ISSUES OF INTEREST

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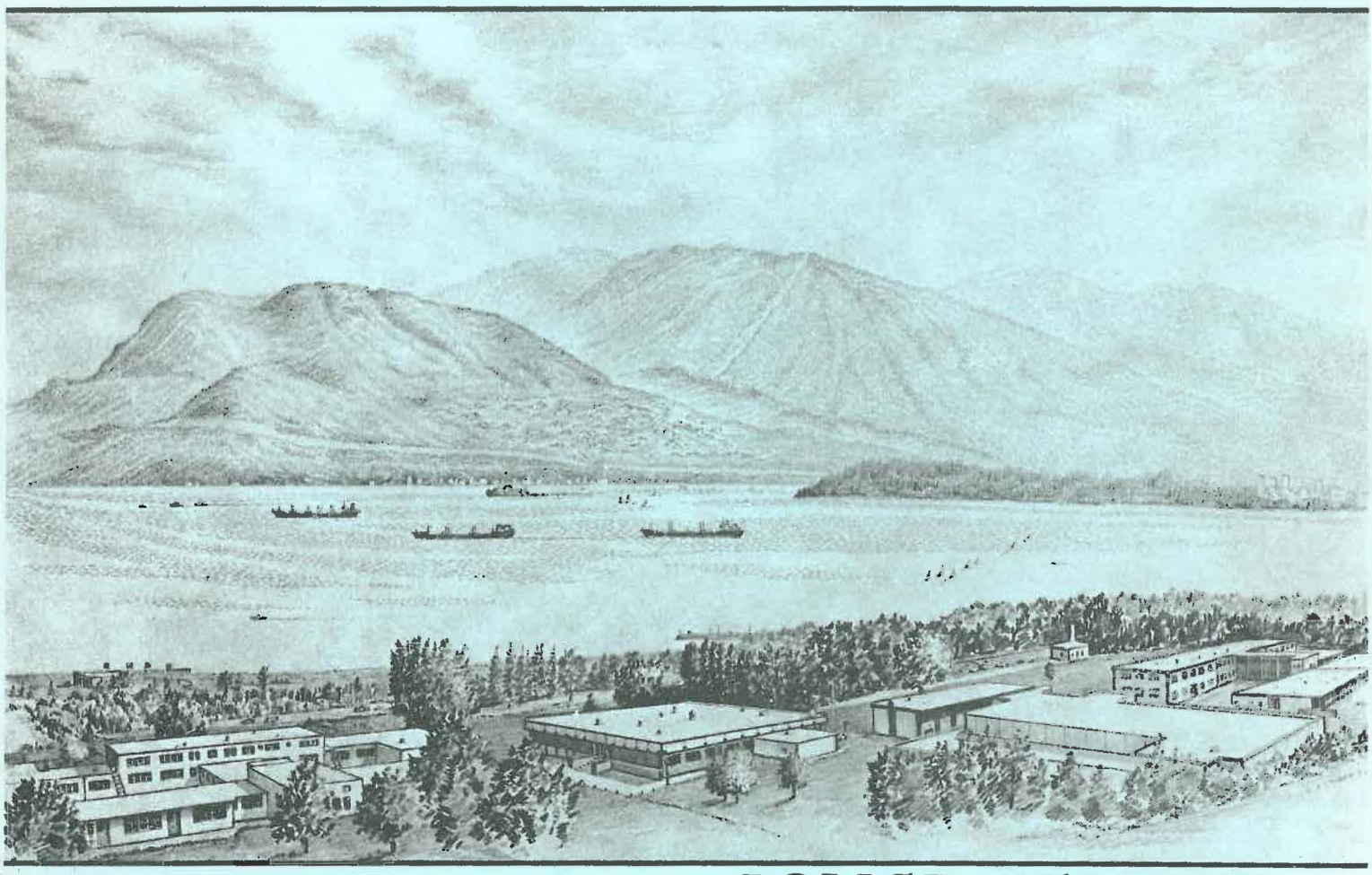

POLICE ACADEMY

Written by John M. Post

May 1985

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CHARTER OF RIGHTS
DAMAGES FOR NOT ALLOWING ARRESTED PERSON TO SEE HIS LAWYER

Crossman v. The Queen - 12 C.C.C. (3d) 547
Federal Court, Trial Division (Events occurred in Yukon Territory)

The plaintiff had been arrested without warrant at 10:00 a.m., for assault (s. 245.3 C.C.). At 11:40 a.m. he had phoned his lawyer requesting him to attend at the Detachment building to give him legal advice. The lawyer then had spoken to the investigating officer and told him he'd be over in a few minutes to see the accused. Approximately 12 minutes later the lawyer had arrived at the police office only to be told he could not see his client until the officer had finished interviewing him. One hour later the officer had phoned the lawyer to say that his client was now available. The accused had not given any statement. He had entered a plea of guilty (was sentenced to 3 months imprisonment) but now sought damages and costs for being denied his right to counsel (s. 10(b) Charter). He brought this action under s. 24(1) of the Charter as a remedy to the infringement of his rights.

The circumstances are not unique. Similar situations have surfaced over the admissibility of statements, or, the evidence of a breath analysis. In this case no evidence had resulted from the infringement and the plaintiff apparently suffered no damages from the interview. Therefore, the damages he claimed were exemplary and punitive in nature. What the constable did amounted to a tort for which the Crown is liable.

The Crown submitted that by consenting to the interview and not refusing to speak until his lawyer arrived, the plaintiff had actually waived his rights.

The Court was critical of the constable starting the interview before the lawyer's arrival, and thought it "inconceivable" that he had no access to his client until the interview was completed. That, said the Court "is in my view a clear infringement of the plaintiff's civil rights". Counsel is always entitled to speak on behalf of his client and "would certainly be justified in invoking on his behalf the right not to be questioned in the absence of his counsel". It could not be inferred from the telephone conversation between the lawyer and the officer, that the plaintiff had been advised not to allow the interview until he (the lawyer) was present. However, the lawyer was most certainly entitled to see his client at the time he arrived at the station or sit in on the remainder of the interview. Furthermore the Court found that the accused had not waived his right to be questioned with his counsel present.

Once again emphasizing that this was not a matter of determining the admissibility of evidence, the Court found that the constable had committed a tort.

Damages in the amount of $500 plus plaintiff's costs were awarded.

Comment: The Court reminded the parties to the proceedings at least twice that it was not dealing with the admissibility of a statement had the plaintiff made one. The Court was dealing with an application for a remedy under section 24(1) of the Charter and not with the exclusionary rule under subsection 2.

Had the plaintiff given a statement in these circumstances, this Court would undoubtedly have found that his rights to counsel had been infringed. This would only have triggered consideration for exclusion. The Court would have had to consider all circumstances and if admission of the evidence would have brought the administration of justice into disrepute. In other words, the statement would not necessarily have been inadmissible.

* * * * *

THE CHARTER AND THE INDEPENDENCE OF THE JUDICIARY

Re Currie and Niagara Escarpment Commission 13 C.C.C. (3d) 35 Ontario High Court of Justice

Mr. Currie was to be tried by an Ontario Justice of the Peace under the provincial Offences Act for allegedly violating some provincial regulatory law. Section 11(d) of the Charter which unlike the Bill of Rights applies to provincial legislation and administration, enshrines a right to be tried by an independent and impartial tribunal. Ontario Justices of the Peace who are appointed by and hold office at the pleasure of the provincial cabinet (executive) are not independent claimed Mr. Currie and he filed a motion for an order prohibiting any Justice of the Peace from presiding at his trial. The order was sought as a remedy under section 24(1) of the Charter.

The Court did a very interesting review of the history of the office of Justice of the Peace from the time of its inception in the 14th century. From Confederation until 1968 the office diminished in prestige and function. In 1968 the Ontario government abolished the office of magistrate and part of that office was assigned to the Justices of the Peace. In 1979 the Provincial Offences Act gave jurisdiction to Justices of the Peace to try nearly all provincial offences which carry a maximum penalty of $10,000. This is 20 times that of the maximum fine for a federal summary conviction offence. When presiding at a trial the Ontario Justices of the Peace are, like any member of the judiciary, empowered to strike down legislation that is inconsistent with the Charter or outside the legislative jurisdiction of the Ontario Government.

The Ontario High Court of Justice reviewed the tenure and security of the Ontario Justice of the Peace.

Appointments of Ontario Justices of the Peace are political in that they are exclusively done by means of Orders in Council. Although political patronage may play a part in the selection there is nothing unconstitutional or improper about such consideration.

The appointment is for life, but the office is held at the pleasure of the Cabinet. In other words, any Justice of the Peace can be removed from office at political whim and without cause. He, therefore has no security of tenure and holds office at the pleasure of the prosecuting government. That is hardly independence, held the Court.

Justices of the Peace are totally dependent on administrative directive what judicial duty they may perform. They are also evaluated by a provincial court judge who may adjust and expand the duties of a Justice of the Peace. This again is totally contrary to the principles of independence.

There are classes of Justices of the Peace. Each has a different salary arrangement. Some are sitting Justices and others non-sitting, some are full-time, others part-time. The latter are paid by the hour or on a piece basis. Again, common sense causes one to conclude that the Justice is not independent from the executive branch of government.

The Ontario High Court of Justice therefore ordered that Justice of the Peace Allan and all other Justices of the Peace are not independent and are prohibited from hearing the prosecution against the applicant.

Comment: The Justices of the Peace in B. C. do have working arrangements not unlike their counterparts in Ontario. In B. C. even provincial court judges have, since the Charter, expressed that they are not independent and cannot seem to be impartial.

To understand the importance of the Canadian Judiciary and the issues involved in these recent challenges regarding the independence of those appointed by the Provinces, perhaps the article I wrote in August of 1975 as a reaction to the then recently enacted B. C. Provincial Court Act may be of assistance:

> The Provincial Government, being responsible for the administration of justice, is in an unenviable predicament with its Court services. Many factors have created an apparent imbalance as proceedings are commenced at a rate greater than the Court can dispose of them. Preservation of proprieties renders Court time unpredictable; witness management with any accuracy is practically impossible; overloads cause fatal administrative errors; legal fancy footwork under the banner of justice, inhibit finalization of proceedings; particularly amendments to Federal Statutes have continuously added to this court's jurisdiction; new laws and precedents have made it mandatory for the Court to conduct more trials on issues, "show cause" hearings, etc.: and an increase in regulatory laws have all added to the burdens of the Provincial Court.
>
> The Government has seen fit to attempt to remedy the consequential problems and there has been greater involvement in the management of this Court over the last years. An attempt to streamline the services to this Court is quite noticeable (Sheriff's Services, Crown Counsel, Court Administrators, etc.) and the Bill 100/1975 "The Provincial Court Act". This Act contains provisions which affect the Judiciary of the Provincial Court.

Laws that affect the Judiciary are sensitive under our Federal and "Anglo-American" system, particularly where those laws tend to bring the Judiciary under government control. The separation of the Judiciary from government is considered to be part of the principle known as "the separation of powers". Too much power in any one institution is a corruptive influence which does not insure for a good and just government.

Executive Power

The Cabinet consists of elected representatives, selected by the leader of the political party which has gained the most seats in the House. Needless to say that they are selected from those who gained seats for that party, unless the party is in such minority that it is forced into coalition. The cabinet exercises executive power. Reading our Constitution one is not left with the impression that the executive is all that powerful. They are only the privy council to the Crown. The Crown can disapprove legislation which the executive initiated and which was passed in the House. In other words, the executive when it "suggests" law seems to have to pass two hurdles: the House and the Crown. In reality, and especially when the party in power has the majority of seats in the House, there are no hurdles. For a cabinet minister, or for a government back-bencher to vote against his own executive is a cardinal political sin which can be very harmful to the individual's political career in Canada. Voting in the House is very much party controlled, except where the issue is one of morality or conscience. There are some pretty good reasons for this, but they are irrelevant to the issue involved in this article.

For the Crown to refuse legislation is extremely remote if not unheard of. The executive itself does by convention enjoy invaluable privileges. Cabinet meetings are held in-camera; orders in Council can result which become law with only the approval of the Crown; for a minister to speak out against policy of the cabinet may well be the end of his or her political career; it controls the finances, and makes the appointments to official positions in government. In fact, the Cabinet is the government. As you can see, executive power is awesome and immense, to say the least.

Judicial Power

The Judges of all our Canadian Courts are appointed by

either a Provincial or the Federal Cabinet. The County Court Judges and up are appointed by the Federal Cabinet and the Provincial Court Judges by the Provincial Cabinet. No one denies that these appointments are often political. Nevertheless this has had very little effect on judicial excellence. The Liberals, when in power, may appoint a good Liberal to the bench, but he must be a qualified person. Each party seems to have a choice of numerous excellent people to fulfill the responsible task on the benches of our Courts. In Federal Canada this is indeed a responsible task, more so than in a unitary form of government. In addition to being the interpretors of the statutes, our Judges are in reality the referees between the levels of government or between the public and the government. Our Judges, at all levels, when having jurisdiction, may declare law initiated by that mighty executive ultra vires that government, or inoperable because it violates fundamental rights and freedoms. In other words, the Courts are the "check and balance" system by being watchdogs over legislative trespass either by one government onto the terrain of the other or by any government onto individual rights and freedoms. An independent Judiciary is therefore one of the essential principles of our form of government. R. M. Dawson, a noted Canadian political scientist said:

> "The Judge must be placed in a position where he has nothing to lose by doing what is right, and little to gain by doing what is wrong, and there is, therefore, every reason to hope that his best efforts will be devoted to the conscientious performance of his duty."

The Separation

In view of the unique role of the Judiciary in Canada the need for a separation is obvious. Judicial review is really the only hurdle the executive has. This, by tradition and of necessity, dictates impartiality in private disputes and disputes between the individual and the government. Although it would seem desirable for an overzealous government to control judicial power, the independence of the Judiciary has been preserved and observed by our governments. The Constitution does place the Judiciary of the Superior Courts (Provincial Supreme Courts Provincial Courts of Appeal, Federal Court and Supreme Court of Canada) out of reach of the governments. It states that they shall hold office during "good behaviour". This means that only criminal and corrupt behaviour would affect their tenure and can be removed for

such behaviour by "the Governor General on address by the Senate and the House of Commons". Note that it does not say "the Governor in Council". This means that the Federal executive can only remove a Superior Court Judge by the request of both Houses. In addition, their salaries are established by Statute and not by cabinet. This, of course, so the livelihood of the Judiciary is not in the hands of the executive and to ensure that they be paid the same to avoid political gratitude. Another safeguard is the general but eroding policy that the executive does not promote Judges to a higher Court. This also may smell of political favour and gratitude. However, exceptions are made for the sake of excellence. It seems in recent history quite acceptable for Judges to be promoted to the more superior Courts.

The County Court Judges are appointed by the Federal Cabinet and can be removed by them. The separation from the executive lies, by accident or design, in the jurisdiction. The County Court is a trial court, and is under Provincial jurisdiction while the welfare and livelihood of its Judiciary lies with the Federal executive.

It seems a correct observation that if government can create laws with controls to make bad Judges good, that law is equally capable to make good Judges bad. Therefore, involvement of governments in managing the Judges is incredibly sensitive.

British Columbia Provincial Court

The Provincial Court Act institutes a Judicial Council which is to separate the Provincial government from the Judiciary of the Provincial Court. The Council consists of the Chief Judge of the Provincial Court, the Associate Chief Judge, the treasurer of the B. C. Law Society, the Chairman of the B. C. Bar Association, one Justice of the Peace, and three persons appointed by the Provincial cabinet. This gives the council eight members, four of which will be members by virtue of their office. Of the four ex-officio members, two are appointed to their office by the cabinet. The Council, therefore, consists of two members indirectly appointed by cabinet, four directly appointed, and only two over which the cabinet has no control. This council under the chairmanship of the Chief Judge has the statutory mandate to improve the quality of the judicial services in the Provincial Court. It must

propose prospective appointees to the bench; conduct inquiries respecting the Judges or Justices of the Peace; propose improvements in Judicial services; organize the training and conventions; prepare and revise a code of ethics; and report to the executive anything it (the executive) may deem necessary. Judges can be removed the same way they are appointed. Though they hold office while of good behaviour, the Act lists a number of other reasons for removal. Their salary is fixed by the Attorney General, their jurisdiction is for the Province and there are no provisions for a Judge to serve in a specific district. This could mean that their welfare, livelihood and place of employment is, in essence, in the hands of the Council and the Executive. Yet we cannot afford a Judicial Siberia for those who the public depend on to stand between them and the government. If there is a dispute, the referee cannot be an employee of one of the parties to the proceedings. If a dispute is between the Federal and the provincial government, the mediator ought not to feel that he or she must be loyal to the employer. The Act gives the Judges an appeal to the Provincial court of Appeal but only for removal from office. They could be as vulnerable as other government officials.

Rebuttal:

There are rebuttals to these submissions. Some can be found by comparing the provisions of the Provincial Court Act with those applying to other Courts or by comparison with Courts under other Federal systems. One could say that the Judges of the Supreme Court of Canada are totally at mercy of the Federal cabinet. The Act under which the Court operates is not entrenched. It can, therefore, be repealed by a simple majority in the House and Senate and all nine Judges would be removed en bloc. The same could be said in relation to the Federal Court. In West Germany, which is also a Federation, the Judges of the Courts are all government employees who, in addition, enjoy a promotional system. One could argue that whenever a Provincial Court Judge makes a decision on a constitutional issue, it will, in all likelihood, be appealed; or decisions of Provincial Court Judges are not binding on other Courts. One could demonstrate, that for a democracy our Canadian Courts are too powerful and that they in fact legislate by interpreting the Constitution and thereby affect the supremacy of Parliament and obstruct government. Democracy means people's power, and we must be governed by elected representatives who are responsible to the people but not by appointed Judges.

Reality:

To suggest that the Parliament of Canada may repeal the Supreme Court Act is, of course, absurd. The same applies to the Federal Court which has unique jurisdictions, distinct from Courts in the provinces.

To compare the Canadian Federation with that of West Germany can be misleading as it is different in concept and character. Firstly, the Judiciary - the same as in many unitary systems - only interpret the law and have, with the exception of one court, no power to judicially review the constitutional propriety of legislation. Furthermore, the German Provinces (Laender) have little original authority and do in practice depend on delegation of power by the senior government. There is, therefore, no "referee" role and little reason why the Judges should not be government officials. As to the argument that Provincial Court decisions on constitutional issues will be appealed and do not set a binding precedent, is of course without value. The Canadian "horizontal" Court system gives our lower Courts, when having jurisdiction, as much authority to deal with constitutional issues as the Courts of Superior Jurisdiction. The parties to proceedings before a Provincial Court are therefore entitled to judicial excellence and should not have to depend on an appeal for that. The Judiciary of this Court must as a consequence be as independent as their counterpart in the Superior Courts. To say that our Courts are by interpreting the law interfering with Parliament is incorrect. The interpretation will only be of significance or binding while the law stands as it was when interpreted. Parliament may amend the law if the court's interpretation does not reflect Parliament's intent. As far as the constitutional issues are concerned, the Courts cannot be superseded unless there is a constitutional change which could be a long drawn-out process. Our system, however, cannot permit the makers of the law to be its interpreters, to determine the constitutional propriety of legislation or to have control over those who are responsible for this. Then, finally, there is the defence that all Courts have a Chief Justice or Judge. This is true, but there seems a distinction between their role and that of the Chief Judge of the Provincial Court. The others administer the Court and assign sessions and workloads. The Chief Judge of the Provincial Court seems the liaison between the Judiciary and the Cabinet and, as Chairman of the Council, a sort of disciplinarian.

Summary

It seems that if the Provincial Court Judges were treated similarly to the Federally appointed Judges, there would be no question about their independence. The Provincial Court Act could, from this constitutional point of view, be amended to ensure independence. For instance:

1. The members of the judicial council could each year select from their own number a chairman with the Chief Judge and Associate Chief Judge as consultants to this Council to represent the Judiciary, and, be present at all its meetings. The liaison between this council and the executive should be by means of that chairman only.

2. It could be provided that removal of a Judge should only be possible by "the Lieutenant Governor on address by the Legislative Assembly".

3. The salary of the Provincial Court Judges could be set by statute.

4. Perhaps a Judge should not be transferred unless it is upon his request or when there is no longer a judicial function to be performed where he is."

* * * * *

RELIGIOUS PRIVILEGE - PRIEST AND PENITENT
JURISDICTION TO ISSUE SEARCH WARRANT FOR A CHURCH

Re Church of Scientology and The Queen - 13 C.C.C. (3d) 97
Ontario High Court of Justice

The Church allegedly sold items which according to their pamphlets, were to give their owner all kinds of religious and health benefits. These items (one of them a "crude" galvanometer) were sold for costly prices while the benefits to be derived were scientifically impossible; nor was the quality as represented. By this the Church allegedly defrauded the purchasers.

Police obtained a search warrant for the Church and seized the stock of the items and related documents. The Church applied to the High Court of Justice to have the search warrant quashed and the goods returned, claiming that on the grounds of religious privilege there is no jurisdiction to issue a search warrant for a church and that the documents seized come under the Priest-Penitent privilege.

The Court conceded that, preaching of a religion is no business of the State, but held that religious practices may conflict with the law. Rendering to God that which belongs to God and to Ceasar that which belongs to Ceasar, a church cannot practice religion contrary to law with impunity. The seized artifacts were, therefore, legitimate exhibits to prove the charge of fraud. Furthermore, there is no known privilege that interferes with the Judiciary's jurisdiction to issue a warrant to search a church.

In regards to the Priest-Penitent issue the Court held that at common law or through the Charter, there exists no such privilege in Canada. The preferential treatment the clergy sometimes receive in the Courts is no more than courtesy, completely in the province of a trial judge. The practice has resulted in pressing counsel not to pursue questions that would compel a member of the cloth to breach a confidence. Sometimes Judges have declined to compel a minister or priest to answer a question where he has claimed the non existing privilege. In general, it is no more than respecting religious confidentiality.

Application to quash warrant and have artifacts returned was dismissed.

* * * * *

SEARCH AND SEIZURE BY A PERSON OTHER THAN A PEACE OFFICER
APPLICATION OF CHARTER OF RIGHTS AND FREEDOMS

R. v. Locke, 13 C.C.C. (3d) 515
Alberta Court of Queen's Bench

The accused was asked to leave a tavern as he could not prove his age. He complied. A short time later he was back again. This time he was requested to accompany a couple of tavern employees to the manager's office. He again complied and when asked to do so, emptied his pockets. After this, one of the employees, without asking consent, went through the accused's pockets and found a quantity of marihuana. Police were called and a charge of possession was preferred.

The trial judge acquitted the accused. He held that the accused's right to be secure against unreasonable search and seizure had been infringed. It was by means of this very infringement that the marihuana was discovered and, consequently, the find was inadmissible in evidence.

Section 32 of the Charter states that it applies to the Parliament and Government of Canada and the legislature of each government of the provinces. This means, it was urged, that in this case, where persons who were not government agents or law enforcement officers had obtained the evidence, the Charter did not apply. Furthermore, that should the Charter apply there was no infringement under section 8 and if the Court found that there was, it did not call for the exclusion of the evidence under s. 24(2). These were the points the Crown raised when they appealed the accused's acquittal.

An examination of U.S. cases on this point (whether the Charter also applies to the actions of a private citizen) was not very helpful. The wording of the U. S. Charter is quite different on this point. It simply enshrines that no State shall make or enforce law that infringes the rights recognized by the Charter. In other words, through the U. S. Charter "the American Constitution protects the rights of citizens against government interference whereas the Canadian Constitution protects the rights of citizens against any interference, be it government or private"*.

The Court reasoned that if it was intended to exclude the Charter in matters between citizens, section 32 would have read: "This Charter only applies ..." instead of "This Charter applies".

* Re Edmonton Journal and Attorney General of Alberta et. al. (1983) 4 C.C.C. (3) 59.

The Court turned to a research article entitled "The Charter of Rights and the Private Sector"*. It is pointed out in this article that although one may be tempted to infer from s. 32(1) of the Charter that its provisions only apply to governmental activities it obviously is meant to cover activities in the private sector as well. Legislation applies to everyone within the geographical jurisdiction of the enacting legislature, except to the Crown (see section 14 of the Interpretation Act). It is a long established principle that the Crown is not bound by the law unless explicitly included. Section 32 of the Charter is precisely for that purpose. In other words if it was not for section 32 of the Charter, its provisions would only apply to the private sector and exclude the Crown and its activities.

Section 32 was also enacted to ensure its provisions applied to provincial legislative assemblies which was not the case with the Bill of Rights (1960).

For these reasons one civilian can infringe the rights of another civilian and in this case the personnel of the tavern did violate the right of the accused to be protected against unreasonable search and seizure. The Court further found that this infringement was not a "mere gossamer possibility of prejudice against him" in the eyes of a fair minded community at large. Therefore, admission of the evidence obtained thereby would bring the administration of justice into disrepute.

Appeal dismissed.
Acquittal upheld.

* * * * *

* U. of Manitoba, 12 Man. L.J. p. 213 (1982) Professor Dale Gibson.

THE CHARTER AND PRE-TRIAL DISCOVERIES

"IS THE CROWN OBLIGED TO TELL ALL TO ASSIST ACCUSED IN PREPARING A DEFENCE"?

Re Kristman and The Queen 13 C.C.C. (3d) 522.
Alberta Court of Queen's Bench

Mr. Kristman was apparently driving dangerously and was apprehended with the assistance of a police dog. The events resulted in charges of dangerous driving, impaired driving and refusing to provide samples of breath. The Crown proceeded by way of summary conviction and a trial date was set.

Mr. Kristman's counsel wrote the Chief of Police and asked for the names of the officers involved in this matter and an opportunity to interview all of them. The Chief responded that he could not comply and referred counsel to the Attorney General's Department. This prompted defence counsel to write the prosecutor with the same demands. He added notice that non compliance would be viewed as prejudicing Mr. Kristman in preparing a full defence. This, counsel wrote, would result in a request for adjournment and an application for a judicial stay of proceedings.

Crown Counsel responded by pointing out that particulars and information to the practising bar is provided by his office and "If you have not as yet obtained such particulars, feel free to do so".

Defence counsel, apparently not to be deterred from his plan to have an examination of discovery by interviewing all police witnesses before trial, demanded, in answer to Crown Counsel's letter, to receive a copy of the policy that police officers are not to be made available for such purpose. In addition he promised to serve "Notice to Attend" on the police compelling them to appear in Judge's chambers to give evidence regarding the policy. He claimed that the particulars available through Crown Counsel's office were already in his possession and now demanded particulars about all communications regarding the officers involved not wishing to be interviewed by him. The prosecutor's response to this demand was:

> "If they (the officers) choose not to submit to interviews by you they have no obligation to explain their decision to you."

Defence counsel then made application to the Court of Queen's Bench for a remedy under section 24 of the Charter, to the denial of his client's rights "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" (s. 11 of the Charter). He requested that the Court order the criminal proceedings against his client be stayed unless within two weeks the Crown satisfied the Court of the Queen's Bench that:

1. all names of the officers involved in the investigation are revealed;

2. the Crown advises the police department to rescind its policy that no officers make themselves available for interviews with defence counsel as such policy is unethical, illegal and obstruct a person from receiving a fair trial; and

3. that if the police officers, on their own initiative, still refused to be interviewed by defence counsel, Crown Counsel conducts the interviews of the officers and provide all details to defence counsel.

In support of the application, defence counsel lamented how police and the prosecutor are in possession of all information and decide whether or not to prosecute. They also decide what aspects of the case are to be investigated and to what extent, while more in-depth investigation may well shed a different light on matters. Not having that information an accused person is disadvantaged and cannot prepare his defence and ensure that there will be a true verdict. He claimed that s. 11 of the Charter cries out for a full discovery policy and concept as had been suggested already in 1974, some 8 years prior to the Charter becoming part of an entrenched Canadian constitution. Furthermore the Canadian Bar Association's "Code of Professional Conduct" states that defence counsel may properly seek information from any potential witness and has a duty to interview witnesses.

It was submitted that at preliminary hearings, for instance, the prosecutor may call just enough witnesses to make a prima facie case against the accused, leaving defence counsel to discover through cross-examination who the other witnesses are. At least the defence does then have an opportunity to interview these witnesses and subpoena them where this is astute to do so.

In cases where there is no preliminary hearing the accused person must have similar opportunity to discover the case against him, argued Mr. Kristman's defence counsel. In this case Crown Counsel and police breached their duties in regard to the principles of criminal justice and had interfered with the accused's constitutional rights, he claimed.

A couple of interesting cases were brought to the attention of the Court. One* was where the Crown concluded its case while there were more witnesses listed on the back of the indictment. Defence counsel, when he objected, was invited to call those witnesses himself. He declined to do so on the premise that a defence counsel ought never to call a witness unless he first determines what evidence the witness will give. Said the Ontario Court of Appeal: "You are at liberty to communicate with them and find that out ...". "The counsel for the defence may not attempt to influence the story that that witness may give ..." "The mere fact that he interviews a witness in preparation of his defence has no effect upon the Crown". The Supreme Court of Canada held** after noting that the accused did not request information in possession of the Crown but had demanded evidence for the purpose of his defence:

> "In my opinion, the failure of the Crown to provide evidence to an accused person does not deprive the accused of a fair trial unless, by law, it is required to do so".

In this Kristman case the accused did not ask for evidence for his defence but requested information in possession of the Crown.

Summing up the applicant's position that he has a right† to interview witnesses or have access by alternative ways to their evidence, the Crown said that the Court was asked to depart from procedures established by a long line of cases and establish a new practice. This would include removing historical discretion from the Crown and compel it to assist defence counsel in providing lists of witnesses, arrange for interviews, and should these witnesses decline to speak to defence counsel, provide details of their evidence. Police departments would have to establish systems by which officers would be taken away from their duties to be available to defence counsel for interviews.

Crown Counsel concluded his submission by pointing out that the accused is not entitled to a remedy under s. 24 of the Charter unless there is an infringement of a freedom or a right. Not making police officers available to him to be interviewed for him to discover the Crown's case against him is not such an infringement.

The Court observed that there is a legislative scheme for pre-trial disclosures, which includes provision for preliminary hearings. It held that it is incorrect by judicial law making, to go beyond what the Charter itself and the Criminal Code are silent on. Extravagance

* R. v. Gibbons (1946) 86 C.C.C. 20.
** Duke v. The Queen (1972) 7 C.C.C. (2d) 474.
† A "Right" as opposed to a "Freedom" places an obligation on another person to respond, comply or perform.

either in one direction or the other, in relation to fundamental law, will only bring disrepute on the justice system the court observed. What had to be strived for is "timely disclosure" as mentioned in the "Canons of Legal Ethics". Said the Court:

> "'Timely disclosure' of the Crown's case and the formal examination for discovery of all persons who may peripherally be involved or aware by hearsay or otherwise of facts relative to a charge are clearly different things".

The position of defence counsel for the applicant is clear observed the court; he does not seek a simple interview with Crown witnesses, he demanded a total pre-trial discovery including all peripheral material including police reports. In respect to police reports the court said:

> "They are an accumulation of facts known to the officer, suppositions or inferences by him, references to what he was told, suspected or thought."

Defence counsel asked for a fishing licence on the waters of this material without indicating what species he was out to catch, doing it by any means available. Witnesses would be without judicial guidance or legal counsel during this expedition; even without protection on fundamental points or matters that cannot be disclosed.

Whether a person receives a fair trial (the accused claimed that without the evidence he wanted in advance he could not have one) is very much up to the trial judge. If he feels an accused is disadvantaged by not possessing certain information he can adjourn the trial and order that the Crown divulges whatever is necessary. Many other aspects of the trial or rulings made can cause a trial not to be fair. When this happens, then an accused can object or take whatever action necessary to have that infringement of his right remedied. In this case the accused asked for reparation before the defect had occurred. By analogy, his application was in the category of preventative maintenance. The symptoms the accused identified simply fell short of justifying the diagnosis that an unfair trial would result. Said the court:

> ". . . nor am I able to conclude the s. 11(d) of the Charter, has such reach, so as to provide to the accused the right of pre-trial discovery because, evidence as yet unknown, may be uncovered, and may prove useful at trial to the defence. The Charter does not provide such discovery".

Considering that:

1. production of evidence before trial is a discretion of the Crown and production of evidence at trial is a discretion of the trial judge;

2. the accused has no discretion in this area;

3. the Crown is not to withhold evidence for an oblique motive and especially not because it would assist the accused; and

4. complete pre-trial disclosure is not part of our law and, therefore, access to all evidence and witnesses is not a right of an accused person;

there was no infringement of a right and consequently no entitlement to a remedy under subsection (1) of section 24 of the Charter.

Application dismissed.

* * * * *

USING CRIMINAL LAW TO COLLECT A DEBT
ABUSE OF THE PROCESS OF THE COURT

Regina v. Van Holland 13 C.C.C. (3d) 225
County Court Judges' Criminal Court Ontario

When the accused arrived for work on Monday morning his boss, the Branch Manager of a trust company, was waiting for him and guided him into the Boardroom. There an auditor told the accused how he had, over the weekend, gone over the books and discovered that the accused had misappropriated $80,000. The accused conceded that he was responsible and apologized. However, he refused to sign a confession claiming that the amount was only $65,000. When that was amended he declined to sign until he had spoken to his lawyer. The confession, prepared by the branch manager, included an undertaking to make restitution and a verbal promise was made that a signature on the dotted line would avoid police involvement. Upon this assurance the accused did not only sign the confession but also a demand note in favour of his employer. At the accused's trial, the branch manager denied the promise of no police involvement and testified that he had simply been anxious to obtain the confession before involving the police.

The matter was reported to police who did not interview the accused for several weeks. During this time, pension funds, accounts and stocks were signed over to the trust company by the accused to apply these funds to his indebtedness. Three months after the theft was discovered, police arrested the accused without warrant on a charge of theft. This had "shocked" the accused in view of the payments he had made and the promise that there would be no police involvement. While out on bail he had lunch with the branch manager who promised that if the accused would make full payment in the next few days, he (the manager) would contact Head Office, in an attempt to have the charges dropped. Although the manager denied to have made such promise, the accused, immediately upon the meeting, arranged a mortgage on his home and paid the debt. He said he would not have done so if it was not for that promise. However, the day before he paid the debt, the manager had sworn the information, charging the accused with fraud.

The Court believed the accused and found that the company had used the criminal process as a means to collect a debt. The criminal law was not designed for that purpose. Had the accused paid his debt a couple of days earlier the criminal allegations would not have been made. Therefore, proceeding with the trial would amount to abusing the process of the Court.

Stay of proceedings ordered.

* * * * *

UNSCRAMBLING PAY T.V.
THEFT OT TELECOMMUNICATION SERVICES

Regina v. Miller & Miller 12 C.C.C. (3d) 467
Alberta Court of Appeal

A municipal police officer noticed a "turnable stub" attached to the Millers' television installation. The Millers were questioned about this length of coaxial cable and tin foil and the following story unfolded.

Mr. Miller, who has some expertise in telecommunications, attempted to clear up the "co-channel interference" he experienced on his cable T.V. reception. He attached the "turnable stub" and the impaired reception became clear. However, to the Millers' surprise they discovered that this gadget gave them a windfall benefit. The pay T.V. channels, with a little bit of fine tuning, came in clear and crisp. They did not complain and enjoyed thereafter the entertainment that came their way free of charge.

The Millers were charged with fraudulently obtaining telecommunication services and thereby committing theft contrary to section 287(1) C.C. They were acquitted and the Crown appealed on the grounds that the trial judge had accepted the explanation by the Millers while expert evidence made their story incapable of belief. According to the experts the problems the Millers claimed they had, could not be remedied by the contraption Mr. Miller fabricated. Furthermore Miller's claim that he was receiving the pay T.V. channels clearly in black and white, prior to the installation of the "turnable stub" was technically impossible. The stub was, according to the experts "an instrument of theft". However, the Court of Appeal was not enthusiastic about reassessing Miller's credibility. The trial judge had believed him and with that the Justices could not interfere. Secondly the Crown claimed that mere watching of a pay T.V. channel without paying for it amounts theft whether or not it is possible that the reception was not intended. Should the Court find that the reception of the pay channel was a windfall situation and could not amount to theft, then it should consider the "second obtaining" of the services when they subsequently to the windfall continued to receive this benefit without intending to pay for it. The Crown actually asked the Court to apply a theory similar to "theft by finding". Finding something is innocent, keeping it without letting it be known that it was found so the owner will not claim it amounts to theft. The Court declined to do so on account of the wording of the charge. The information alleged that the accused "fraudulently obtained" the T.V. service. They had not so obtained the service if one was to believe Mr. Miller.

The Court held that if the T. V. company wanted to prevent unpaying spectators they simply had to build higher fences. If non paying viewers receive unscrambled signals through no connivance of their own, watching the program does not result in an offence under 287(1)(b) C.C.

Acquittal upheld.
Appeal dismissed.

Comment:

The subsection under which the accused was charged also prohibits fraudulently "using telecommunication facilities". It makes one wonder if a pay T.V. channel is a "facility" and if watching it includes "use". However, the Crown selected to charge under that part of the subsection that prohibits the fraudulent obtaining of telecommunication services and was, in the circumstances, unsuccessful.

* * * * *

POLICE DISCIPLINE REGULATIONS AND JURISDICTION

Bowles et. al. vs. John Post and Attorney General, B. C. Supreme Court Victoria Registry No. 184354 January 1985

A good time was had by all at a "platoon" social get-together at the home of a municipal constable who lived well outside the boundaries of the municipality he and the platoon members served. The host and two other platoon members got the "Rembrandt" urge and allegedly painted grafitti on a retaining wall. The symbols and words were apparently aimed at and incredibly offending to an elderly neighbour. When she inquired why she was targeted, the alleged response by the host was equally offending.

The provincial police were called and advised the lady of the procedure under the Discipline Code appended to the Police Act. This resulted in a complaint in writing along with pictures and details being forwarded to the chief constable, the Mayor and Attorney General.

An attempt to resolve the complaint informally failed and the chief constable ordered an investigation. The procedures as outlined in section 39 of the Police Act and the Police Discipline Regulations were followed. The chief received the investigation report together with the statements by the witnesses and the three constables. He refrained from familiarizing himself with the content of the statements, in compliance with the spirit of section 12(1) of the Regulations which states that the decision whether to proceed with preferring a charge must be based on the investigator's report and to prevent a claim of prejudice as he intended to preside over the hearing himself. He personally served the necessary documents on the constables and presided over the hearing when the constables denied the charges of "acting disorderly thereby likely bringing discredit upon the reputation of their police force".

The bargaining unit to which the constables belonged petitioned the Supreme Court to prohibit the chief constable from conducting and continuing the disciplinary hearing. Grounds they raised in support of the application were, in essence, as follows:

1. The constables were off shift and therefore the Chief Constable had no jurisdiction over them;

2. The constables were not within the geographical boundaries within which they are municipal constables and peace officers;

3. There is an apparent bias when the presiding officer over the discipline hearing was the recipient of the investigation report and the person who decided if and what charges would be preferred;

4. The Police Act and particularly the Discipline Code dictate procedures that deprive the accused municipal constables of the principles of fundamental justice; and/or

5. The procedure as outlined in section 39 of the Police Act was not adhered to.

In respect to points 1 and 2 above the Court held that the Police Act or its Regulations do not restrict the chief constable's jurisdiction to municipal constables who are on shift or within the geographical boundaries of the municipality they serve. Whenever a municipal constable discredits the reputation of the force, then regardless where he is ("at Shawnigan Lake, Vancouver, or New York") the chief constable must have power to discipline and correct; this to maintain the effectiveness of the force and public respect.

In regards to point 3 above, the Court pointed out how the chief constable, under the Discipline Code has the power to order an investigation, receive the resulting report, lay charges and preside over the disciplinary hearing. That does not create an apprehension of bias, as he cannot and must not personally investigate the complaint or prosecute the charges. Neither can the chief sit on the appeal of his decisions. With appeal procedures in place and the Chief's actions leading up to the hearing being merely mechanical and procedural (including his decision to lay charge), there is no interference with the fair and impartial hearing the constables are entitled to. Therefore the reasons in 4. above were rejected also.

However, the Court held that the chief constable had made a procedural error. Section 39 sets out a four part procedure:

1. The complaint must be lodged with the appropriate disciplinary authority;

2. The disciplinary authority shall attempt to resolve the complaint informally;

3. If that informal process fails, then the complainant may submit the complaint in writing to the disciplinary authority; and

4. The disciplinary authority, receiving a written complaint under (3) shall cause the complaint to be investigated.

As explained, the complaint was triggered by an elaborate and detailed letter from the complainant. Therefore, when step 2. failed it seemed superfluous and redundant to ask the complainant to write again. The author of the section has seemingly assumed complaints to be verbal in the first instance. In any event, the section is procedural and not

designed to protect anyone's interest or to prevent abuse. As a matter of fact should step 2. be successful and no written complaint follows, a disciplinary authority is not prevented from taking disciplinary action. Although the trend is that only departures from strict procedure which are protective in nature are fatal, the Supreme Court Justice considered this technical error sufficient to grant the order to prohibit the chief constable from continuing with the hearing.

Comment: The outcome of this application in respect to the bias and jurisdictions was somewhat predictable. Although any person who is to perform a judicial role must be conscious of the appearance of justice, he can hardly be considered biased for performing the duties imposed by statute. From time to time the issue of bias has been raised in regard to magistrates or provincial court judges who may have entertained an information supporting the application for a search warrant, before whom the proceeds of the search were brought, who may have issued a warrant in the first instance, then presided over the first appearance of the accused, decided on the bail hearing, presided over the trial and subsequently did so in respect to a co-accused. Whether the Judge was biased must be demonstrated in the way he conducted the trial. If the rules of evidence were adhered to, natural justice was appropriately applied and the facts found, and the verdict is supported by the evidence, then previous knowledge is of no consequence. We are inclined to equate the rules related to jury members to those applicable to persons presiding over trials. In respect to the jurisdiction the Court applied a theory similar to that in criminal law. Where the perpetrator committed the crime outside the geographical jurisdiction of the court by which he is tried but where the victim suffered the consequences of that crime within those geographical boundaries, the court has jurisdiction. Mail frauds and those committed by means of credit cards are good examples. The Courts have held that, unless the accused has been convicted elsewhere for those very criminal acts, he can be tried in any of the jurisdictions where the victim suffered the consequences of the crime. The Police Act and its Discipline Code seem to similarly say if the behaviour of a municipal constable brings disrespect on the force he serves then, regardless when or where he does it, disciplinary proceedings can be preferred and concluded in the jurisdiction of the victimized force.

The Justice made it quite clear to be of the opinion that a chief constable can, in these procedural circumstances, go ahead with a disciplinary hearing. The Court held that sections 38(1)(b) and 40(2) of the Police Act provide for this.

Although section 38 is somewhat obscure as to its meaning, it seems that it, as well as section 40 are referring to public inquiries. These cannot be conducted until the "investigation is complete" (see 39(4)). This, according to section 54(2) of the Discipline Code Regulations is not the case until the "presiding officer" has found that the alleged disciplinary action should be dismissed, or on the date punishment is imposed. The investigation is not complete when the investigators present their report to the disciplinary authority. It is with the greatest respect that I wonder if the Justice was aware of section 54 of the Regulations. The applicable portions of section 38 and 40 appear to only provide that a sentence can be enforced despite the fact that the municipal constable or the complainant has requested a public inquiry.

* * * * *

THE CHARTER AND THE ADMISSIBILITY OF STATEMENTS
WHEN IS INFORMING OF RIGHT TO COUNSEL COMPLETE?

Regina v. Michael Johnny, Supreme Court of B. C., Vancouver Registry CC841146, September 1984

The accused, a 19 year old native person, had been arrested for murder and was subsequently questioned by two police officers. These officers informed their prisoner of his rights to counsel four times and asked him if he understood what he had been told. The response had been: "You mean ...do I have ... I tell you story about what happened, then you tell lawyer"? He was then told that what he would say ... "we could say in Court, yes.". When asked, "Do you want to call a lawyer", the answer was "No". The accused had then made a statement which the Crown adduced in evidence.

The accused was, at the time, a pupil at the school for the deaf. His hearing is severely impaired, his vocabulary is like that of a 6 year old while his reading capability is at a grade 4 level. One of the officers, before questioning the accused, had phoned the principal of the school and learned that the accused knew sign language. The officer was given the name and phone number of an interpreter. However, the officers decided to proceed without the interpreter.

Evidence during the voir dire showed that the accused did not know the meaning of the words - "duty" - "inform" - "right" - "retain" or "instruct". Despite the four times he had been told of his rights, the court was asked to find that the accused's right to be informed of his right to counsel had been infringed. It was also submitted that, considering the circumstances, admitting the statement in evidence would bring the administration of justice into disrepute.

The Justice found that due to the accused not knowing the meaning of the key words in the form read to him, he was not informed of his rights as it was intended under the Charter of Rights and Freedoms. Having established that there was an infringement of the accused's right to be informed of his right to counsel and levying some criticism at the officers as they ought to have known the accused's disabilities, the statement was not allowed in evidence as such would bring the administration of justice into disrepute.

* * * * *

EXECUTION OF SEARCH WARRANT - STATEMENTS AND THE CHARTER OF RIGHTS AND FREEDOMS

Regina v. Capson, County Court of Vancouver No. CC840807, January 1985

Police obtained a search warrant for the accused's home under the Narcotic Control Act. They showed the accused and the lady he lived with an unsigned copy of the warrant and confined the two in the kitchen area of their apartment. A bag containing 42 smaller bags with marihuana (378 grams in total) was found. When asked who owned the marihuana, the accused said "It's mine" or words to that effect. The accused was then placed under arrest and for the first time during this episode, told that he had right to counsel. A further search resulted in the finding of more marihuana and a pair of scales.

The accused, the lady he lived with and her daughter (who had arrived during the search) testified during the voir dire to determine the admissibility of all this evidence. They told the court that the accused, upon being informed of his rights, had asked to phone a lawyer. The answer had been: "There's lots of time for that". Subsequent requests to phone a lawyer were ignored. When he was taken to the police car to be transported to the detachment, the lady offered to phone a lawyer for the accused. He accepted her offer.

The officers denied that any such requests were made and that no such conversation took place. They also denied that the accused asked at the police office to be allowed to phone a lawyer before he gave them several statements.

Defence counsel argued that all evidence should be excluded on the basis that the warrant was improperly obtained and was, therefore, invalid. Consequently the search was unreasonable under s. 8 of the Charter. Furthermore the copy of the warrant shown to the accused was unsigned. This argument was rejected. Firstly, the officers had not obtained the warrant by any improper means. If there was anything amiss with the warrant, it was of a technical nature. For the purpose of the search the warrant was valid and the officers acted in good faith. In other words they acted in "objectively reasonable reliance" on a warrant issued by an impartial Justice of the Peace. In addition, an invalid warrant does not necessarily mean that the search is unreasonable*. The fact that the copy of the warrant was unsigned did not taint the search either, and the search and seizure were held to be reasonable.

* R. v. Heisler (1984) 11 C.C.C. (3) 475, Alberta Court of Appeal.
R. v. Cameron, November 1984, B. C. Court of Appeal CA001541.

The defence also submitted that the evidence should be excluded on account of the infringement of the accused's right to be informed of his right to counsel when, before his arrest, he was detained in the kitchen of his home during the search. The Court, applying the famous Chromiac test* held that the restraint during the search was not the detention contemplated by the Charter. Said the Court:

> "In my opinion there was no obligation on the part of the police officers when they directed the accused to remain in the kitchen area to then deny him of his right to retain counsel".

Then the defence argued that the accused was denied his right to counsel when he, according to his testimony and that of his witnesses, had been refused access to a phone.

The Judge had been impressed by the accused and his two witnesses. The officers who at the preliminary hearing testified not to recollect any request from the accused, had at trial "vehemently and abruptly" denied that any such request was made.

On the balance of probabilities, the Judge found that the accused's right to have access to counsel had been denied. He therefore found that all statements the accused made after his arrest, were inadmissible. The marihuana and the accused's admission of ownership were admitted in evidence.

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* See page 3 of Volume 1 of this publication.

THE LETTER OF THE LAW AND ITS APPLICATION
ACCUSED FAILING TO APPEAR ON UNDERTAKING AND s. 738(3) C.C.

Horvath and The Queen, County Court of Vancouver No. CC841904, December 1984

Horvath was arrested for theft and assault. He had been released by a Justice of the Peace upon his undertaking to appear. He did appear, and a date for trial was set. On the date of trial the accused failed to appear and as his lawyer had received no instructions the matter was adjourned. The court warned that if the accused failed to show the Court would proceed ex parte. The accused did not instruct his lawyer, failed to show up for his trial and was convicted in his absence, of both counts. The accused now appealed the convictions.

Section 738(3) C.C. empowers a summary conviction court to proceed in the absence of the accused if he has failed to appear for trial where he was served with an appearance notice or had been served with a summons. This does not include an undertaking argued the accused and therefore the trial judge had no jurisdiction to proceed in the accused's absence.

The Court found it unexplainable why Parliament would limit ex parte proceedings for two means only by which a person is compelled to appear. An undertaking is no less personal in terms of notification than the serving of an appearance notice or summons. The Judge assumed it was a draftman's oversight. Though Courts have inherit jurisdiction over its own process they cannot try a person in his absence unless the law specifically permits it.

Convictions set aside.

* * * * *

THE COURT AND "THE DEAL" BETWEEN POLICE AND THE ACCUSED

Regina v. Wood, County Court of Vancouver Island, Victoria No. 32991, December 1984

Police arrested the accused, an 18 year old youth, with a quantity of marihuana in his possession. He had it for the purpose of selling it. When charged accordingly, there was no problem in proving the requisite facts. However, the accused claimed that there was a deal made between him and the police that should he cooperate and identify his source, the charge would be simple possession only. Despite the fact that the youth identified his supplier, he was released on an appearance notice which noted a charge of possession for the purpose of trafficking.

The police acknowledged that there was such a "deal" but had felt that they could, in view of the evidence, not take it upon themselves to reduce the charge. They had however, in an attempt to comply with the agreement, sought the favour of the prosecutor. This was apparently unsuccessful. Counsel for the defence sought similar consideration for his client as was given in undistinguishable cases*.

Another part of the defence was an issue raised in respect to the Charter. The accused had been wrongly released. The offence stated on the appearance notice carried a maximum penalty of life imprisonment. An appearance notice can only be issued in the case of summary conviction offences and indictable offences over which a Provincial Court Judge has absolute jurisdiction (see s. 451 and s. 483 C.C.). If we give the most liberal interpretation to the curious section 454 (1.1) C.C., the accused could not be released by police other than on a Promise To Appear or a Recognizance.

In any event police discovered their error after they released the accused and remedied it by re-arresting him. When the original arrest was effected the accused was told of his right to counsel, upon the second arrest he was not. This the defence claimed was an infringement of his rights and should result in some kind of remedy under s. 24 of the Charter.

In regards to "the deal" the Court acknowledged that arrangements and plea bargaining are not unheard of but held that such matters as these must be left between the accused, his counsel and the Crown. However,

* R. v. Smith 22 C.C.C. (2d) 268.

he concluded that the accused had been misled by police and was not dealt with fairly. He did as was asked of him and yet he ended up being charged with the offence of possession for the purpose of trafficking.

The Court also found the "re-arresting" of the accused heavy handed. The Judge suggested it would have been better to allow their error "to sift through the Court for remedy". They could have released him on a simple possession charge and made the accused aware that that may not be the charge he would be facing. "Deals" are a matter involving public policy which lies exclusively with the Crown. That should have been made clear to the accused and that would also have justified the suggested release on simple possession.

When re-arrested, the accused should have been informed of his right to counsel held the court. Particularly in view of the complications that were caused by the error and the action to remedy it, a lawyer could easily have arranged with Crown Counsel a release as suggested above. Instead the accused spent the night in jail.

This infringement triggered access to a remedy under s. 24 of the Charter. Although the Court seemed to imply that without this constitutional provision it had inherent jurisdiction to rectify injustices and unfairness.

The reasons for judgment are not clear whether the Judge used section 24 of the Charter or the "court's duty to protect the judicial process", but a stay of proceedings was ordered on the charge of possession for the purpose of trafficking and a conviction entered for the charge of simple possession.

* * * * *

ACCEPTING A BRIBE WITH THE INTENT TO INTERFERE WITH THE ADMINISTRATION OF JUSTICE. ACCEPTING MONEY FOR BRINGING MONEY INTO A CORRECTIONAL INSTITUTE.

Regina v. Smalbrugge, County Court of Westminster, Chilliwack 28/29 February 1984

The accused, a food services officer at a correctional institute, did on two occasions, bring money into the gaol for an inmate. He was tried for that he did "corruptly with the intent to interfere with the administration of justice, accept money for bringing money into the institute"... contrary to the rules of the institute.

The inmate, testifying for the Crown, said that the accused knew that the money had been given by persons on the outside, who believed that he would use it to take a hairdresser's course. The accused also knew that the money was for purchasing drugs and had agreed to bring the funds in as long as he would receive part of it in remuneration. The accused denied this in his testimony and said that he believed the inmate needed the money to pay the tuition fees for the course and that he had accepted some money for his services only after the inmate had insisted he did so.

There was no doubt that the money was contraband for whatever purpose it was brought into the jail. The accused was fully aware of the rules and he was at all relevant times a peace officer. The defence, however, claimed that the rules prohibiting the money being brought in, was no more than an institutional administrative rule and was not included in "the administration of justice". The Crown took the position that the sentence the prisoner served was judicially imposed and that, therefore, the rules of the institution were part of the administrative structure that governs convicted offenders. This is clearly part of the responsibility under the constitutional provision that the government provides for the administration of justice. In other words, the course of justice continues until the penalty is satisfied. The Crown claimed that if the front end of the system belongs to the administration of justice* then so does the tail end. This, as the Supreme Court of Canada has said regarding the administration of Justice in s. 109, that it is "... not restricted to what takes place after an information is laid but includes the taking of necessary steps to have the person who has committed an offence brought before the proper tribunal".

* Supreme Court of Canada in Kalick v. The King (1920) 61 S.C.R. 1975.

The Court was not persuaded and held that the administration of justice, as used in s. 109 C.C. "does not include the punishment itself, unless in the infliction of that punishment there arises a violation either by the punished or by those executing the punishment". In this case there was no interference with the administration of justice as was intended by s. 109 C.C. Parliament meant to provide punishment for those who subvert the process of justice. The accused, if he had brought drugs in the gaol he would have committed the crime of trafficking; if he had assisted in an escape he would have been charged with that specific offence. He violated a rule made by his employer and he was "rightly fired for it". Had he, if it was within the range of his authority, arranged for the accused's sentence to be altered from what was intended by the Court, then perhaps he would have interfered in the administration of justice. He did not have any control over such matters and the money given to him was therefore not a bribe.

Accused acquitted.

* * * * *

Note: Section 109 C.C. (1)(v) deals with accepting a bribe with the intent to procure or facilitate the commission of an offence. The Court hinted that if the Crown could have proved that the accused knew the money was intended for the purchase of drugs, a conviction could have been possible had he been charged under that subsection.

BREACH OF PROBATION - BURDEN OF PROOF

Doggett and The Queen - The County Court of Westminster No. X012920 November 1984

The accused, convicted of theft, was placed on probation. One of the conditions was a curfew until he was fully employed or attending school. He was found in apparent violation of the probation order and charged accordingly under the Criminal Code. The accused was convicted and appealed.

The accused had remained silent on the issue of his employment, when arrested and during his trial. He argued that the Crown had failed to prove that he was not employed.

The Court would not accept the defence position and held that the trial judge had appropriately applied section 730 C.C. which provides that the burden of proving that "... an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant, is on the defendant". The employment and school attendance was clearly an exception, exemption, etc. Failure on the part of the accused to show that he was employed or attended school at the time of the offence allowed the trial judge to assume that the accused was not engaged in either.

Appeal dismissed.
Conviction upheld.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS

To what extent are police obligated to co-operate with an accused to prepare a full answer and defence.

Regina v. Longejan, County Court of Vancouver Island, No. 07986 Duncan Registry, January 15, 1985

The accused just could not believe that his blood-alcohol level was as high as the breathalyzer operator said it was (200 mlg). He asked to be shown the dial after each test, but was refused. He then asked that a third sample and a blood sample be taken. Police declined the offers and instead placed him in cells for approximately four hours before releasing him.

Some of the details about the process followed by police are important to explain the innovative and interesting submissions advanced by defence counsel. The arresting officer had made the demand for breath samples of the accused followed by the "police warning" which is assumed to include the right to remain silent and the right to counsel. After the breath samples were analyzed the accused was, without him requesting access to counsel or a doctor to take a blood sample, placed in cell. Not at any time was he officially placed under arrest but was told he would be charged with impaired driving and "over 80 mlg". When questioned by defence counsel the officer who had processed the accused said that he had decided to detain the accused in cells because of his state of intoxication. Although he did not inform the accused of this, the custody was in essence because of the wording of section 43 of the Liquor Control and Licensing Act. The section prohibits an intoxicated person to be or remain in a public place. Defence counsel argued that not releasing the accused on account of his intoxication amounted to the detention being for intoxication in a public place. The accused was not arrested or informed of this, nor was he arrested for the drinking driving offences.

The officer, on the other hand, seems to have wanted to convey to the Court that although he failed to officially place the accused under arrest, the detention was for the charges he informed the accused he would face in the Court. His reason for not releasing the accused, as he is compelled to do when the public interest has been satisfied, was that he would have permitted the accused to commit an offence under the B. C. Liquor laws, had he released him.

Defence counsel, however, submitted that his client:

1. was arbitrarily detained contrary to section 9 of the Charter; and
2. could not be penalized except in accordance with the principles of fundamental justice which includes to be afforded an opportunity to prepare a full defence.

The latter point was raised as a consequence of the refusal to let the accused see for himself what the readings were, the rejection of the demand for a third breath test, and not being afforded the opportunity to have a blood sample taken. These events had deprived the accused from obtaining evidence to the contrary to rebut the presumption in section 237 C.C. that the blood alcohol level at the time of analyses is equal to that at the time of driving.

The Court found that the officer had improperly invoked the detention of the accused. Nevertheless, the detention was not arbitrary. The detention corroborated the officer's opinion that the accused was intoxicated which would justify the detention under s. 452 (1) (f) C.C. to prevent the continuation or the commission of another offence. The four hour detention, in the circumstances, was reasonable. In relation to all the prerequisites to a legal detention the Court reminded how the accused was made aware of all his rights when "the demand" was made of him; furthermore, before being placed in cells he was informed of the charges that would be preferred against him.

In regard to the blood test, the Court held that there was no obligation on the police to provide for such a test. The accused should have arranged for that himself. Despite his detention, there was nothing standing in his way to make the arrangements. Quoted the Court*:

> "If it were established that the police, upon arresting someone suspected to having committed an offence, were advised that unless active steps were taken immediately to preserve evidence favourable to the accused such evidence would be lost, and they in bad faith did or failed to do something which caused that evidence to be lost, then the accused person might have good cause to raise the Constitution Act 1982...".

In other words had the accused been hindered by police to make the necessary arrangement for the blood test he wanted, his argument that the principles of fundamental justice had not been adhered to in his case would have been successful. Neither police nor the detention had hindered or prevented the accused from making his arrangements and his

* Regina v. Strayer (1983) 5 CCC (3d) 573.

argument therefore failed.

In an Ontario case* the appellant had raised a similar argument that he was deprived of making a full answer to the charges against him in that police had refused to let him see the dial that indicated his blood-alcohol level. The Ontario Court had held that a suspect is "entitled" to see the dial to ensure what is written on the certificate coincides with what the dial indicates. However, the Court also held that where the accused's attitude raises reasonable risk of damage to or interference with the breathalyzer the suspect must justifiably forego that entitlement. In the Ontario case the suspect had been such that there was a reasonable apprehension that damage or interference would result. In this B. C. case the accused had been "polite and co-operative throughout."

The B. C. County Court Judge reasoned that the Ontario case does not propose that every refusal to be shown the results of an analysis on a breathalyzer scale, is a denial to make full answer and defence. Cutting through a lot of reasoning on this point, the County Court Judge in essence said to the defence counsel that if he had prepared better for the argument he may well have succeeded. Although the transcript shows that the operator in his testimony admitted that the accused asked to be shown the dial, he was not asked why he had refused to comply with the request. Neither did defence counsel dispute the accuracy of the reading the operator announced at the time and subsequently certified.

The police officer is not duty bound to comply with the request, but ought to if there is no reason to refuse. In this case neither the Crown nor the defence pursued the reason for the refusal. Therefore there was no evidence before the Court that the accused's entitlement to see for himself what the reading was, had been triggered.

Appeal dismissed.
Conviction for "over 80" mlg. upheld.

Comment: Please note that the B. C. Judge did not reject his Ontario's counterpart's view in relation to the "entitlement" (which he could have done) but, in fact, accepted it. He ruled, however, that the onus to show the prerequisite condition of the "entitlement" are on the accused. I am not so sure other courts would be that generous. This particularly in view of recent reasoning by the Supreme Court of Canada that seems to favour that the Crown must show that there was no infringement of a right or freedom. Although that was in regard to a right not raised in this defence, it nevertheless may be the beginning of a trend.

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* The Queen v. Douglas Thunder Bay District Court No. 12380/83.

OBLIGATION TO IDENTIFY ONESELF

Regina v. Johnson County Court of Kooteney, Rossland No. CC58-1984 January 1985

Larry Johnson, the accused, told police his name was Bolivar Swatwater and was not believed. He, along with three buddies was seen smoking a marihuana cigarette. This was inferred by the way they held the cigarette, the fact that it was passed from one to the other and the strong smell of marihuana smoke. When the officers arrived at the scene, the butt was ground under foot. What was retrieved was inadequate for an analysis. The three buddies identified themselves but the accused was hostile and persisted that Swatwater was his name. In addition he gave an absurd birthdate and a non existing address. He was convicted of obstructing a peace officer in the lawful performance of his duty.

The accused appealed his conviction arguing that he was, in the circumstances, not obligated to identify himself. Defence counsel reminded the Court that the Crown had to prove the officers were performing a lawful duty and that the alleged obstruction must have been wilful on the part of the accused; the latter meaning that it had to be intentional and without lawful excuse.

The Court held that an offence had been and was seen to be committed. What they saw gave them reasonable grounds for so believing. This placed the officers under a duty to attempt to identify the offender so process could be commenced against him. This placed an obligation on the accused to identify himself. His failure to do so was therefore wilful and the circumstances support that it was intentional.

The appeal was dismissed and
Conviction for obstruction upheld.

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