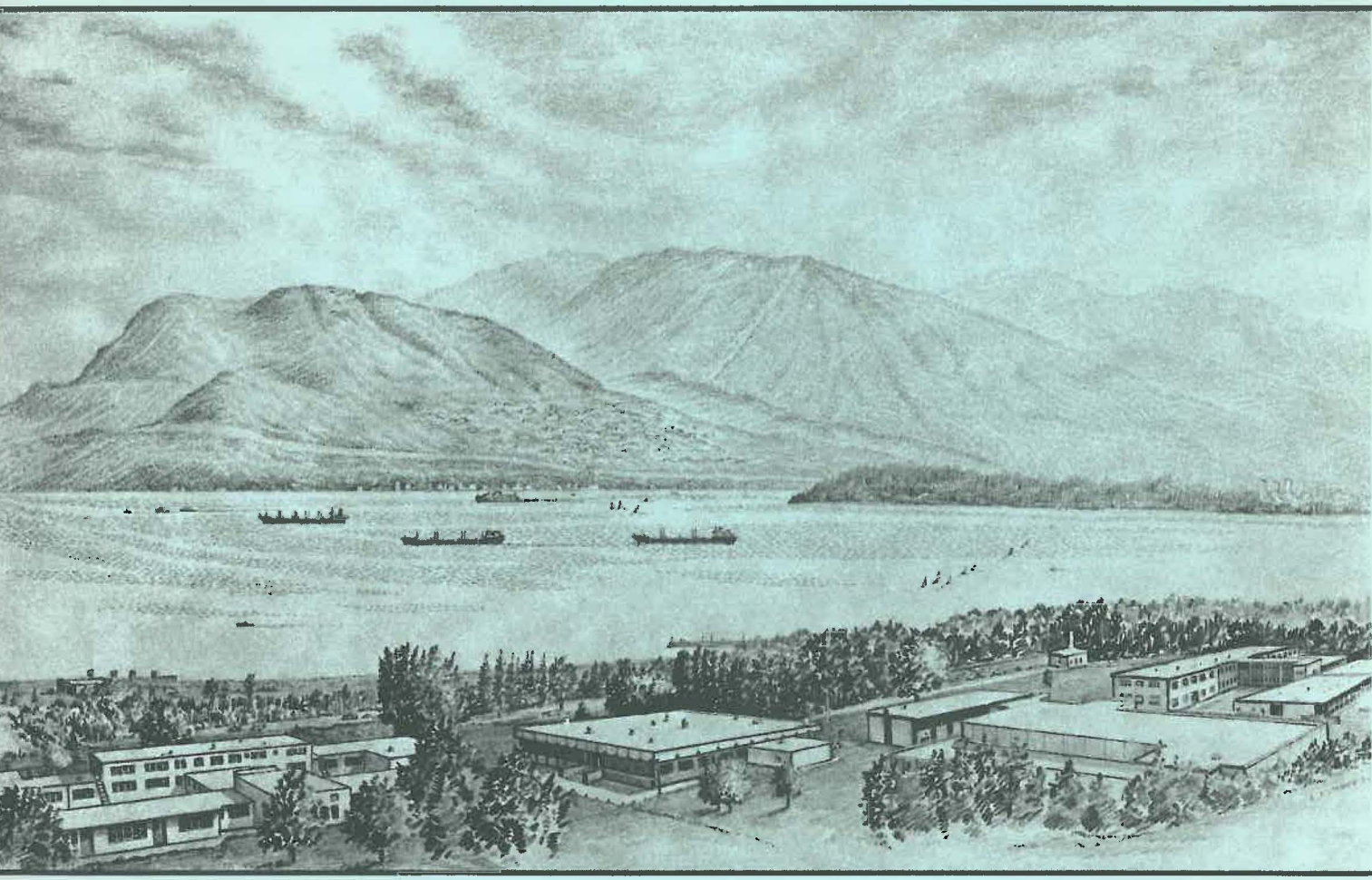
ISSUES OF INTEREST

VOLUME NO. 15



Written by John M. Post

March 1984

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LETTER FROM A READER

In Volume 13 of this publication, on pages 26 and 27, you were made familiar with the circumstances and the legal issues in the case of Regina v. Phillips.

Police had wanted to question a person who was suspected to have committed two armed robberies. They did not have sufficient grounds to obtain a warrant for the suspect's arrest. However, police had reasonable grounds to believe that he was at a certain address, which was not the suspect's regular abode. The unsuccessful search of the home was conducted without the consent of the occupier. However, the officers encountered Mr. Phillips, alias Ward in the home who was in possession of ignition keys to stolen cars which were found parked out front.

The County Court had disallowed the evidence against Phillips, alias Ward, as the search by which it was obtained was unlawful and unreasonable. Needless to say, this resulted in an acquittal.

In reaction to our synopsis of the case, Chief Constable R. J. Stewart of the Vancouver Police Department wrote me a letter, the relevant portion of which reads as follows:

> "I would like to comment on an article in your publication Issues of Interest, Volume #13. This is an interesting subsequent tale relating to the item on page 26, 'Regina v. Phillips (alias Ward)'. After Phillips was arrested, it was learned through a fingerprint analysis that he was in fact, a person by the name of Gordon Michael Ward. At the time of his arrest in the name of Phillips, he appeared on C.P.I.C. under the name of Ward and was wanted for being unlawfully at large, being an escapee from a B. C. Corrections facility. There were two other warrants, one for failing to appear in a Provincial Court and the second for failing to appear in the County Court.
>
> When you consider this information, which was unknown to the police and to the County Court Judge, the Judge's remarks seem almost facetious.
>
> I thought you might find this information interesting and worthy of comment at some later date".

The County Court Judge had expressed belief that the community would

be shocked by the action of the police and he, congratulating police on their good investigative work, had, nevertheless, found that the rights and liberties of Phillips had been seriously infringed. If it was not for the narrow legal issue involved, then considering Phillips' apparent gross disregard for and his alleged contempt of the Court and its process, the Judge's comments do indeed appear facetious and generous to Phillips.

Chief Stewart, thank you for the information and for taking the time to share it with us.

* * * * *

POLICE INFORMERS
CAN POLICE BE COMPELLED TO REVEAL IDENTITY OF INFORMER
POLICE SHIELD LAW
SECRECY RULE - CROWN'S PRIVILEGE

Biscillon v. Keable et. al. 7 C.C.C. (3d) 385
Supreme Court of Canada

In the seventies the Quebec Government gave a mandate to what became known as the Keable Commission. The mandate included a number of interesting items the Commission was to investigate and report on. Some relate to police practices in specific incidents and others to police procedures in general. Many of the issues raised in this case ought to be of interest to the Canadian police community.

The Commission was created by an Order in Council which was challenged in 1978 and was held to be intra vires the Quebec cabinet. In 1979 this cabinet added to the mandate, among other things, that the commission was to examine "the recruitment of informers by illegal or reprehensibe means".

Officers of the Montreal police department were subpoenaed to appear before the Commission. The Director of the department who feared that the officers would be asked to identify their informers and how they were recruited, filed an affidavit with the commission stressing how harmful it would be to the enforcement of criminal law if police officers have to reveal such information. Also that it would be contrary to the public interest to divulge in public the identity of the informers. This affidavit was to no avail and three officers were questioned by the commissioner. Instead of having counsel intervene on their behalf, raise the issue of privilege or apply any other legal means, the officers refused to testify and read out a lengthy statement entitled: "Why we refuse to answer the Keable Commission". It spoke of kangaroo court, bias and the bourgeois state. Later the superior court which reviewed the officers' legal position labelled the paper as "diatribe" (ouch).

The officers' refusal, of course, was referred to the superior courts of Quebec which ordered them to answer the commissioner's questions, including those related to the recruitment, management and identity of police informers. These courts realized that at common law police officers do not have to and cannot divulge such information. However, section 308 of the Quebec Code of Civil Procedure, conceding that a government official cannot be obliged to divulge what he learned in the exercise of his function, restricts that obligation to situations where the judge finds that disclosure is contrary to public order. In other words, where the Court holds that disclosing the information is not contrary to public order, the official is obliged to answer the questions put to him. The Quebec superior courts held that police officers are public officials and, therefore, held that the officers were compelled to answer the commissioner's questions, including those regarding police informers.

The matter was taken to the Supreme Court of Canada, which clearly spelled out a number of legal and constitutional issues relevant to the role and position of the police officer.

Firstly, the Court ruled that provided the mandate to a commission investigating police practices is specific in terms of incidents, cases and events it is to report on, it is intra vires the executive branch of a provincial government. In other words, the mandate, like a search warrant, cannot be a fishing licence for all species in relevant waters. Furthermore, such a mandate must not be to investigate "the powers, duties and capacities" of police officers, but is only appropriate if it concerns itself with the manner in which "they were in fact exercised in the circumstances described in the mandate".

In 1981[1], the Supreme Court of Canada "implicitly recognized as axiomatic" (something generally accepted as being true) that a province has power to take disciplinary actions against provincial (except R.C.M.P.) and municipal police officers. Hence the Quebec mandate to the Keable Commission was appropriate.

Secondly, the Supreme Court of Canada held that section 308 of the Quebec Code of Civil Procedure (the only province that has such a code) did not supersede the common law. Said the Court:

> "In my opinion the Quebec Legislature did not, in enacting Act 308 of the Code of Civil Procedure, intend to abrogate or limit the secrecy rule regarding the identity of police informers".

It seems the Court said in addition, that even if that had been the intent of the Quebec law makers, no Legislature can constitutionally abrogate the limits of this common law rule; or, no provincial law can compel a police officer to reveal the identity of an informer in criminal or civil proceedings. Furthermore, the Court (for the sake of coming to grips with the impact of section 308 on this issue) assumed that police officers were government officials, but added in the same breath that this must not be seen as confirming that they are. (As a matter of fact, it is very doubtful that they are).

The Supreme Court of Canada then went into considerable depth in regards to the secrecy rule. It was recognized centuries ago that the government would come to an abrupt halt if it did not have a considerable amount of information available. Particularly when this information is personal, disclosure is sensitive and can be harmful. It should therefore not be used for purposes other than those for which it was given to the government. Although there are times when the public interest outweighs the interest of the individual and confidentiality, the state is entitled to its secrets, particularly

[1] A. G. Alberta et. al. v. Putnam et. al. 62 C.C.C. (2d) 51

where it touches on national security and effective conduct of government. In regards to this (known as the "Crown's privilege") the Court said:

> "There are cases in which the public interest obviously demands secrecy; and there are borderline cases. The common law allows a member of the Executive* to make the initial decision; if he decides in favour of secrecy and states his reason for doing so in a sworn statement, the law empowers the judge to review the information and in the last resort the decision by weighing the two conflicting interests, that of maintaining secrecy and that of doing justice".

Over the years, many have included "police secrecy" in this "Crown's privilege" and believed that when a police officer is asked in public proceedings who his informer is, then the Judge must consider and weigh the above mentioned conflicting interests. The Supreme Court of Canada called such belief a matter of confusion and a mistaken belief. The Court clearly held that the secrecy rule regarding police informers' identity is separate and distinct from Crown privilege.

In reviewing the historical development of the police secrecy rule, the Court went as far back as 1794[1] when it was established. In 1890[2] it was held that the rule also applies in civil law. The Court referred in that case to

> "... the well established rule of law that the identity of police informers may not be disclosed in a civil action, whether by process of discovery or by oral evidence at trial".

The Supreme Court of Canada held that the secrecy rule regarding police informers is now a rule of evidence in criminal as well as civil proceedings which imposes a duty on a peace officer as well as on the judiciary. The Court went as far as to suggest that a police officer is prohibited from disclosing the identity of an informer in judicial proceedings, even where the Court considers the public interest superior to that of the administration of justice. The Court added that there is even a greater and stronger duty on a police officer to keep the identity of his informer confidential outside judicial proceedings and suggested that revealing the identification may amount to obstructing justice. The Supreme Court of Canada held that this secrecy rule cannot be waived and that a judge must not consider whether the officer must answer the question but must simply not allow it to be put. The Court

* A Cabinet Minister
1 R. v. Hardy (24 St. Tr. 199)
2 Marks v. Bayfris (1890) 25 Q.B.D. 494

concluded that this common law rule applies also to a public inquiry into the administration of justice. Said the Court:

> "The common law did not give a peace officer this right simply because it would be useful to him, but because it concluded empirically that the right was necessary. It is certainly not possible to go so far as to say that, without this right, a peace officer would be entirely powerless and the criminal laws would be totally ineffective. However, the inability of the one to act and the ineffectiveness of the other would reach a point where they could no longer be tolerable".

Some additional interesting points on this subject were the inevitable exception to the secrecy rule. There is, according to the Supreme Court of Canada, only one exception and that is in criminal proceedings only, where the identity of the informer can demonstrate the innocence of the accused.

Another point made was that an informer may well be a witness in the proceedings. Is he, in cross examination for instance, compelled to answer when he is asked if he is the informer? The Court's reply to this question was "No". However, it is vague whether the witness, who was in fact the informer, can waive the exclusionary rule that protects him. When that happens there may not be any need for the rule any more, as the informer obviously no longer feels threatened.

In conclusion, the Supreme Court of Canada ordered the commission to stay

> "... any proceedings, inquiry or examination compelling, or tending to compel, appellant (police officer) to disclose the identity of his informer, or to produce documents from which their identity can be established,..."

* * * * *

PROVINCIAL POLICE OFFICER MAKING A DEMAND FOR BREATH SAMPLES IN A MUNICIPALITY POLICED BY ITS OWN POLICE FORCE. DOES FAILURE OF COMPLIANCE WITH POLICE ACT AFFECT AUTHORITY?

The Queen and McCarthy County Court of Westminster, New Westminster Registry No. X82-8365 September 1983

A R.C.M. Police officer followed a car from a municipality which is policed by the R.C.M.P. into a city which has its own municipal police service, "where he made observations of the appellant causing the constable to make a demand for samples of breath". The readings of 170 mg. resulted in a conviction for over 80 mg. "at or near" the district policed by the R.C.M.P.

The accused appealed the conviction claiming that the officer had no jurisdiction to make the demand in the city with its own police force.

The matter was not argued on the officer's jurisdiction in respect to his oath of office (which could have been the case if he was a 'municipal constable') but the issue was debated on non-compliance with the provisions of B.C.'s Police Act. Section 15 of that Act states that when a provincial constable (R.C.M.P. officer) exercises his jurisdiction in a municipality with its own force, he must, where possible in advance or in any event promptly thereafter, notify that municipal force. In this case the Crown adduced no evidence that the city force had been notified and the defence claimed that this non-compliance with the Police Act deprived the officer from jurisdiction to make the demand for breath samples.

The County Court rejected this defence theory and held that the legislation simply provides a protocol or courtesy of a notification when this member of one force does business within the geographical jurisdiction of another. Section 15 was not enacted to "stultify" investigations. A failure to comply should have no more than a disciplinary consequence.

Accused's appeal dismissed
Conviction upheld

Comment: It should be noted that the Court held that the well-known B. C. case of R. v. White[1] was, for obvious reasons, found to be distinguishable from this case. It dealt with a municipal constable making a demand in an area policed by the R.C.M.P. while it was not a matter of fresh pursuit. In that case the Court was most generous in its interpretation of the Police Act and held that the demand was authorized and the municipal constable had jurisdiction.

[1](1978) 9 B.C.L.R. 179 County Court Decision

Those interested in this topic may wish to read R. v. Arsenault[1] a synopsis of which can be found on page 11 of Volume 3 of this publication, along with an article on jurisdictional issues in B. C.

* * * * *

[1] R. v. Arsenault 55 C.C.C. (2d) 38 New Brunswick Court of Appeal

CHARTER OF RIGHTS AND FREEDOMS
LIABILITY OF "OWNER" OF MOTOR VEHICLE

The Queen and Watch Supreme Court of B. C. Vancouver Registry No. CC831258 and CC831158 October 1983

Mr. Watch was, under the provisions of sections 76 and 62 of the Motor Vehicle Act, charged with Hit and Run. Obviously it was unknown to the Crown who was driving the car (owned by Mr. Watch) when it was involved in a hit and run accident.

The defence had claimed that the combination of the two sections created an "absolute liability" which is, since the Constitution Act became effective, contrary to section 7 (principles of fundamental justice) and section 11 (presumption of innocence) of the Charter of Rights and Freedoms.

In criminal law there are three distinct liabilities:

1. In matters of outright crime or offences under provincial statutes where a prerequisite intent is clearly indicated, (for instance that something must be done "wilfully", "intentionally", "knowingly", etc.) mens rea is required;

2. All other offences must presume to be strict liability offences which have mistake of fact, due diligence and care as defences; and

3. Offences of absolute liability where the defence of reasonable care is not available.

The Provincial Court Judge before whom Mr. Watch appeared, had held that the sections (62 and 76) created an absolute liability offence which was now unconstitutional. The accuracy of that conclusion was tested in the B. C. Supreme Court which applied a definition created by the Supreme Court of Canada[1]:

> "Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act".

In other words, if "due diligence and reasonable care" are defences to a person charged with an offence as the owner of a motor vehicle, then the offence must be one of strict liability.

The court reasoned that the motor vehicle laws are there to render our streets places of safe and orderly conduct. It provides that if the

[1] R. v. Sault St. Marie [1978] 2 S.C.R. 1299.

driver of a car who violates these rules is not identified "there is still an avenue of enforcement" in that the owner can be charged. It is reasonable to assume that the owner of a vehicle under normal circumstances controls the use of his vehicle. However, should someone take the motor vehicle without the owner having entrusted the vehicle to him, then there is a defence. If due diligence and reasonable care is exercised in controlling the use of the car the person accused of an offence under this status liability provision, can escape liability.

Therefore, the creation of liability under s. 76 M.V.A. does not violate section 7 of the Charter of Rights and Freedoms.

Crown's appeal allowed.

* * * * *

ADEQUACY OF AN INFORMATION TO OBTAIN SEARCH WARRANT

Jackson and The Queen, B.C. Court of Appeal CA 000709 November 1983

Police were granted a search warrant for the accused's home. A quantity of marihuana was found in a nearby garage and the accused was charged accordingly. He applied unsuccessfully to have the search warrant quashed and took his plight to the B. C. Court of Appeal.

A "Justice" may issue a search warrant when satisfied upon the "information" sworn before him that there are "reasonable grounds for believing" that there is a narcotic in the place to be searched. In this case a police officer swore that he had received information from a colleague that he saw a number of marihuana plants growing in an orchard owned by the accused. The information, however, did not say when this was seen, did not give the location of the orchard and did not link the accused with the contraband. The source of the information was, no doubt, reliable. But did the content of the sworn document give the "Justice" grounds to conclude that there was marihuana in the accused's home? Did the information disclose grounds for the "Justice" to be satisfied that on the date the warrant was issued, some of the marihuana earlier seen growing in the accused's orchard, was now in his home?

The B. C. Court of Appeal concluded that there had been insufficient evidence for the Justice to issue the search warrant. However, if the Court quashed the warrant it would put the accused in a legal position "to claim the return of the illegal substance".

Although the search warrant was not validly issued, the accused's application was dismissed.

Comment: In the past these kinds of applications were rare. It did not profit a person to incur the legal expense to have a search warrant quashed. The admissibility of the evidence did not depend on the validity of the search warrant by which it was obtained. Most of these applications were in regard to warrants by means of which documents were seized.

However, with our exclusionary rule under s. 24(2) of the Charter, a quashed search warrant may well enhance an accused's ability to show (on the balance of probabilities) that there was an infringement of his rights, that the search was unreasonable and that the evidence should be excluded.

* * * * *

ARSON - CIRCUMSTANTIAL EVIDENCE - SIMILAR FACT EVIDENCE

On pages 27, 28 and 29 of Volume 10 of this publication is a synopsis of the case:

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), he 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 he 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 totally inconsistent with one another and found not worthy of belief. The Court thought the testimony 'not credible' and a complete fabrication.

The Crown sought a conviction based on circumstantial evidence comprised mostly of similar fact evidence of arson fires in which the accused was involved. The false statements made by the accused, were also claimed to have some weight contrary to his interest.

It is only natural for police to concentrate on persons they know to be predispositioned to commit the crime under investigation. Particularly where 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 one for which he is tried. The prejudice created by the admission of such evidence would 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 miraculous coincidences of the accused's presence at mysterious fires or it demonstrates 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 resulted in this charge of arson against the accused. Besides the accused's involvement outlined above, the police who followed him from a 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 girlfriend was, according to the friend, completely dressed when he awakened her to evacuate the apartment. The accused had received a ride in the car 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 found on fire. 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 to his apartment and in the normal path of travel between the two apartment buildings, fires were set to a news paper building, and the sauna area in the the accused's building. The accused had set off the alarm and helped to evacuate the building. 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 huge set of unhappy coincidences, 'a run of bad luck' as the accused puts it, is too 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, and his trial resulted in a conviction.

* * * * *

Whittaker has now successfully appealed his conviction to the B. C. Court of Appeal which gave its reasons for judgement on December 2, 1983 (Vancouver Registry CA000045).

Whittaker claimed, in essence, that the circumstantial evidence to prove similar facts were inadequate to link him to the fire which resulted in him being accused of arson. The B. C. Court of Appeal unanimously agreed and held that, although the trial judge had accurately stated the law in respect to "similar fact" evidence, he had failed to apply it. The Crown had failed to show a link between the accused and the setting of the fires at which he was suspiciously present. It would not be surprising if the Appeal Court Justices were of the opinion that the aggregate of the evidence of the accused's presence at all of these fires certainly would cause a reasonable person to suspect, if not to be convinced beyond a reasonable doubt, that the accused is a pyromaniac. However, there simply was no evidence at all that the accused had set the fire despite the finger of suspicion the evidence pointed at him. Therefore, there was no link between those fires and the accused (other than evidence of opportunity) and the evidence of them and the accused's presence did not amount to "similar fact" evidence.

Appeal allowed - conviction quashed.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS
REFUSAL TO GIVE SAMPLES OF BREATH - NOT BEING INFORMED OF RIGHTS

Regina v. McRae Provincial Court of B. C. Prince George B. C. November 1983

The accused was seen driving erratically. He showed every symptom of impairment and was arrested. He was not informed of his rights to counsel and testified that he was outrightly refused to contact a lawyer. Subsequently, the accused refused to give samples of his breath.

The accused was convicted of impaired driving but the Judge had some difficulty to hold that the failure of informing the accused of his rights to counsel had no consequences. The Judge did not believe the accused when he testified that he had been refused an opportunity to call a lawyer. Furthermore, it was obvious that the accused was confused about the law when he was demanded to give samples of his breath.

The courts differ in opinion about the consequential effects of a failure to inform a suspect of his rights to counsel. It is an infringement of a right and a court is empowered to remedy that wrong (section 24(1) Charter). Subsection (2) of that section states that evidence that is obtained by such an infringement may be excluded after the Court considers all circumstances and finds that admitting the evidence would bring the administration of justice into disrepute.

The Saskatchewan Court of Appeal[1] expressed the opinion that a Court can exclude evidence as a remedy under subsection (1) OR by the provisions under subsection (2). The B. C. Court of Appeal[2] disagrees with this opinion and held in the Collins case that the Courts can only exclude evidence by means of the provisions in subsection (2) of section 24 of the Charter, where an infringement of a person's rights has been shown.

The latter case was, of course, binding on the Provincial Court Judge. He considered all circumstances and felt that the administration of justice would be brought into disrepute if, in the circumstances, he admitted the evidence of the refusal to blow.

Accused convicted of impaired driving. Acquitted on refusing to give samples of breath.

* * * * *

1 R. v. Therens (1983) 33 C.R. (3d) 204
2 R. v. Collins 1983 CA 821232. Also see Volume 12 of this publication on page 1.

CHARTER OF RIGHTS AND FREEDOMS
DRINKING-DRIVING PROCEDURES

Regina v. Keaney County Court of Cariboo Quesnel Registry 27/83. December 1983

The accused was tried for "over 80 mg". The Crown had only one witness, the arresting officer. The testimony revealed that the officer pulled the accused over and had, from the symptoms he observed, good reason to believe the accused's ability to drive was impaired by alcohol. The officer did not make a formal demand but told the accused to come back to the detachment to undergo a breathalyzer test. He did not arrest the accused but placed him in the enclosed back seat of his cruiser from which the accused could not alight without help from outside. He was not informed of his rights to counsel.

The reason why the officer had not made the proper demand was that he had a "gut feeling" what reaction that would have produced. At the office the accused said, "Well, aren't I entitled to call a lawyer?" At this point the officer did make the demand and read the accused his rights. In 40 minutes the accused made eight calls during one of which he was heard begging to let him speak to a lawyer. He was then given three minutes or "face the consequences". He blew and the analyses resulted in readings of 180 and 170 mg.

The Provincial Court Judge convicted the accused, who appealed claiming that the evidence of analyses ought to have been excluded due to infringement of his constitutional rights.

The County Court Judge did not seem impressed with the officer's performance, however, he held that there were not sufficient reasons to ex lude the evidence. Admitting it, does not bring the administration of justice in disrepute, he reasoned. The accused demonstrated that he knew and understood his right to counsel and the words used by the officer were sufficient to convey the reason for having to accompany him.

Accused's appeal dismissed.
Conviction upheld.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS
RIGHTS TO TRIAL WITHIN A REASONABLE TIME

Attorney General for B. C. and His Honour Judge Craig and John A. C. Carter Supreme Court of B. C. October 1983.

In April of 1980 the accused Carter allegedly committed rape, buggery and gross indecency. In January of 1983 a four count information was sworn charging Carter with these offences.

The Judge of the Provincial Court, after he heard evidence related to the delay of three years, entered a judicial stay of proceedings as a remedy to the infringement of Carter's right to stand trial within a reasonable time. The Crown took the matter by means of "extraordinary remedy" to the Supreme Court of B. C.

The ruling by the Supreme Court Justice, ordering the Provincial Court Judge to proceed with the case, is as significant to the meaning of section 11(b) of the Charter as it is to a sprinter to know where the race begins and where the finish line is.

The Justice held that the time that must be considered for the purpose of this section is that between the laying of the information and the accused coming before a Court to be dealt with according to law. In some cases, "exceptional cases", the delay before the charge being laid may be considered but for all practical purposes it is as stated above.

* * * * *

IS IMPORTING A NARCOTIC A CONTINUING OFFENCE OR DOES THE ACT OF IMPORTING STOP UPON THE NARCOTICS CROSSING THE BORDER?

Harris Bell and The Queen Supreme Court of Canada, November 1983

The accused had footstools shipped to him from Jamaica. Upon arrival in Toronto, customs officers found that the footstools contained marihuana. They notified police and shipped the stools to the Mirabel Airport in Montreal. Police took the footstools to their office, removed most of the marihuana and returned them to the airport from where the accused picked them up. The accused was acquitted of importing by the trial judge who held that the police intervention had broken the chain of possession and that "importation" had been completed before the accused received the goods. The Court of Appeal reversed this decision and the accused appealed to the Supreme Court of Canada.

The majority decision of this Court was that, although "importing a narcotic is not of a continuing nature", and is complete upon the entry of the goods into the country, the intervention by the R.C.M.P. was "in the circumstances" irrelevant. In other words, it did not interfere with the importing by the accused.

Accused's appeal dismissed.

* * * * *

Comment: The conclusion of this case is not nearly as significant as the reasoning to arrive at it. It is hard to say which (the conclusion or the reasoning) was the means and which the end. It seems that the reasoning of many tribunals is becoming less clear and decisive. Unless it is the hardening of my arteries that cause this, it seems that the reasons for judgement rendered by the Courts of Appeal and the Supreme Court of Canada are increasingly difficult to fathom or follow. Also, recently set precedents are departures from well established law for reasons that do not seem to justify the change. In this case, to decide whether "importing" is a continuing offence, the Supreme Court Justices explored and compared the act of "importing" with theft, possession of stolen property and other crimes, even murder. Theft which has always been considered a continuing offence[1] was in the reasoning of this Bell case identified as an offence which is not continuing after it is complete. Assuming the principal thief receives help somewhere along

[1] Regina v. Campbell 2 C.C.C.

the line from someone. If that someone joins in before the completion of the offence of theft then he must be charged as a party to the offence and can be charged jointly with the principal offender. If he joins the action after the offence is completed, then he can only be charged as an accessory after the fact. In other words, if the offence is of the continuing kind, he is a party to it, if not he is an accessory only.

The criminal law states that when a person begins to cause something to become moveable for the purpose of stealing it, the offence of theft is complete. Assuming that a thief moves a heavy object for the purpose of stealing it, but he cannot handle it by himself. A friend, who knows that his buddy is committing theft, comes and helps remove the stolen property. According to the definition of theft, the offence was complete and the assistant is only an accessory after the fact. However, for decades it was held that, despite the definition of theft, the offence was a continuing one and the assistant in the scenario described above is a party to the offence. In view of what the Supreme Court of Canada said in its reasons for judgement is this law now a thing of the past? I guess we'll have to start all over again and see how other courts interpret the interpretation of theft by the Supreme Court of Canada. Perhaps the rumored new definition of theft will make this question an academic one; who knows.

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CHARTER OF RIGHTS AND FREEDOMS - UNREASONABLE SEARCH

Regina v. Morrison 6 C.C.C. (3d) 256
Vancouver County Court

The accused was found acting suspiciously in a place frequented by drug traffickers. His behaviour became more suspicious after they searched his companion and found nothing. The accused was given a choice, he either had to accompany the officers to the station or allow himself to be searched in the bathroom of a nearby restaurant. The accused selected the latter and the search resulted in a bag of cannabis being found attached to his underwear. He was not arrested prior to the search.

Section 10(1) of the Narcotic Control Act authorizes a peace officer, upon the well-known reasonable belief, to enter and search any place except a dwelling house and search any person found in such place. In this case the accused raised the old argument that "place" in the section does not include a public place. He submitted that it only refers to constitutionally protected places. His counsel was fully aware that case law tends to defeat his argument particularly in view of a decision made by a B. C. County Court in 1977[1]. However, he persuaded the Provincial Court Judge that since the Charter of Rights and Freedoms became effective (April 1982) the judicial precedents on this subject are no longer valid. The Provincial Court Judge agreed and acquitted the accused and the Crown appealed.

The County Court Judge found that the officers had reasonable grounds to believe the accused was in possession of a narcotic. Secondly, it was reiterated that:

> "'place' does include a street, lane or other place where the public may have unrestricted access".
>
> "... I am of the view that a street falls within the definition of 'any place' and as such a peace officer is entitled without warrant to search such location".

The Trial Court had expressed fear that if a street was included in "any place" as used in section 10 N.C.A., then police could search "any person" in "any place" for narcotics if, for instance, the particular street was known to be frequented by drug peddlers. That, said the County Court Judge, would undoubtedly be unreasonable.

[1] See article on this issue on page 6 of Volume 11 of this publication. Also Regina v. Hamilton B.C.L.R. 7 146.

Referring to B. C. cases and applying the principles established by them, the County Court Judge held:

> "In my view, .. s. 10 of the Narcotic Control Act can be restricted to authorize searches of places and persons on the basis of a peace officer having a reasonable belief of the existence of a narcotic and that there must be a nexus or a connection between the place, the person and the narcotic". (Underlining is mine).

The search the officers conducted was lawful, not unreasonable and, therefore, not contrary to section 8 of the Charter of Rights.

Crown's appeal allowed
New trial ordered.

* * * * *

THE MEANING OF "PLACE"
SEARCHING A PERSON FOR NARCOTICS

Regina v. Mitchell Vancouver County Court Registry No. CC830693 October 1983

Two police officers walked through an alley which is notorious for the sale of drugs and narcotics as well as the places which exit into this passageway.

The officers melled the smoke of marihuana and saw three men coming out of a "dark bushy area". The accused was one of them. He was advised that the officer had grounds to believe that he (the accused) had marihuana on him. The search produced a gram of cocaine. However, he was acquitted in Provincial Court. The Judge felt that a stop had to be put to police conducting unreasonable searches like this. The officers had depended on section 10(a) and (b) of the Narcotic Control Act which authorizes a peace officer to enter "any place" and to search any person found in such "place". The trial judge held that a public place was not included in "any place". He felt it only referred to private places the police had no right to enter without warrant[1]. As the search was unreasonable, it was contrary to section 8 of the Charter and the judge excluded the evidence.

The County Court Judge found the trial judge had erred in nearly all these issues. A public place is included in "any place"[2]. The search was in circumstances which would create in a reasonable man a reasonable suspicion[3].

The evidence should have been admitted if the trial judge had applied the precedents binding on him. Furthermore, the County Court Judge held that the exclusion of evidence by the trial judge had been predominantly for disciplinary reasons. Again, the superior courts (see the Collins case) have held that in Canada, disciplining police is not a function of the Courts.

Crown's appeal allowed.
New trial ordered.

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[1] See page 6 of Volume 11 of this publication on this issue.
[2] Regina v. Morrison Unreported. County Court Regina v. Hamilton B.C.L.R. 7 146 (1977)
[3] Regina v. Collins 33 CR (3rd) 131. Also page 1 of Volume 12 of this publication.

DANGEROUS DRIVING - DEFENCE OF DURESS

Regina v. Darryl County Court of Cariboo, Prince George B. C. 126/82 August 1983

The accused was in a gas station and made a comment to the girl attendant. A group of "thugs" in another car in a "simulated intent of misguided chivalry" picked a fight with the accused. The girl phoned police. Before the gendarmes arrived things got out of hand and the accused drove away to escape the grievous bodily harm he had good reason to believe would be inflicted if he stayed around. He was pursued by two cars, the occupants of which were armed with baseball bats and shovels. The behaviour and threats by his pursuers were such that the accused had cause to expect to be killed if they caught him. The plan the pursuers had was obvious; they attempted to box the accused in and force him to stop. The accused consequently drove in a manner which was, no doubt, dangerous to the public. To prevent his intended assailants from passing him he drove on several occasions on the wrong side of the road, once when approaching the brow of a hill. In short, it was a miracle that no one was killed.

The accused was convicted of dangerous driving and he appealed claiming that he had no intent to drive in such a manner but did so to escape death or at least grievous bodily harm which would be carried out by persons present on the scene. (See section 17 C.C.)

The County Court judge, in essence, held that it was difficult to find a case more deservant of the defence of duress than this one.

Accused's appeal allowed
Conviction quashed.

* * * * *

SPATIAL LIMITS TO THE EXERCISE OF AUTHORITY

ARREST WITHOUT WARRANT MADE INSIDE A DWELLING HOUSE

Regina v. Fiddler, King and King - County Court of Kootenay - Cranbrook, B. C. CC83000315 November 1983

At 10:50 p.m. police received a complaint that a Lance Fiddler had assaulted a woman by striking her over the head, and threatening her with a knife. Two hours later a police officer checked a truck parked in an odd position outside a house. Bertha Fiddler (one of the accused) and another person came out of the house to speak with the officer who connected the name Fiddler with the earlier assault complaint. He also recognized Lance Fiddler who was inside the house.

The officer informed Fiddler he was under arrest for causing bodily harm and that he was to come with him. Lance declined and after assistance arrived he was removed from the house and taken away. This however, had not gone as smoothly as it sounds. Bertha Fiddler, had attempted to block the officers from entering the home. This resulted in an altercation which involved Edward and Karen King, the persons who were charged jointly with Bertha Fiddler for obstructing and assaulting the officers in the lawful performance of their duty.

The Provincial Court Judge had held that:

> "... while section 450 of the Criminal Code gave a peace officer the right to arrest a person without warrant, it did not give the right to do so in the person's home without that person's consent or in circumstances not approved by common law".

The trial judge had concluded that, although the Crown proved assaults and obstruction, it had failed to show the officers were in the lawful performance of their duty. The spatial (space or geographical) limits of section 450 were violated when the officers effected the arrest in a home without consent. The Crown appealed the acquittal that resulted.

The trial judge, as well as the County Court Judge agreed to the common law that applies to this situation[1]. Section 450 does not establish geographical limitations. It grants to peace officers the authority to arrest without warrant a person who they, on reasonable and probable grounds, believe has committed an indictable offence. However, there are spatial common law limitations to that authority, based on the principle that "a man's home is his castle". The two paragraphs that sum these

[1] R. v. Landry 63 C.C.C. (2nd) 289 - Report of the Canadian Committee of Corrections

limitations up are as follows:

> "A constable has no general right of entry into private property for the purpose of obtaining evidence, questioning persons or effecting an arrest; every invasion of private property, however slight, is a trespass, and no person has the right to enter property except by consent, or strictly in accordance with some lawful authorization. A constable is in this regard in no better position than any member of the public and is not entitled to enter premises merely because he suspects that something is amiss even though a reasonable householder might not object to his doing so if the entry were bone fide and no damage was caused".

In the Report of the Canadian Committee on Corrections, the applicable portion is:

> "We think that a police officer presently (sic) has the right to enter premises, including a dwelling house, by force if necessary, without a warrant, to prevent the commission of an offence which would cause immediate and serious injury to any person, if he believes on reasonable and probable grounds that any such right to enter premises, including a dwelling house, by force if necessary, and without a warrant to effect the arrest of a person who has been found committing a serious crime; and who is being freshly pursued and who seeks refuge in such premises."[1]

The officer in this case, came upon a truck which was parked in a peculiar position. He checked it and fortuitously found Lance Fiddler, who the police were looking for. This obviously does not amount to fresh pursuit.

The leading case in Canada on this issue is Eccles v. Bourque et. al., a B. C. case which was finally decided by the Supreme Court of Canada. The only difference between the two cases is that in Eccles v. Bourque, police had a warrant for the arrest of a person while the arrest of Fiddler was made without a warrant. The question is whether this makes a difference in law.

Police had reasonable and probable grounds for believing that a man for whom warrants were outstanding in Montreal was in the Eccles home. They knocked, identified themselves, stated their reasons for being there, gave proper notice of their authority, and searched the house without finding the wanted man. Mr. Eccles sued the officers for trespass but

[1] R. v. Landry 63 C.C.C. (2nd) 289 Report of the Canadian Committee of Corrections

[2] Semayne's Case (1604) 5 Co. Rep. 91A, 77 E.R. 194.

did not get anywhere. The Supreme Court of Canada recognized that the law of 1604[2] is still valid today. In the famous Semayne's case these well-known words were engraved in British legal history:

> "The house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose."

The Court reminded that even the Bible (Deuteronomy 24:10) dictates that we are not to enter someone else's home to collect a debt. However, it was also recognized that private interest must yield to public interest on occasion and the Court concluded:

> "The criminal is not immune from arrest in his own home nor in the home of one of his friends."

In the Semayne's case the Court said when this private interest must yield:

> "In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors."

In the case of Eccles v. Bourque, warrants were involved and the officers were executing the Queen's process and their entering the private premises did not amount to trespass.

In this case, no warrant was involved. The Queen's process can only come upon a sworn document (information) and the entering of the home without a warrant (in the absence of fresh pursuit or consent) in these circumstances was not included in the peace officer's authority and the arrest was consequently unlawful.[2]

Crown's appeal dismissed
Acquittals upheld.

* * * * *

[1] See also Finnigan v. Sandiford (1981) 73 CR A.R. 153.

HIGH SPEED - DANGEROUS DRIVING

Regina v. Baldwin County Court of Vancouver Island Victoria 27482 November 1983

The accused drove on a motorcycle (capable of doing 240 kilometres per hour) up to speeds of 160 kph in a 80 kph zone. He was followed (not chased) by police for a distance of 16 kilometres before he was stopped by another patrol car. The officer who had followed the accused had not activated the emergency equipment on his unmarked patrol car as he realized the accused could easily outrun him. All this took place on the Island Highway leading over the Malahat during dark hours. On several occasions, the accused had passed cars crossing over double solid lines. The accused testified in provincial Court during his trial for dangerous driving. He admitted the speed but denied that any of his driving had endangered any other person. The accused was nonetheless convicted. He appealed.

The County Court Judge found that a jury could attach considerable weight to the fact that the officer had allowed the accused to continue to drive in a manner he considered dangerous. He should not have assumed that the accused would have committed the additional offence of trying to outrun him (obstruction). Secondly, the Judge had given no consideration to the accused's testimony.

A jury, properly instructed, could return a verdict of guilty. However, in view of the trial judge not having addressed himself on the two points made above, the accused should have a new trial.

Appeal allowed
New trial ordered.

* * * * *

IS A C.O.^{2} PISTOL A FIREARM?

The Queen and W. Covin and The Queen and D. Covin Supreme Court of Canada June 1983.

The accused who robbed a credit union teller armed with a C.O.^{2} pistol, were convicted of armed robbery but acquitted of using a firearm in the commission of an indictable offence (s. 83. C.C.). The Nova Scotia Court of Appeal had held that the pistol was, no doubt, a weapon for the purpose of armed robbery but:

> "... a jury could not on the evidence have reasonably concluded that it was a firearm within the definition in s. 82(1), as used in s. 83(1)."

Evidence at trial revealed that the pistol was in a state of disrepair and that no less than 14 parts were missing, seven of which are essential to its operation. However, an expert would need no more than 10 minutes to install those parts. Section 82(1) C.C. states:

> "For the purposes of this Part, "firearm" means any barrelled weapon from which any shot, bullet missile can be discharged and that is capable of causing serious bodily injury or death to a person and includes any frame or receiver of such a barrelled weapon and anything that can be adopted for use as a firearm."

The portion of the section I underlined establishes that an unloaded but otherwise functional barrelled weapon is included in this definition. The Supreme Court of Canada held that the section also includes barrelled weapons that have "the potential of becoming a firearm through adaptation.

The Court, as it has done many times before, examined the French version of the law, to determine with greater certainty the intent of Parliament. There is no doubt that if a phrase or sentence is translated into another language, it may in the one language be ambiguous or is subject to multiple meanings, while in the other it is more clear or has only one possible meaning.

In French, literally interpreted, the section states:

> "'Firearm' means any weapon, including the frame or chamber of such a weapon and anything that can be adapted to be used as such, that is capable, because of a barrel which shot bullets or any other missile can be discharged, of causing serious bodily harm or death to a person".

Of course, a good instrument maker or machinist can, if given time, attach parts to a piece of pipe for instance, converting it into a firearm. Therefore, in each case, said the Supreme Court of Canada:

> "The purpose of each section should be identified, and the amount, nature and time span for adaptation determined so as to support Parliament's endeavour when enacting that given secton".

Of course, the Court referred to the section creating the indictable offence during the commission of which the firearm was used. An armed robbery is usually a crime of short duration while other crimes can be committed over an extended period of time. The Supreme Court of Canada, in view of this, concluded:

> "Therefore whatever is used on the scene of the crime must in my view be proven by the Crown as capable, either at the outset or through adaptation or assembly, of being loaded, fired and thereby having the potential of causing serious bodily harm during the commission of the offence, or during the flight after the commission of that main offence, the hold-up".

In other words, the Courts must consider the scene of the commission of the indictable offence; if it is reasonable, considering the modification the weapon would have to undergo, to make it functional; the availability of the parts at that time and the skill of the accused make the modification, to determine if the non-functional barrelled weapon at the time of the offence was a firearm.

The section does not require that the accused had possession of ammunition. If all that is missing to make the barrelled weapon functional is the ammunition, it is for the purpose of sections 83(1) still a firearm.

Crown's appeal dismissed
Dismissal of the charge under s. 83(1) was upheld.

* * * * *

IMPAIRED DRIVING - NO EVIDENCE OF ERRATIC DRIVING ACCUSED NOT INFORMED OF HIS RIGHTS

Regina v. Samra County Court of Cariboo Prince George 40/83 October 1983

Reacting to a complaint, a police officer was looking for a certain car. As soon as he spotted the vehicle he stopped it without observing the manner in which it was being driven. The symptoms the accused displayed resulted in a demand for breath samples. The accused attempted to give samples by apparent pretences that he was blowing while in fact no breath filled the cylinder. Consequently the accused was tried for impaired driving and failing to give samples of his breath. He was acquitted of both counts because of a lack of evidence of erratic driving and of the failure to blow because the officer had not informed the accused of his right to counsel. The Crown appealed the acquittals.

The County Court Judge ordered the accused to stand trial anew on both charges. He found that in regards to the impaired driving the Provincial Court Judge had erred. What he should have considered was if the accused was driving and if his physical condition was such that his ability to drive was impaired by alcohol or a drug. Evidence of erratic driving may make the evidence stronger and is undoubtedly supportive of what is alleged. However, it is not essential evidence.

In relation to the failure to inform the accused of his rights to counsel the County Court Judge observed that there was no evidence adduced, either directly or by means of cross-examination, that the accused was not so informed. If the accused was in fact under arrest or detained at the time he was to give the samples of his breath, a failure having made him aware of his right to counsel may amount to an infringement of the accused's rights and the Court, by virtue of s. 24(1) of the Charter may remedy that infringement by excluding the evidence if, in addition, the conditions mentioned in s. 24(2) of the Charter have been shown to exist. However, the onus to show there was such an infringement is upon the defence. Secondly, a prerequisite to the infringement by failure to inform a person of his right to counsel, is evidence that he was under arrest or was detained at the time. As we have discussed, in many cases of this kind in this publication, accompanying a peace officer for the purpose of giving breath samples on demand, does not necessarily mean the suspect is detained[1]. The trial judge had not addressed either of these points.

Crown's appeal allowed.
New trial ordered.

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[1] Chromiak v. The Queen Supreme Court of Canada (1980) 49 C.C.C. (2d) 257

SURETIES TO KEEP THE PEACE
WHERE INJURY OR DAMAGE FEARED

The Queen and Forrest Supreme Court of B. C. Nelson Registry No. S.C. 100/1983 November 1983

Mrs. Forrest swore an information under section 745 C.C. stating to fear that her husband would cause injury to her.

The Justice of the Peace issued process and Mr. Forrest "was brought before him". However, Mrs. Forrest, the informant, was not present. This created a problem as the Justice of the Peace could not do anything remedial for the complainant unless he is "satisfied by the evidence adduced that the informant has reasonable grounds for her fear".

Relying on section 457 C.C. that he was authorized to do so, the Justice of the Peace adjourned to a date for the hearing to be held and released Mr. Forrest on an undertaking that he would not go on the property of his wife. Mr. Forrest breached the undertaking and was charged under section 133(3) C.C. for failing to live up to the conditions of the undertaking.

When he appeared before a Provincial Court Judge on that charge, the information was dismissed. The Judge held that the provisions for adjournments and recognizance or undertakings under section 457 C.C. had no application to proceedings described in section 745 C.C. The Crown appealed the dismissal by stated case.

In proceedings under section 745 C.C. there is no accused and no one is charged with an offence. The provisions contained in the section are preventative in nature. Section 457 exclusively provides for interim releases for persons charged with offences. The Crown took the position that the "mutatis mutandis" in section 728(1) C.C. overcomes the difficulty. After all, the term means "with the necessary changes in points of detail".

The Supreme Court Justice in essence said that mutatis mutandis cannot change a bungalow into a sky scraper simply because both are buildings. He said that using the words to change a person not charged with any offence (but is merely a person against whom proceedings have been initiated under a preventative measure (s. 745 C.C.)), into the position of an accused charged with an offence constitute a change in substance and not "a change in points of detail".

The message is that the complainant should be available to testify when the person who is feared is brought before the Justice of the Peace or a Provincial Court Judge.

* * * * *

MULTIPLE CONVICTIONS ARISING FROM ONE INCIDENT - DOUBLE JEOPARDY
BREAK AND ENTER - ROBBERY - ATTEMPTED MURDER

Regina v. Wigman - 6 C.C.C. (3d) 289
B. C. Court of Appeal

In the early morning the accused broke into an apartment where a Mrs. W. lived alone. Late in the afternoon of the same day the apartment block manager found Mrs. W. for dead lying on the floor of her suite.

The accused pleaded guilty to break and enter and to robbery but found himself also charged with attempt to murder. At his trial he testified how he had broken into the apartment with a fellow he only knew as "David". While the accused was gathering up the loot in the living room, David had gone into the bedroom. When the accused entered the bedroom, he found David delivering a beating to the woman. However, a conviction of attempt to murder followed.

In 1974, a party by the name of Kienapple[1] questioned the Supreme Court of Canada on how he could find himself convicted of (then) rape and sexual intercourse with a female person under the age of fourteen years where the two convictions arose from one incident of sexual intercourse. Basically the Supreme Court of Canada said that since both offences had sexual intercourse as an essential ingredient, the two convictions arising from one such act was improper. Although sexual intercourse with an underaged female person is not included in rape, the raping of such a person inescapably and inevitably amounts to the offence of sexual intercourse with a female person under the age of fourteen years. When rape was proved in one trial there was nothing to be proved in the other except the victim's age.

It seems not an exaggeration to say that there has been a great deal of confusion about the "Kienapple" principle. Some judges have held it to mean that if there is one incident of wrongdoing, only one conviction can result in the absence of a specific direction to the contrary in legislation. Others have held that the principle only applies when there are two offences alleged arising from one incident, which have essential ingredients in common. This discrepancy was cleared up (apparently) by the Supreme Court of Canada in 1980[2] when the Chief Justice (who also wrote the reasons for judgment in Kienapple) said:

> "... this Court was concerned with a single act which gave rise to two different offences, and it held that multiple convictions could not be supported for the same delict or for the same cause or matter or where the same or substantially the same elements entered into two different offences." (Emphasis is mine).

[1] Kienapple v. The Queen (1974) 15 C.C.C. (2d) 524.
[2] Scheppe v. The Queen (1980) 51 C.C.C. (2d) 481.

Applying what it thought was the proper application of the Kienapple principle the B. C. Court of Appeal held that the violence in the robbery was distinct from the violence when the woman was struck. Any kind of violence or threat of it, would have been sufficient to support the robbery conviction. However, the striking of the woman with the inferred intent to cause death or being reckless whether death ensued, to which the accused was at least a party, amounted to attempt to murder.

Said the B. C. Court of Appeal:

> "On the facts in this case there were two offences involving the same violence, but I have no difficulty in reaching the conclusion that different factual and legal elements underlie the two offences."

* * * * *

CHARTER OF RIGHTS AND FREEDOMS - INCRIMINATION

CAN A PERSON CHARGED AS AN ACCESSORY AFTER THE FACT BE COMPELLED TO TESTIFY AGAINST THE PRINCIPAL OFFENDER?

Regina v. Bleick 7 C.C.C. (3d) 176 Manitoba Court of Queen's Bench

A Mr. Ruben was called as a witness by the Crown to assist proving that the accused Bleick had committed murder. Mr. Ruben objected and claimed that he was not compellable to testify. The Crown alleged, in separate proceedings of course, that Mr. Ruben had assisted the accused to escape while he was fully aware that the accused had committed murder. Ruben's trial had yet to take place and of course, a prerequisite to his conviction was proof that the man he helped escape had committed murder. In other words, the Crown compelled Ruben to help convict himself. This he claimed, is contrary to the self-crimination provisions in the Charter and he took his plea to the Court of Queen's Bench to obtain an order not to be compelled to testify at the trial of the accused Bleick.

The Charter assures that we have a right not to be compelled to be a witness in proceedings against ourselves. It also states that when we do testify in proceedings commenced against ourselves or someone else and the testimony is incriminating, it may not be used against us in subsequent proceedings. This, of course, was not sufficient to remedy the situation for the accused. We must assume that Ruben's testimony was important to the Crown and that it would assist to convict Bleick. Of course none of Ruben's testimony can be used when he is tried, but the conviction he is compelled to assist in obtaining is one of the three major ingredients necessary to prove that he (Ruben) is guilty of the crime alleged against him (accessory after the fact). As a matter of fact, the Supreme Court of Canada held in 1974[1] that:

> "... an accessory after the fact may not be tried or enter a valid plea of guilty until the principal is convicted, so that if the latter is acquitted the accessory must, of necessity, be discharged."

Courts of Appeal have interpreted this ruling to mean (particularly in view of section 581 C.C.) that if there is proof that the person who was assisted after the fact, had committed the principal crime, and that the assistant knew this, the latter can be convicted. They reasoned that if the escape was successful or if the principal died, the accessory should not necessarily escape prosecution and conviction[2]. This tends to provide that Mr. Ruben can be prosecuted and convicted whether or not Mr. Bleick, the accused, is convicted.

1 R. v. Vinette 19 C.C.C. (2d) 1.
2 R. v. Anderson (1980) 57 C.C.C. (2d) 255.

All these cases were decided prior to the Charter becoming effective and the Manitoba Court of Queen's Bench had to decide if the provisions it contains in respect to self-crimination brought about any change to these precedents.

The Court concluded after reviewing a number of cases decided since April of 1982 that Mr. Ruben was compellable but that his testimony could not be used to incriminate him at his own trial. The Charter, as the law did in the past, only provides protection against compulsion to testify against oneself.

Mr. Ruben's application was dismissed.

* * * * *

DOUBLE JEOPARDY
DISCIPLINARY AND CRIMINAL PROCEEDINGS ARISING FROM THE SAME INCIDENT

R. v. W. 7 C.C.C. (3d) 170 Saskatchewan Court of Appeal

Constable W. apparently pursued his duties with too much enthusiasm in that he had choked and slapped a suspected impaired driver until the latter confessed that he had been the driver of the car. Consequently, the constable was convicted of a major service offence under the R.C.M.Police Act and fined $300.

The constable also found himself charged with assault under the Criminal Code, but the Provincial Court Judge had quashed the "information" as, in view of the disciplinary proceedings, a subsequent charge arising from the same incident would offend section 11(h) of the Charter which states:

> "Any person charged with an offence has the right ... if finally found guilty and punished for the offence, not to be tried or punished for it again...".

He had reasoned that, despite the fact the charge of assault and the disciplinary default were distinct from one another, they, in fact, alleged the same offence.

The Crown appealed this decision claiming that section 11(h) of the Charter did not apply in this case and that the two offences were not the same and not an alternative to one another. The Court agreed and reviewed a case decided by the Supreme Court of Canada[1] in which that Court pointed out that by joining the Force one agrees "to enter into a body of special relations" and submits to certain restrictions on his freedom. The created offences amount to a code of law of domestic discipline regulating behaviour and discipline. The offences may, but are usually not an offence "of a regular nature to be tried in the regular courts of criminal jurisdiction". But even where a disciplinary default does also happen to be, in the circumstances, a public offence, they are separate and distinct from one another. In view of this, Cst. W. was not subjected to double jeopardy, section 11(h) of the Charter has no application and the Court did set aside the constable's acquittal and substituted a conviction for assault.

* * * * *

[1] Regina and Archer v. White (1955) 114 C.C.C. 77. See also R. v. Rees [1981] 2 W.W.R. 657.

CHARTER OF RIGHTS AND FREEDOMS
IS AN UNLAWFUL SEARCH AN UNREASONABLE SEARCH?

Regina v. Cameron The County Court of Westminster New Westminster Registry X820067 November 1983

Customs officials intercepted a parcel addressed to the accused and containing two pounds of marihuana, in the mails from Hawaii. One police constable arranged to get dressed up as a mailman, while another went to a Justice of the Peace to apply (successfully) for a search warrant upon reasonable and probable grounds for believing that in the accused's home narcotics were kept. Everything went off as planned; as soon as the delivery was made the search warrant was executed, the narcotics were seized, and the accused was charged accordingly.

The defence claimed that the search warrant was invalid (it was issued prior to the package being delivered) and the search, consequently, unreasonable. This is contrary to section 8 of the Charter of Rights and Freedoms and should be remedied by excluding the evidence obtained thereby, as provided for under section 24(2) of the Charter.

The County Court Judge was of the opinion that the search warrant was unquestionably invalid. The officer swore prior to the delivery that he had it from a reliable source that narcotics were kept in the home. His grounds for so believing were related to the narcotics which were to be delivered some time hence. This rendered the search of the accused's home unlawful. But, is an unlawful search automatically an unreasonable search? The County Court Judge did not entirely agree that this American doctrine of law is an appropriate test to determine if a search in these circumstances is reasonable. He commented that, since the officers themselves delivered the contraband, they knew the narcotics were in the home and it would not have been unreasonable for them to have searched the house, if "all other matters had propriety". The snag, of course, was the search warrant. However, he said:

> "I think one would start with the proposition that a search that was in substance without authority is in the absence of a satisfactory explanation, taking into consideration the totality of the circumstances, a search which starts upon the proposition that it is an 'unreasonable' search."

The County Court Judge held that the police officers knew the warrant was invalid and so did the Justice of the Peace. Although the Judge was sure that these people were well motivated, he thought that particularly the actions of the Justice of the Peace, who was to act judicially, was "extremely disturbing". Awesome powerful documents are issued by the

Courts to assist police in their investigation. If the judiciary became sympathetic in issuing these documents and would do so without the prerequisite grounds existing, the only safeguard for the Courts to ensure the public that the judicial process is not abused, would be to have the authorities prove the validity of the documents to the target persons, before they were executed (the documents that is). Would a deliberate short cut as was taken in this case shock the community? The resounding answer is "Yes" the judge thought.

The Court also reviewed the police actions. He firstly observed that police, when they are up against sophisticated and cunning criminals, must and are expected to adopt methods that deceive and are less than honest. Treachery and deception on the part of police are often totally acceptable and frequently amount "to the best police work the community and the courts have seen". Police talents in "dramatic arts" have been both novel and necessary. In such circumstances, the Courts have solidly supported the police and held that their deception did not bring the administration of justice into disrepute.

In this case the delivery of the narcotic was in fact "planting" the evidence. In view of the fact that the contraband was on route to the accused anyway and that non intervention on the part of police would have resulted in her eventually being in possession of it, brought the planting within the acceptable realm of police practice; but only marginally. The practice in circumstances like these, was not to be encouraged. Despite the fact police did nothing to mislead the Justice of the Peace, they were still party to the execution of an invalid search warrant.

Regretting to have to dismiss an indictment where appropriate investigation would have resulted in a conviction, the County Court Judge discharged the accused.

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QUESTIONING A SUSPECT VIA AN INTERPRETER

As our communities are becoming more cosmopolitan in character, the likelihood of police officers having to question a person with whom they cannot converse directly, due to a language barrier, is far from remote. It seems, therefore, appropriate to review the law on how statements made to a person in authority should be taken to maximize the possibility of having them admitted in evidence.

Persons in authority are inclined to use an interpreter like one would a mechanical device which enables them to gain access to something. They seem to compare the interpreter's part in the interview to that of the locksmith when they want a door opened. However, interpreters are much more than that and are unique in their legal status when it comes to their role in obtaining a statement.

It is important to apply the common law hearsay rule to the taking of a statement by a person in authority via an interpreter. Although this test is not exhaustive, it is safe to say that when one testifies to a fact and cannot personally vouch for the truth of that fact, then the testimonial area he is involved in better be one of the thirty some exceptions to the hearsay rule.

When an accused person relates his version of an incident to a person in authority, the latter may relate this to the Court as an exception to the hearsay rule. After all, the person in authority cannot likely vouch for the truth of the content of that statement. If the officer cannot directly communicate with a suspect and does so through an interpreter, the "hearsay" aspect is certainly aggrevated. It is not only the truth of the content of the statement he cannot vouch for, he cannot even vouch for the fact that the statement was made. All he can say is that the accused spoke in a language he did not understand.

The exception to the hearsay rule in regards to statements by an accused person includes utterances made in the presence and hearing of the accused, as long as he associates himself to what is being said. If you apply this rule to the scenario so common when someone is questioned by means of an interpreter, it does not take much to run into snags. Legally and for the purpose of the rule there is not one conversation that takes place, but two. One is when the officer speaks to the interpreter, or vice versa. They have a conversation in the presence of the accused, but not within his hearing considering that this includes understanding what is being said. The other conversation that takes place between the accused and the interpreter is not understood by the officer. As a matter of fact, when the officer makes notes in English

of the conversation that took place, those notes record only the conversation between the interpreter and himself. He has no clue, and cannot swear to it that his notes reflect what the accused said. The interpreter's endorsement of the English notes, indicating that they are accurate in terms of what the accused told him, do not assist the officer in enabling him to testify as to what the accused said. The interpreter seems the king pin and the all important link. He is the only one who can relate what the accused said and verify the accuracy of the notes taken, whether by himself or the officer.

It also remains a question, particularly when the interpreter is a civilian, whose agent he is. In some cases the interpreter is obviously there at the behest of the person in authority, but regardless who engaged him or selected him he remains the mainstay.

The cases that deal with this issue are not that plentiful. The one mostly adhered to in Canada and Britain is R. v. Attord (1958)[1] decided by the English Central Criminal Court. Attord only spoke Maltese and he had been questioned by a police officer via an interpreter in respect to a murder. At Attord's trial the police officer's testimony of what Attord had said, had not been allowed in evidence. Said the Court, "the evidence ought not to be given through the mouth of the police officer in the witness box" in that his testimony was entirely hearsay.

There are two Australian and three American cases on this point. In one Australian case R. v. Wong and Wong (1957)[2], the court would not allow the evidence of the accused's utterances to be given other than by the interpreter. In another Australian case, Gais v. The Queen (1960)[3] an illiterate Papua was used as an interpreter. The accused Gais had confessed to murder. The interpreter had testified that he could not recall what Gais had said to him but he swore that he had accurately relayed to the investigating officer what the accused had told him. Because of the illiteracy problem the Court had allowed the officer to testify what the interpreter had told him the accused said. In the American cases the law as stated in Attord (supra) was followed with the exception of one, Commonwealth v. Vose (1892)[4]. In that case the Court held that the interpreter is a "joint agent" and that persons who adopt a mode of communication through an interpreter must be assumed to be trustworthy and the officer was allowed to testify what he was told the accused said in a language he did not understand.

In a 1970 Vancouver case, Regina v. Kores,[5] a County Court Judge totally

1 43 Criminal Appeal R. 90
2 [1957] S.R. (N.S.W.) 582
3 Gais v. The Queen (1960) 104 C.L.R. 419
4 32 N.E. 355
5 5 C.C.C. 1970 55.

rejected the "agency doctrine". He held that the law as stated in Attord is correct. Kores was charged under the Immigration Act and had been questioned by an investigating police officer who did not understand a word of Greek, the only language Kores claimed to speak. A stenographer, who only spoke English and an interpreter were present at the interview. The Crown, in an attempt to follow the law as established in Attord (supra), called first the interpreter who told the Court that he had to the best of his ability translated from Greek into English and vice versa during the interview. He had not made any notes and could not of his own recollection say what the questions and answers were.

The next question put to the interpreter by Crown Counsel was if the officer had told the accused that he did not have to say anything. Defence counsel objected and the debate was on. The County Court Judge held that neither the officer nor the interpreter could give any of the conversation they had in the English language. Only the interpreter could tell the Court in English what he had said to Kores in Greek and what Kores had answered in that language, and of that conversation he had no recollection. To the best of my knowledge this and other cases, have established the law in Canada as it still is today.

The cases suggest that the interpreter should make notes of the conversation. The cases where this was most successful is where the interpreter's notes were in the language spoken by the suspect. Any bilingual person knows that to give a precise interpretation that reflects the true meaning or tenor of a statement can be very difficult. Sometimes a word or phrase in one language with a specific meaning cannot be translated into another language but must be described as to its meaning. Simultaneous interpretations can do injustice to what is actually being said. Notes made by the officer in English are not anywhere near as accurate and reliable as notes by the interpreter in the language spoken by the accused. If the officer is the only one who has made notes (which is second best) then at least the interpreter must while the conversation he (and not the officer) had with the accused is still fresh in his mind, certify or indicate that those notes reflect that conversation. The doctrine of "recorded recollection" must be applied.

The matters discussed in this article do, of course, only apply where a statement is adduced to prove the truth of its content and not just the fact that it was made. The ills identified are not likely remedied by electronically recording everything that took place during the interview as some suggest. Furthermore, when the statement is simultaneously transcribed in English, the suspect's signature on it would be meaningless and whether or not it would have any value as an exhibit is questionable.

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