty to ensure that one's dog is not at large, is helpful. However, "there is a common law duty that makes a person liable for any damage caused by keeping an animal which he knows has a propensity to do a particular kind of mischief".

The dogs were vicious and the accused knew it; the accused were heedless and therefore reckless; they had treated the matter of the dangerous animals they harbored as though it was not anything of importance and, therefore had a disregard for the lives and safety of others.

Accused convicted

The case that was apparently most helpful to the Judge was Regina v. Petzoldt* which was decided by a County Court Judge in Ontario.

Petzoldt was an animal trainer who kept two large chimpanzees in his basement. One day he took one of them for a walk on a leash. The 200 lbs., 5 foot high animal grabbed an 8 year old girl and bit her on the head and shoulders doing her bodily harm which required considerable medical attention.

Petzoldt knew the chimp was dangerous. On a previous occasion when a police officer attended to a complaint of the ape having scratched a child he told the officer that if he came too close the animal would attack and possibly kill him. These and several other incidents were sufficient proof of knowledge that the animals were vicious. An expert on the behaviour of these animals (a curator of a zoo) said that the chimpanzee is a wild animal by nature. They belong to a category of "beasts" known as farae naturae. The Judge noted from a history of cases on the issue that the owner can be civilly liable without having particular knowledge that such undomesticated animal was dispositioned to be vicious. In the case of a domesticated animal, the owner must have knowledge of the propensities of the animal before he can be held civilly liable. To be criminally liable such knowledge on the part of the accused must be shown whether the animal is domesticated or otherwise. In addition, the accused's action must be advertent and heedful.

Petzoldt was also found guilty of criminal negligence causing bodily harm.

* * * * *

* 11 C.C. (2d) 320.

CHARTER OF RIGHTS AND FREEDOMS

SEARCH WITHOUT WARRANT - UNREASONABLE SEARCH - EXCLUSION OF EVIDENCE

Regina v. Phillips (alias Ward) - The County Court of Vancouver No. C.C. 830603 August 1983

Seven police officers attended at a private residence to search for a party they wanted to question in regards to two armed robberies. Police had reasonable and probable grounds for believing the suspect was in the home but they had no such grounds for believing that he had committed the robberies. The Crown conceded that police had suspicions but lacked the requisite grounds to obtain a warrant for the arrest of the suspect or for a warrant to search the place where he made his home. The home, however, was not the suspect's abode and the occupier inquired if there was a warrant issued for the search. He was told: "You know better than to ask a stupid fucking question like that" and the search was conducted without success. Neither the suspect nor any evidence connected with the robberies was found.

However, the search was not fruitless. The accused Phillips, alias Ward, was encountered as a house guest. Two sets of car keys were found on him. These keys were for cars parked in front of the house which displayed incorrect plates and were in fact stolen vehicles. Phillips was charged accordingly and at trial the admissibility of the finding of the keys and the cars became the subject of a voir dire. Defence counsel argued that the search was so unreasonable and unlawful that acceptance of the evidence thereby obtained would bring the administration of justice in disrepute.

The County Court Judge said that to determine if the administration of justice would be brought in disrepute he had to pose and answer the following questions:

1. Would, considering all the circumstances (including the breach of social values, the gravity of the alleged offence, the effect of the exclusion of the evidence on the proceedings), the actions complained of in this case bring the administration of justice in disrepute in the eyes of the community at large?; and

2. Would the community at large be shocked by the actions of police and the Court's acceptance of the fruits of their illegal actions?

In answering both questions in the affirmative, the Court summed up the lack of grounds to conduct a search. The judge said that although no force was used "... the rights and liberties of the individuals were nevertheless seriously infringed". He complimented police for their good investigative work in this case and said to have the greatest respect for their difficult task, "But it must not be forgotten that in a free society the police must work within the framework of the law, if they themselves are to enforce that law". In conclusion the Court held:

> "Certainly in the circumstances of this case, it would be dangerous indeed to hold that private rights of an individual to the exclusive enjoyment of his person and property are to be subject to the invasion by police officers whenever they can be said to be acting in the furtherance of the enforcement of the criminal law, although they are not armed with any authority to justify their actions".

Evidence excluded.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS
UNREASONABLE SEARCH - EXCLUSION OF EVIDENCE

Regina v. Rex, County Court of Vancouver, Vancouver Registry C830263
July 1983

A police informer told a constable that the accused had handguns and chemicals for the purpose of making explosives and that they were in the accused's locker at a Regional College. A search warrant was executed in the accused's absence but nothing of the above description was found in the locker. When the constable had time some time later again to get back to this investigation he learned that there were warrants outstanding for the accused in regards to charges of possession of marihuana. He attended at the house where the accused lived. This place was described as a communal home for a number of persons. All had a private bedroom but shared the kitchen, bathroom and living room. The accused and another person who resided in the house were found in the living room. The accused was placed under arrest for the warrants (which they did not have in their possession) and he and the other resident were asked "... you don't mind if we have a look around?" to which the 'other resident' answered: "Well, I guess not". Nothing of importance was found in the living room but police destroyed a plant they believed to be marihuana. When this happened the accused and the co-habitant inquired if police had a search warrant and indicated that they wanted the search to cease. The officers responded that it was too late to withdraw the consent they were given to search and they continued their examination of the house.

The police also found some chemicals the accused claimed to use for "model rocketry". These chemicals became the basis for a charge. During the trial a voir dire was conducted to determine if the search was reasonable and, if not, whether the chemicals thereby found could be admitted in evidence or had to be excluded as such admission would bring the administration of justice in disrepute.

Although police did not have to have the arrest warrants in their possession to effect the arrest the reason for not having them right there did apparently not impress the judge. It seems that he saw some trend of indifference to following the legally prescribed procedures. The arrest warrants were available in the municipality in which the search was conducted but the constable had claimed that he just had been too busy to pick them up while he was assisted by officers of that municipality. Neither was there an explanation given why no search warrant was obtained for the search of the house.

The Court did not hestitate to find that the ". search of a subject's dwelling house, without a search warrant and under guise of effecting an arrest warrant, constitutes unreasonable search".

It is lawful to search a person and the immediate surroundings when an arrest is effected. This is provided at common law to prevent access to weapons or the destruction of evidence.

When the officers received consent to search the most protected place (a dwelling - a man's castle) it was perhaps alright to search although the practice was questionable under the circumstances. However, the legality of that part of the search was academic as the chemicals were found after the consent was withdrawn. Furthermore the search allowed when effecting an arrest in constitutionally protected places does not include an "... invasion of a man's privacy by a top to bottom search of his house...".

Section 101(2) of the Criminal Code did not apply in this case either. The section provides for the search without warrant, but only where the situation is urgent and where there is potential danger which makes the obtaining of a warrant impractical. If the officers would have found contraband within plain view and considered a search of the premises, they should have secured the place while a warrant was obtained.

The judge concluded that unreasonable search is synonymous to illegal search or seizure.

To decide if the unreasonable search should result in the exclusion of the evidence thereby obtained, the Court reasoned that five factors had to be considered:

1. Was the impropriety trivial or technical?

2. Did the impropriety show a disregard for the legislation or of the apparent policy reflected therein?

3. Was the impropriety a result of deliberate action on the part of the police, or did it arise as a result of their ignorance of the law or mistake in judgment?

4. Other considerations were also included, such as the seriousness of the offence and the significance of the evidence sought to be excluded.

5. Was the degree of the impropriety such a breach of social values and such a misconduct that it would shock the community.

The Court concluded that the attendance at the house was not solely to arrest the accused but predominantly to search the home and the officers knew they needed a search warrant for that purpose. Furthermore the search was conducted at night for which special consent is required included in the requisite warrant.

The circumstances exposed that the procedure followed was 'convenient expedience' to circumvent the required scrutiny by a justice of the peace.

The crime alleged against the accused carries a penalty of 5 years and the gravity of the offence is in the 'lower middle range'. The gravity of the impropriety in respect to the search outweighs the offence the accused allegedly committed, the Court seems to have concluded.

The aggregate of all this caused the Court to conclude that "an ordinary right thinking citizen of the community would be shocked "by the improprieties committed by police. Admission of the evidence would bring the administration of justice in disrepute.

The chemicals were ruled to be inadmissible in evidence.

* * * * *

TID-BIT

RECENT POSSESSION & THE CHARTER

Ten days after a break and entry of a store the accused was found in unexplained possession of all the goods stolen (value $6,800). The doctrine of recent possession (which gives the judge of the fact the right to infer that the accused had guilty knowledge) was applied and the accused convicted.

The accused appealed claiming that the aged doctrine is now unconstitutional in that it violates the presumption of evidence. Not so, responded the Nova Scotia Court of Appeal. The doctrine is simply "a lofty way" for the jury or a judge to infer a fact when no explanation is forthcoming where one is due under the dictum that

> "There comes a time that a man is so surrounded by inculpatory circumstances that he either explains or stands condemned".

Russell v. R. 32 C.R. (3d) 307 Nova Scotia Court of Appeal

* * * * *