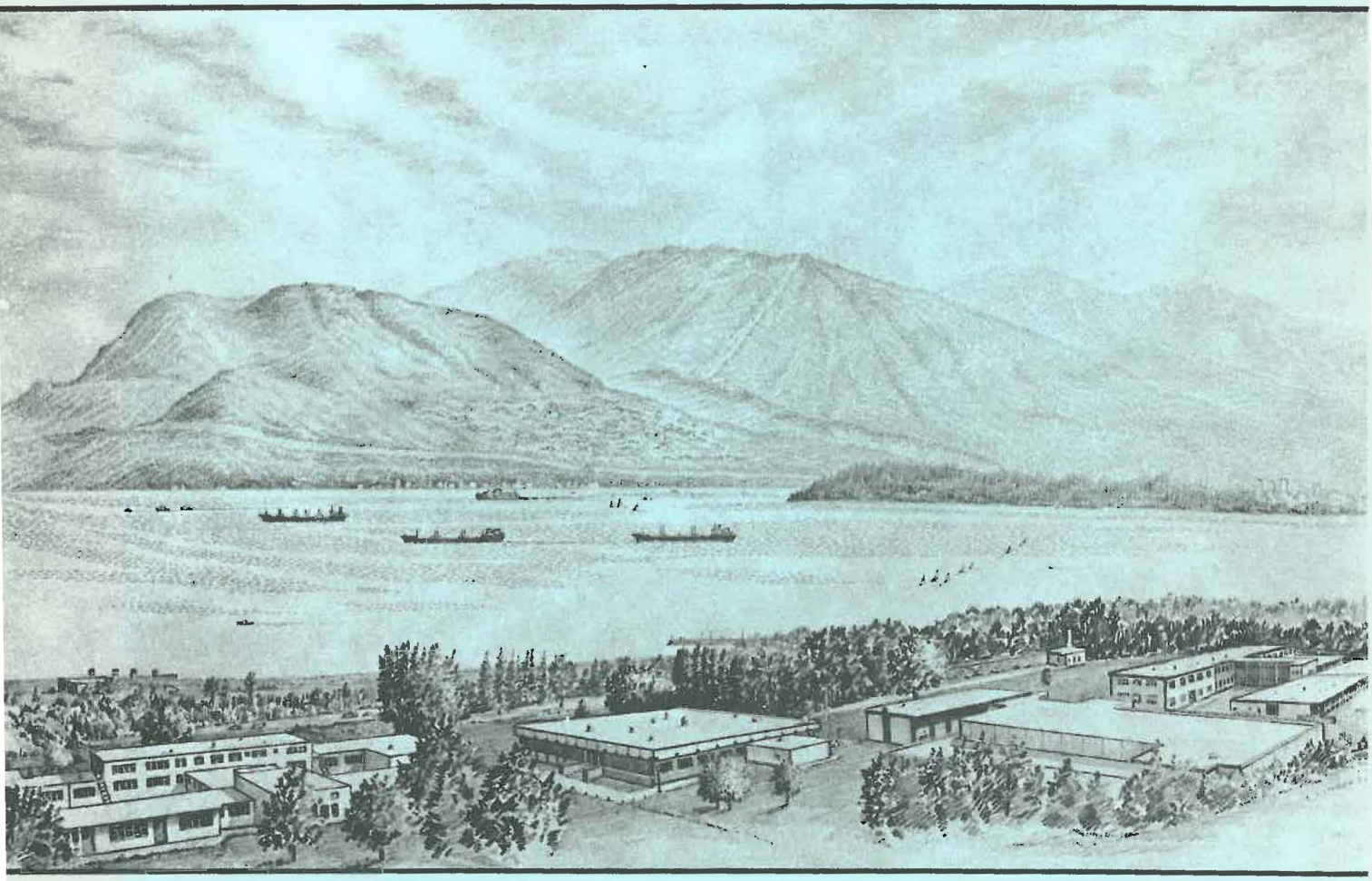
ISSUES OF INTEREST

Volume No. 20



Written by John M. Post

Aug. 1985

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ACCUSED CONFESSES IN ONE STATEMENT TO HAVING COMMITTED TWO SEPARATE CRIMES

Duhamul v. The Queen 15 C.C.C. (3d) 491
Supreme Court of Canada

The accused confessed to police in one statement to have committed two armed robberies. He was tried separately for these robberies. At his first trial the Crown adduced the statement in evidence. A voir dire resulted in the judicial finding that the statement was inadmissible as it amounted to no more than "an alleged adoption through nods and statements of a statement made by a third party". The adoption, of course, was by the accused. The Crown's evidence against the accused was his confession. The exclusion of the statement did therefore result in the jury being directed to render a verdict of not guilty.

On the second charge of robbery the accused was tried before a different Judge and the same statement was adduced by the Crown. This Judge held, that the statement was free and voluntary and therefore admissible. Although this is total conjecture on my part, the second Judge probably restricted the test of admissibility to voluntariness on the part of the accused and there being no infringements of freedoms or rights that would bring the administration of justice into disrepute. Whether or not the content of the statement can be relied upon as being the truth is really up to the jury, the judge of the facts. The first Judge seemed to have been concerned about the reliability of the statement which is usually not considered in determining admissibility. Just because it is admitted in evidence does not mean that it amounts to proof of anything.

In any event, the accused was convicted (obviously the statement was considered proof of the truth of its content) of the second charge of robbery. He appealed that conviction. His single ground of appeal was a principle in law, known as "res judicata". It basically means a matter or thing previously decided or adjudicated. We must consider a matter that has been judicially ruled upon as being final and the courts must (other than in appeal procedures) not be asked to rule on that very issue or matter again. In this case both courts had jurisdiction over the offence and, said the accused, the matter of the admissibility in evidence of the statement was judicially decided and that decision is final.

When a matter that has been judicially decided, is brought before the courts again, the other party to the proceedings can raise "issue estoppel", which simply means that the court is "estopped" (stopped, barred, prevented or impeded) from dealing with it. This principle had until 1979* only applied to civil law. At that time the Supreme Court of Canada held that there is as much need in criminal law to prevent excessive adjudication as there is in civil law and confirmed that "issue estoppel" is also part of the criminal law. If it was not, there would simply be an "absence of the elements of finality or of identity with an issue" said the Court. Based on this reasoning the accused claimed that when the first Judge held that his statement was inadmissible the second one could not decide on that issue again. If the Crown disagreed and wanted to test the accuracy of that first ruling, it should have appealed the acquittal but not have raised the already decided issue in a subsequent trial.

On the surface the accused's arguments seem sound and hard to defeat. However, both the Alberta Court of Appeal and the Supreme Court of Canada disagreed with the accused's position.

It is quite complicated to determine when the doctrine marginally explained above, does apply. I will, therefore, attempt to simply give the practical reasons why the Supreme Court of Canada did unanimously decide that the principle should not be extended to judicial decisions made upon a voir dire.

Currently a Provincial Court Judge may conclude upon a voir dire within a preliminary hearing that a statement is not admissible. Despite the fact that the proceedings are a "hearing", a voir dire is a trial. If the doctrine was extended as the accused is suggesting, the consequence would be (assuming the accused is committed for trial, of course) that the trial judge would be precluded from determining the admissibility of the evidence. The Crown, when it fails at the preliminary hearing to have, for instance, a statement admitted in evidence, it has always been allowed to adduce the statement again for judicial consideration at trial.

If the doctrine was extended to decisions upon voir dires, it could also be very detrimental to an accused. For instance, if an accused admitted in one statement to a number of crimes which were going to be tried separately, then if in the first trial the confession was wrongfully admitted, the doctrine dictates that it would have to be accepted in all subsequent trials.

* Gusheu v. The Queen 50 C.C.C. (2d) 417. Supreme Court of Canada.

The Supreme Court of Canada concluded that the doctrine exists to prevent a person from being retried after an acquittal; not to be punished twice for one act of wrongdoing; that matters fully litigated are not reopened over and over; and avoid scandal arising from conflicting decisions. Therefore in the absence of being shown a clear advantage to extend the law as the accused suggested, the Supreme Court declined to develop the law in that direction.

Appeal dismissed.

The Crown was not blocked from relitigating the accused's statement.

* * * * *

BREACH OF THE PEACE - FALSE IMPRISONMENT

Hayes v. Constables Thompson and Bell - B. C. Court of Appeal, C.A. 00525

Mrs. Hayes, the plaintiff, visited a pub with her husband and her father. The husband nearly became involved in a fracas and the threesome was told that they "had enough" and would not be served any more alcoholic drinks. Mrs. Hayes raised cane when the drought was announced and raised some more in the parking lot when a bartender asked if they had taken any glasses with them. Mrs. Hayes even emptied her purse to prove her innocence. She followed the bartender back inside and could be heard "all over the pub". She refused to leave and police were called. A taxi was hailed and the three left peacefully. All was tranquil until Mrs. Hayes discovered that her wallet was missing from her purse. She and her companions headed back for the pub and turmoil seemed inevitable to the officers if the three would get inside. To prevent this, all three were placed under arrest by police for breach of the peace.

Mrs. Hayes sued the constables and was awarded $2,000 for damages. The constables appealed the decision to the B. C. Court of Appeal claiming that the trial judge should have left the jury to decide if there were reasonable and probable grounds for them (police) to believe that a breach of the peace was about to take place. Secondly, the jury should have been left to decide if they (the officers) had a right to arrest the plaintiff under section 47 of the Liquor Control and Licensing Act when she threatened to re-enter the pub after being requested to leave. Not leaving these issues to be decided by the jury, the trial judge had erred in law, claimed the officers.

The B. C. Court of Appeal firstly answered the question put to them in relation to section 47(2) of the Liquor Control and Licensing Act. It empowers a police officer to arrest a person without warrant, who enters a licensed establishment within 24 hours after he was requested to leave the premises, as well as any person suspected of contravening this prohibition. However, Mrs. Hayes had not entered the pub at the time of her arrest. The Court of Appeal interpreted the words "suspected of contravening subsection (2)" not to include in its meaning a suspicion that one is about to enter in contravention of the 24 hour suspension. Furthermore, the officers had not relied on this provision to justify the arrest of Mrs. Hayes. They had arrested her for a breach of the peace and relied on section 31 C.C. for authority to do so.

In view of her previous performance, any reasonable person could foresee that a tumultuous disturbance would result if Mrs. Hayes, in

her intoxicated condition, would have gotten inside the pub. Considering the circumstances at the time the arrest was effected, the officers had to have power to arrest for an anticipated or apprehended breach of the peace. Section 31 C.C. empowers the arrest of persons who breach the peace, are about to join in on an existing breach of the peace, or are believed to renew a breach of the peace. Semantically, section 31 C.C. is confined to existing breaches of the peace or ones that have actually taken place and are about to be renewed. It does not empower anyone to effect an arrest for the purpose of preventing an inevitable, anticipated or apprehended breach of the peace. However, legal scholars claim in their text books* that at common law anyone is empowered to arrest "where an imminent breach is reasonably apprehended". This was inferred from commentary by the English Court of Appeal† the most significant portion of which records:

> It would be wrong if a constable (or any other person) had overwhelming evidence for believing that a grave breach of the peace was about to be committed in the immediate future but could do nothing to prevent it because no previous breach had occurred.

On the basis of an analysis of all of the cases, the B. C. Court of Appeal held that if there is a power to arrest for an apprehended breach of the peace, it is not included in section 31 C.C. Therefore, if the arrest of Mrs. Hayes was legal, it had to be so at common law.

The B. C. Police Act (section 15) states that provincial constables are to carry out the powers, duties, privileges and responsibilities that a constable is entitled or required to exercise or carry out at law under any Act or regulation. The words "at law" include the common law, held the B. C. Court of Appeal. Including municipal police officers in this, the Court quoted from the "Legal Status of Police" which states that such officers in B. C. "have the common law status of constable, as modified by the provisions of the Police Act". For this conclusion the Court relied on the decision by the Supreme Court of Canada†† in regard to the obstruction of an Edmonton City police officer when he prevented someone from confronting the then U.S.S.R. Premier Kosygin. At common law, said the Supreme Court, the officer was not only entitled but was duty bound to prevent the imminent breach of the peace. Lacking the reliance by the Supreme Court of Canada on any specific statutory provision empowering the Edmonton officer to arrest the person who wished to forcefully confront the Russian Premier, the B. C. Court of Appeal inferred that

* The Law of Torts, 7th ed., 1983, Prof. Street at pg. 82.
† R. vs. Howell [1982] Q.B. 416
†† Knowlton vs. the Queen [1974] S.C.R. 443

its decision was based on common law. Adding to all of this the oath of office of the constables who arrested Mrs. Hayes ("to preserve the peace and prevent offences") the Court concluded that in B. C. peace officers have "the accompanying common law power to arrest for an apprehended breach of the peace".

Although the appellants (the constables) won their argument on the issue of law, the B. C. Court of Appeal declined, in the circumstances, to set aside the verdict of the jury. The cost of a new trial would be much higher than the nominal damages ($2,000) awarded by the jury.

Comment: It must be remembered that all the B. C. Court of Appeal has decided is that at common law a peace officer is empowered to arrest a person for an apprehended breach of the peace. Some misplaced enthusiasm or confidence may result from this decision. The Court did not alter the definition of breach of the peace nor did it deal with the detention subsequent to arrest. These issues are, in my view, one of the most misunderstood powers police officers have to preserve the peace. Perhaps what has been outlined previously should be repeated.

A breach of the peace is not any disturbance or any offence. The actual or imminent incident must be an affray in which there is a threat of physical harm to a person. In other words, there must be a threat of violence attached to the affray.

Furthermore, a breach of the peace is not an offence in itself and the powers to arrest is one similar to a protective custody. Custody should not extend much, if any, beyond the time period during which there is the belief on reasonable and probable grounds that the prisoner will cause, join in or renew a breach of the peace.

* * * * *

ENTRAPMENT

Regina v. Coupal - County Court of Vancouver, No. CC841620 February 1985.

According to the testimony of the accused a year after he broke up with a girlfriend, the mother of the girl contacted him. Despite the fact that the accused had not had any contact with the woman for one year, she approached him and said that she was suffering of terminal cancer and, to get some relief from discomforts, she asked him to get her some cocaine. At first the accused refused. However, the phone calls and urgent requests continued and increased as time went on. Finally he had caved in and agreed "to keep an eye out for her".

The approaches continued and the request for cocaine extended to suggestions for the accused to be her bodyguard while she made transactions which would be profitable to both of them. She promised him $700 for one deal and said that her share was needed to pay for doctors and medication to combat her cancer.

The accused claimed that to get the woman off his back he finally agreed to take delivery of some package containing cocaine and take it to her. She stressed that he should sample the content before accepting the package. When the accused arrived with the package at the designated hotel he was told by the woman to present himself as a drug dealer to the person she was about to introduce him to. She then took him up to a room and the accused was introduced to an undercover police officer. What occurred from thereon in according to the police witnesses was conceded to be the accused.

The accused claimed to have been the victim of entrapment and requested the Court to enter a stay of proceedings as continuation would amount to an abuse of the process of the Court. Furthermore, the lady who had set him up was not produced by the Crown and not available to testify for the Crown or the defence. Also this fact warrants a judicial stay of proceedings claimed the defence as no fair trial could be had. Only the lady could corroborate or verify the accused's testimony. The accused had no criminal record and denied being a drug dealer.

Police evidence revealed that before the accused's involvement, the "lady's" home was searched and nine charges of possession of stolen property had resulted and one of possession of cocaine. She approached police and offered to deliver a drug dealer in return for

them dropping the charges against her.

Despite a lack of enthusiasm on the part of police she persisted that she could deliver a deal of 2 pounds of cocaine. She was told to go ahead but that no promises could be made regarding the charges against her. All the officer promised to do was to mention her cooperation to the prosecutor should she be successful. After the accused was charged all charges against the lady were dropped and all property and money seized during the search of her home were returned to her ($61,000 worth).

First the Court dealt with the accused's claim that his rights to a fair trial were infringed as the person who allegedly enticed him to commit a crime was not made available by the Crown. The defence relied heavily on a similar case also tried in the Vancouver County Court* where a judicial stay of proceedings was invoked. In that case the disappearance of the witness (who the defence claimed had entrapped the accused) and an assurance that she did not have to testify, were conditions of the deal. In this case no such deals were made. The witness was out of the Court's jurisdiction and when contacted by police, she had refused to attend the trial. She feared for her safety, particularly as there had been a "bomb incident" since the charges were preferred against the accused. In the other case, there were a number of discrepancies between the testimony of police and that of the accused which could only be cleared up by the absent witness. In this case there were no such discrepancies.

In relation to entrapment this Judge disagreed with his "learned and experienced brother" that it was a recognized defence in the province of British Columbia. He felt as many others, that the Supreme Court of Canada did not clear this issue up in the Amato case† and that therefore the B. C. Court of Appeal decision in that case is still binding on the B. C. Courts.

The Judge decided that a judicial stay of proceedings could be entered any time the facts offend against the principles of justice and abuse the process of the Court. Entrapment is only one of such injustices. There were, in this case, no injustices justifying a stay of proceedings.

Application denied.
Trial to be continued.

* * * * *

* R. v. Ross, Unreported - see page 36 of Volume 18 of this publication.

† R. v. Amato - see page 34, Volume 1 and page 32 of Volume 8 of this publication. 51 C.C.C. (2d) 401.

BURDEN OF SHOWING THAT NO AUTHORITATIVE PERSON HAS INFLUENCED ACCUSED IN MAKING A STATEMENT

Regina v. Munroe, Cariboo County Court, Prince George No. 00985/84

The accused was convicted of impaired driving and failing to blow and appealed these convictions. He had been involved in a minor accident in early morning hours on the parking lot of a hospital. A security guard in uniform was at the scene when police arrived. The constable asked who had been driving and the accused had readily answered that it was he. The usual (demands, warnings, accompanying the constable, etc.) happened and the charges resulted. Without the admission by the accused that he was the driver, the Crown simply had no case and the admissibility of that admission was therefore challenged. The defence claimed that the hospital security guard should have testified that he, prior to the arrival of the police, had done nothing to influence the accused to make the admission. The trial judge had rejected this submission and had admitted the statement in evidence.

The Judge of this County Court who heard the accused's appeal disagreed with the trial judge. The kernel of his reasons for doing so was that the Crown witness (the officer) could not say if the uniformed guard had spoken to the accused. The accident had been very minor and was non-reportable, yet the accused was at the scene with the guard.

An inference was drawn by the County Court Judge that the guard had in some way detained the accused or forced him to stay around. Therefore the Court held:

> I think the onus is on the Crown to prove and to prove beyond a reasonable doubt, that a person who prima facie may have been in a position of authority, did not say or do anything to influence the appellant.

The Court hastened to add that not every person in the police station or all prison guards who may have had something to do with the accused must be called. However, unless the absence is adequately explained, "persons in apparent authority who are present at or immediately prior to the giving of a statement and who, by the circumstances of the particular case might be inferred to be persons who were in a position to influence the accused to make a statement", ought to be called to prove voluntariness on the part of the accused.

Appeal allowed.
Conviction set aside,
acquittal substituted.

* * * * *

UNREASONABLE SEARCH AND THE ADMISSIBILITY OF EVIDENCE

Regina v. Johnson, County Court of Cariboo, No. 0291, Dawson Creek December 1984.

The Consumer Protection Act creates an offence for purchasing tax refunds for less than 85% of the anticipated refund. The Ministry of Consumer and Corporate Affairs received several complaints about the accused, an accountant, for purchasing refunds for considerably less than 85% of the taxpayer's entitlement from the tax department. The Director of the investigative branch appointed two personnel to investigate the complaints. These investigators swore informations and obtained two search warrants from a Justice of the Peace: one for the accused's home, the other for his bank. Consequently he was charged with violating the Consumer Protection Act and admitted for trial upon a preliminary hearing.

The accused, during a voir dire at his trial, argued that the Act under which he was charged and the procedures outlined therein are indistinguishable from those in the Combines Investigation Act. The latter were declared without force or effect by the Supreme Court of Canada as they were inconsistent with the right to be protected against unreasonable search and seizure*. The provincial Consumers Act provides for the Director of Consumer and Corporate Affairs to order investigations. Investigators can proceed by "entering the business premises and examine any record relevant to the alleged contravention and/or obtain a search warrant from a Justice of the Peace and search any place in which it is believed are such records".

The Supreme Court held that two ingredients are prerequisite to such a warrant being consistent with the reasonable search and seizure clause in the Charter: (1) the warrant must be issued by an impartial person and (2) the section authorizing the issuance of a search warrant must require that the sworn information includes reason to believe that an offence has been committed. Section 48 of the Consumer Protection Act does not require such reason to be included in the information. Therefore, the section was held to be inconsistent with section 8 of the Charter and consequently invalid.

The accused now wanted his documents returned to him and requested the Court to so order as a remedy to the infringement of his right (s. 24(1) Charter). The Court declined to do so. The accused was reminded that he had the option anytime after the execution of the warrant, to apply to the Court (County or Supreme) to quash the warrant and have the seized documents returned to him. The documents

* Hunter v. Southam Inc. - page 12 of Volume 18 of this publication.

were now before the Court as evidence in criminal proceedings against the accused and the sole issue was the admissibility of them in evidence.

It was already determined that the legislation under which the warrant was issued, was of no force and effect due to being inconsistent with the Charter. All that was to be decided now was whether admitting the documents in evidence would bring the administration of justice into disrepute. To that end the events leading up to the investigation were reviewed.

Several letters of complaint received by the ministry had triggered the investigation. There was no evidence that, prior to taking out the warrant, any investigation took place or that even statements were taken from the complainants. The Director ordered an investigation into the "possibility" that the accused had committed an offence. The statutory provision of the warrant was immediately used before the investigators could swear that they had reasonable and probable grounds for believing that the accused committed an offence. The warrant included authorization to seize a wide variety of documents while the information upon which the warrant was obtained did not justify the seizure of such documents.

All documents were thoroughly examined and eventually the accused was charged with offences under the Consumer Protection Act and several counts of theft and fraud. Even if the search provision of the Act was not contrary to section 8 of the Charter "the paucity* of information the investigators had and the sweeping nature of the search warrant and its execution" made the search unreasonable. In other words, had the search warrant been issued under the Criminal Code and the seizure been so sweeping as in this case with no justification sustained in the information, the search would have been unreasonable. Said the Court:

> The investigators in the present case did not merely commit an error. The procedures they elected to pursue amounted to a wholesale trammeling of the s. 8 Charter rights of the accused.

The Court appeared to have little sympathy for the accused and did not accept several claims he made in his testimony. Nevertheless, the documents seized were ruled inadmissible in evidence.

* * * * *

* paucity - smallness of quantity

IMPAIRED DRIVING - DEFENCE OF

Regina v. Swark, County Court of Vancouver, No. CC841102

The accused, after drinking three glasses of wine, and two "incredibly strong" screwdrivers in a short period of time, got into her car and attempted to drive home. She struck a car the driver of which was attempting to park. With this car in pursuit she drove on for a couple of blocks and rear ended a car that had stopped. To all witnesses she appeared intoxicated, but also frightened, upset and concerned. In any event, the accused was convicted of impaired driving and appealed that verdict.

The accused testified that while looking for work she spotted an ad for a housekeeper. She arranged for an interview at the prospective employer's home. The interview lasted 1 1/2 hours during which the middle aged interviewer poured drinks generously. Eventually the man began to ask her very personal questions and made sexual remarks. When the accused expressed shock the man exposed himself to her and tried to grab her. Believing she was about to be raped she escaped and ran out onto the street. All the accused remembered was that she was terrified and wanted to go home; ..."getting away and being safe. Getting back to my dogs where I would be protected". According to her testimony, her recollection of things afterwards was quite sketchy.

The accused claimed that the defence of necessity should have been available to her. The Provincial Court Judge (the trial Judge) had held that there had been plenty of opportunity for the accused to assess her situation whence she got onto the street to see whether there were any alternatives open to her so she would not have to drive. Failure to weigh the alternatives does not amount to a defence of necessity. In other words, there was insufficient "urgency in the peril that the only recourse was to break the law".

The County Court Judge agreed with the trial judge. He found that the accused was not fleeing her attacker but the scene of the attack. She was not pursued and her anxiety was one of escaping an unpleasant experience.

Appeal dismissed.
Conviction of Impaired
Driving upheld.

* * * * *

DOES A PRIVACY ACT AUTHORIZATION INCLUDE POWER TO SURREPTITIOUSLY ENTER PREMISES TO PLANT EQUIPMENT?

Supreme Court of Canada - December 1984.

The Courts of Appeal of British Columbia[1], Alberta[2], and Ontario[3] expressed varied views in response to the question whether an authorization to intercept private communication includes authorization to surreptitiously enter premises, be they homes or places of business, to install the equipment necessary for such an interception.

The British Columbia case was appealed and as promised on page 35 of Volume 18 there would be a synopsis of the Supreme Court of Canada decision.

The Interpretation Act states that a person who is empowered to perform a certain act is ipso facto empowered to do those things ancillary to that act. For instance, the law gives a peace officer powers to arrest in certain circumstances but does not say you can transport that person, book him into holding units, etc. The latter acts, although recognized at common law, are ancillary to the powers to arrest. The statutes are simply not exhaustive in that they do not cover all aspects and contingencies.

Some Courts have held that surreptitious entries are a power ancillary to the authorization to intercept private communications. Others felt that if such entry is necessary, particularly when it involves a home, the Crown must apply to have permission included specifically in the authorization.

There are also judicial opinions that the very enactment is exclusively designed to protect privacy and Parliament would have included the matter of surreptitious entries if it had wanted interceptions of private communications to go as far as to intrude someone's most private place.

In the B. C. case, police entered the home of one of the accused and installed a monitoring device. The authorization did not include consent for such procedure. The propriety of police action became an issue when the Crown adduced evidence obtained directly and indirectly from the interception by means of this device. The defence claimed, of course, that the evidence was unlawfully obtained and that by virtue of the provision in section 178.16 C.C. the evidence was inadmissible. The trial Judge, as well as the B. C. Court of Appeal, allowed the evidence to be admitted.

[1] Lyons, Prevedosos and McGuire and The Queen; [2]Reference re an Application for an Authorization, page 11 Volume 17; and [3]The Queen and Papelia et. al., page 13, Volume 17.

That decision as well as that of the Alberta Court of Appeal were appealed to the Supreme Court of Canada.

The reasons for judgement are very detailed and interesting. The aggregate of the majority judgements is no less than 110 pages in length. The Court reviewed legal history and doctrines fundamental to the Court's decision. Out of the seven Justices who made up the coram one did not participate, four joined in the binding decision and two dissented.

The kernel issue was the lawfulness of the interception. There is no doubt that the officers trespassed when they installed the equipment in the home without being specifically empowered to do so by statute or the authorization. The Supreme Court of Canada responded to this submission by saying that Part IV.I of the Criminal Code (Invasion of Privacy) is "a mini code within the codified criminal law". Therefore, when that mini-Code speaks of an interception that was lawfully made it refers to means of interception in accordance to its own provisions and not to conformity with other parts of the Criminal Code or any other law. Said the Court:

> Indeed, once Parliament has granted the power to authorize and once that power has been exercised, the authorized conduct in law would no longer amount to trespass.

The Supreme Court reviewed how Parliament had devised procedures to obtain judicial authorization, approved the use of certain equipment thereby supplying peace officers with appropriate means to carry out something that otherwise would amount to a crime. Surely, concluded the Court, Parliament should not be taken to have made all of these provisions and then leave those who must carry out the interceptions without "appropriate means and authority to carry them out."

Dealing with the means of intercepting private communications and the use of equipment (observing that if not used in a certain way the approved equipment could not function as an interception device), the Court said:

> ... Parliament cast the section broadly so as to empower the Court in its discretion to authorize the placing of the "device" <u>inside the premises designated in the authorization whether or not a trespass might occur and whether or not the owner of the premises was the person whose communications was to be intercepted.</u>

(Emphasis is mine.) (Also note that Court referred to owner of

premises. I assume the Justices did not refer to the landlord but the occupier of the premises).

The Court continued by saying that the mini-code (Privacy Act) is bilateral in nature and therefore Parliament has authorized judges to include in the authorizations "such terms and conditions as the judge considers advisable in the public interest". This, of course, to maintain a reasonable balance.

In the case before them there was no provision in the authorization to enter any premises, yet police had entered a home to install a monitoring device. The Court said that the authorization was sufficiently broad to empower the officers to do as they did.

In my view the Supreme Court advised that the Crown ought to apply to have officers empowered to enter premises to plant and maintain devices, if the need is known at the time the application is made. It seems that if no such provision is included in the authorization but the need arises, the police have ancillary powers to enter premises to intercept communications as they were authorized to do.

This is also apparent when reading the appeal of the decision by the Alberta Court of Appeal where the same questions were put by means of reference. The Supreme Court of Canada said:

> An authorization given by a judge under Part IV.I. of the Criminal Code authorizes by necessary implication any person acting under the authorization to enter any place at which private communications are to be intercepted to install or service a permitted listening device ... provided such entry is required to implement the particular authorization... unless the authorization includes limitations or prohibitions of such entry. A judge in giving an authorization has jurisdiction to expressly authorize a person acting under the authorization to enter any place at which private communications are to be intercepted to install or service a device, provided such entry is required to implement the particular authorization.

The appeal by the accused in the B. C. case was dismissed. Conviction of conspiracy to import a narcotic was upheld.

* * * * *

DECEPTION CAUSING SEARCH TO BE UNREASONABLE

Regina v. Cameron, B. C. Court of Appeal, C.A. 001541

The Crown appealed the decision of the County Court of Westminster to acquit the accused of possession of marihuana for the purpose of trafficking (see page 3 of Volume 15 of this publication). In the event you have no access to that Volume, I'll repeat the circumstances and the County Court's reaction.

A parcel addressed to the accused containing two pounds of marihuana, was intercepted by Customs Officers. Police had one of their officers dress up as a mailman and deliver the package. Prior to him making the delivery a search warrant was obtained by means of an information which stated that the officers had grounds for believing on good information that there were narcotics in the accused's home. Of course, when they swore to the information the goods had not arrived at the accused's home. The officers and the Justice of the Peace knew this. This caused the County Court Judge to be disturbed. He held that the warrant was invalid, the search unlawful and the narcotics (although marginally within the limits of police deception) were actually planted in the accused's home by the Police/mailman. The evidence was excluded, the accused was acquitted and the Crown appealed.

The Crown conceded that the search warrant should not have been issued as the applicable provisions of the Narcotics Control Act is so worded that the narcotics should have been in the house at the time of the application. In other words the package should have been delivered firstly and then the warrant should have been applied for. However, the trial judge had held that the search was unreasonable and consequently the evidence obtained thereby inadmissible. This especially as police and the justice knew that their practice was irregular and illegal. The Justice had simply been sympathetic and accommodating while he should have been acting judicially. Actually the trial judge implied that there was some plot to act unethically and irregularly against knowing better. This had apparently been the reasons why the trial judge gave a resounding "Yes" to the question if the administration of justice would be brought into disrepute if he admitted the evidence of the marihuana.

The Crown submitted that there was no evidence upon which the judge could have concluded that there was any manipulation as described above.

The transcript of the trial showed that the officer who applied for the warrant had been incredibly candid about the matter. He volunteered to know that some justices do not grant a search warrant in these circumstances while others will. It also showed that on this issue defence counsel needed not to do anything. The trial judge conducted quite a thorough examination of the police witness with expressions strongly indicating that he disapproved of the practice.

The Court of Appeal did observe how the police/applicant had sworn that "there is a narcotic in the dwelling house", while he knew that the very narcotic upon which he based that belief was not there. However the rest of the affidavit was an accurate statement of facts and, said the B. C. Court of Appeal, there is no reason to call the affidavit false. There was no evidence to conclude that there was any collusion between police and the justice said the Court. If the Justice honestly believed that a warrant could be issued in these circumstances that is not "utterly unreasonable". Arguments could be raised to support such view, although, hastened the Court to add, such views are erroneous.

The warrant should not have been issued and it was therefore invalid. However, that does not mean that the search was unreasonable or that the evidence should be excluded. Agreeing with its Alberta counterpart* the B. C. Court of Appeal held that an illegal search is not necessarily unreasonable in terms of s. 8 of the Charter. Even if it was unreasonable, then the test under s. 24(2) of the Charter must be applied to determine the admissibility of the evidence.

The B. C. Court of Appeal held that the marihuana should have been admitted in evidence and that the exclusion was an error in law.

As the trial Judge had indicated strongly that but for the exclusion of evidence there would have been a conviction, the Court of Appeal allowed the Crown's appeal.

Acquittal was set aside and conviction for possession for the purpose of trafficking was substituted.

* * * * *

* R. v. Heisler (1984) 11 C.C.C. (3d) 475

INDECENT ASSAULT - RAPE - SEXUAL ASSAULT

Regina v. Cook, B. C. Court of Appeal, Victoria CA23/84, May 1985

The complainant, a 20 year old woman, testified how she offered to drive the accused's truck as he was too intoxicated to drive. The accused, a 50 year old man, had been out fishing with the complainant and was supposed to drive her to her car. On the way the accused made physical sexual advances and was rejected. Finally he turned the ignition key off and changed places with the complainant. He prevented her from getting out of the truck, drove her onto a side road, pulled her clothing over thereby baring her private parts and penetrated her. She fought back and when he slumped down she assumed he had ejaculated. Medical examination confirmed the penetration and spermatizoa was found in her clothing.

The accused's version of the events was quite different. He said the complainant had not objected to his sexual advances and she had become sexually aroused. She had driven down the sideroad and laid down on the seat, pulled her clothing over and had thereby invited him to have intercourse with her. He had not been able to achieve an erection, did not penetrate her and had aborted his attempt to reach a sexual climax. Furthermore he testified that he had a vasectomy years ago and he could not ejaculate spermatozoa.

The accused was convicted of sexual assault and appealed the conviction.

The B. C. Court of Appeal observed that the Criminal Code provisions related to ordinary and sexual assaults, which became effective in January of 1983, fail to set boundaries between the two. The Court further observed that what now may amount to a sexual assault would not necessarily have been an indecent assault under the old provisions of the Criminal Code. The Court gave an interesting example. In 1982 a fellow by the name of Burden* placed his hand on the thigh of a woman sitting next to him on the bus. He was charged with indecent assault under the now repealed provision of the Criminal Code. The B. C. Court of Appeal had agreed with the trial judge that the assault was not indecent and had set aside the accused's acquittal, but substituted a conviction of common assault. The Court now used this case as an example and said that such an assault might now "well be categorized as a sexual assault...".

* R. v. Burden. See page 16 of Volume 5 of this publication.

To demonstrate the meaning of a sexual assault the Court said that mere intentional touching may amount to assault. It then follows...

> ... that a light but intentional sexual touching may constitute a sexual assault.

The Court recognized that this ruling by itself could result in "trivializing the offence" of sexual assault. Every touch of approach or uninvited kiss is not necessarily a sexual assault. To distinguish between such matters the Court said:

> The better approach, to my mind, rests on a theory of implied consent to an initial mild sexual touching, if preceded by a sufficient acquaintanceship. Therefore, there would be an implied consent to each further reasonable advance in touching, until such time as consent is explicitly refused.

The touching thereafter, would, of course, amount to assault. Whether or not such an assault is a sexual one is not "solely a matter of anatomy" warned the Court.

> ... a real affront to sexual integrity and sexual dignity may be sufficient.

Although the Court did not endorse the theory with apparent enthusiasm, it acknowledged defence counsel's version of the distinction between an assault being common or sexual. He had suggested (to support his defence that his client was too drunk to form a specific intent) that for an assault to be sexual the assaulter must intend to obtain some sexual gratification, some form of reaction (rejection or acceptance) by which the person assaulted acknowledges the sexual nature of the assault.

Perhaps it is reasonable to infer that the Court agreed that in fitting circumstances, this is one way by which the distinction can be established.

In conclusion the Court agreed with the trial judge that the touchings by the accused in this case were capable of amounting to sexual assaults.

The defence then claimed that the indictment was faulty. If the accused had been charged with rape as the offence used to be, all the evidence would have been part of the act of rape. Now the accused was charged with one count of sexual assault. In view of the Court's

description of this offence he committed four separate sexual assaults. Three while the truck was driven by the complainant and the most serious one when it was parked. The Crown had for lack of a better term, thrown all of them in the pot and left the jury to select any one of them to convict the accused.

The Court of Appeal concluded that although the defence seemed technically to be correct, no injustice was done. Had the trial judge ordered that the indictment should be separated into four counts of sexual assault, no jury hearing the evidence in this case would have concluded that the minor touchings were without consent and the major one, while parked, was with consent.

Obviously, the verdict of guilty was based on the major incident, the act of intercourse.

The accused also claimed that the trial judge had not directed the jury how drunkenness may have contributed to the mistaken belief that the complainant consented.

Defence counsel seemed to have danced around the issue of drunkenness but obviously did not press it. Therefore, the B. C. Court of Appeal did not decide on this. However, the trial judge had been quite specific on this point. He had said to the jury "You just take that from me, as a matter of law, drunkenness... is not a legal defence, so dismiss it from your minds".

When criminal intent is an element to an offence then, whether drunkenness is a defence, depends on the category of the offence. If the offence is one that requires "specific" rather than "general" intent, then drunkenness may be a defence. Rape was an offence requiring general intent only, therefore drunkenness was not a defence. An honest but mistaken belief that there is consent, was a defence. In this case the defence did not actually raise the defence of drunkenness but simply said that the accused's intoxication "might have had an effect on the formation of an honest belief that the complainant had consented".

The B. C. Court of Appeal decided that the matter of the defence of drunkenness in respect to the new offence of sexual assault was not before them. This, if there is such a defence for the offence of sexual assault, there was no evidence of a degree of intoxication that could have triggered consideration for it. This left the Court to decide if the accused's intoxication could have caused a misconception on his part, in respect to consent. In other words, considering the circumstances and his condition, might he have had an honest belief the complainant consented? The Court rejected the possibility of this.

When the accused was cross-examined on the details of the event and in particular on whether the complainant had objected, he had replied:

> I wasn't so drunk that I would not have known if she was objecting to my advances.

As there was no level of intoxication that could have served as a defence if such defence exists for sexual assault, the Judge's directions to the jury did not amount to a misdirection. Secondly, there was nothing sufficient to find that the accused's judgement to determine if he had consent for his sexual activities with the complainant, was impaired.

Accused's appeal dismissed.
Conviction of sexual assault upheld.

* * * * *

THEFT OF MONEY ON DEPOSIT IN A BANK

OWNERSHIP

The Queen and Bissoondatt, B. C. Court of Appeal, CA 001987, April 1985.

The accused was an employee of one of the Canadian chartered banks. One of his functions was to buy and sell gold for bank customers.

The accused had completed numerous transactions for a Mr. N, and apparently the latter was satisfied with the services the accused provided. At least, this is indicated by Mr. N. transferring his account to the branch to which the accused was moved by his employer.

Mr. N. had literally tens-of-thousands of dollars on (term) deposit at the accused's branch. Without going into details as to transactions, the accused bought and sold gold for Mr. N. and for this purpose withdrew and deposited funds from Mr. N.'s accounts. In all cases, it appears that the accused received specific instructions from N. in respect to the transactions. However, after two years of this relationship and arrangement, the accused cashed in two of Mr. N.'s term deposits and failed to deposit proceeds from a gold sale into the N. account. This was done without Mr. N.'s consent or knowledge.

A few months after the accused had acted without instructions, as related above, he went to Mr. N.'s home and told him about this. The statement was hardly a confession of theft as the accused told N. that he had taken the money and placed it in a safety deposit box. This was on a Friday and it was agreed that on Monday the money would be removed from the deposit box and be made available to N. However sometime over that weekend Mr. N. demanded promissory notes from the accused.

The accused managed to drag his feet in living up to the agreement for a couple of weeks and when N. finally persisted the accused confessed he had taken the money and distributed it among his relatives. This resulted in a conviction of theft of money, the property of Mr. N. The accused appealed the conviction using a very common defence for a charge of theft like this. He claimed the Crown had failed to prove that the money he took from the bank and distributed was in fact the property of Mr. N., who was specifically named in the indictment as the owner.

When money is deposited in a bank, it becomes the property of the bank. In essence, the depositor purchases credit. Therefore, the accused did perhaps steal from the bank but not from Mr. N.

The B. C. Court of Appeal acknowledged that the Bank was the owner of the money the accused stole but disagreed that ownership must be proved precisely as alleged in the information (as it used to be). For instance, in one case* the Crown proved that jewelry belonged to Westwood Jewellers while the information alleged a theft from Westwood Jewellers Limited. The Supreme Court of Canada agreed that the accused's acquittal was improper.

Said the Supreme Court of Canada:

> If, however, the name of the alleged owner is mentioned in the indictment, is it correct to state that, unless ownership in that person is proven by the Crown the charge must be dismissed? I am not ready to accept that this is a true statement.

An information must be sufficient to identify to an accused what alleged transaction it is that is claimed to constitute the offence.

In this case the accused received reasonable information of the transaction which amounted to the theft alleged. The B. C. Court of Appeal concluded:

> Here there were sufficient circumstances to indicate to the appellant the true nature of the charge.

Appeal dismissed.
Conviction of theft upheld.

* * * * *

* Little & Wolski v. The Queen (1975) 19 C.C.C. (2) 285.

WHO, FOR THE PURPOSE OF CRIMINAL LAW, IS THE OWNER OF PROPERTY?

Regina v. Naziel, The County Court of Vancouver, Smithers, No. 44102, September 1984

The accused deliberately drove into a car driven by a Mr. D. The car Mr. D. was driving was owned by a Ms. T. She testified as to her ownership during the accused's trial for mischief. The information outlining the offence, alleged that the accused had damaged "the automobile of Mr. D.". The Crown took the position that since Mr. D. had possession of the car, he was the owner for the purpose of the offence. This was so said the prosecutor, on account of section 517 C.C. which, in essence, states that he who by law has possession of property shall, for the purpose of criminal law, be deemed to be the owner of that property. The words, shall be deemed, left no alternative but to allege that Mr. D. was the owner of the car, said the Crown. In view of the direct evidence from the actual owner of the vehicle, the Provincial Court Judge held that the evidence had not supported what was alleged and he acquitted the accused. The Crown appealed.

The Canadian courts are not in agreement on the meaning of s. 517 C.C. The Alberta Court of Appeal, and long before that, the B. C. Supreme Court, gave the section a sensible and clear interpretation. Those Courts noted that the section does not speak of someone who lawfully possesses property but who does so "by law". The former means that it is a possession the law does not prohibit while the latter implies that there must be a specific law that provided for the possession. For instance, in one of the cases a person had shoplifted something that was in possession of the store by a lease of floor space arrangement. The charge of theft named the store as the owner while in fact the goods were owned by the lessee. The Crown had taken the position that the business contract between the store and the owner made the store the owner "by law". Not so said the Court and held that the arrangement only accommodated the store to take over from the owner in caring for property rather than for the purpose of having the use of it. For instance the law provides specifically that the registered owner of a car must be considered the owner, while in fact someone else may have purchased it and is compensated for the use of the vehicle by the registered owner; in cases of backruptcy a person is appointed to administer and possess assets; the executor of an estate (although he must administer it in accordance with a testament or other provision) does by law possess the estate; a police officer does by law possess contraband he has seized, etc. In many of these cases and particularly in the case of an estate, it is difficult for someone to claim actual ownership. The Courts held that s. 517

* R. v. Scott (1973) C.C.C. 109

C.C. was designed only to cover such situations and not civil arrangements like lending, leasing or like contracts. The Alberta Court of Appeal* reasoned very similarly and its conclusions were identical to those of the B. C. Supreme Court.

In 1969, however, the B. C. Court of Appeal had also given its opinion on section 517 C.C.**. It disagreed with what the B. C. Supreme Court and its Alberta counterpart had to say. It did not only extend the term of "by law" to include contractual stipulations but also where "control or custody is derived by implication of law". The Court actually held that the section states that a person who has "lawful" possession of property shall be deemed to be the owner.

That leaves us in view of the compelling language (shall be deemed ...) to wonder if we must consider in all cases of offences against property, if the person who had possession of the property at the time of the offence must be named as the owner in the information.

The County Court held that if the contrary had not been proved by Ms. T.'s testimony, Mr. D. would have been the owner. However, in view of that testimony the Crown proved ownership in one person and alleged it to be with someone else.

Crown's appeal dismissed.

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** R. v. Hogen (1969) 4 C.C.C. 140.

IS TAKING THE LAW IN ONE'S HANDS ALWAYS A CRIME?

Regina v. Cotswick, County Court of Vancouver, No. CC840124, August 1984.

The accused, a free miner, became involved in a number of disputes with a mining company in regards to mineral claims. The accused lost his arguments in court and had to move equipment across the property owned by the company and over a road the company claimed to own. The accused asked for a key to the gate and was refused. He then checked the statutes and also discovered that the road was built with public money. This means, according to the Highways Act, that the road was a public road.

The accused, using his own equipment, simply removed the gate and found himself charged with mischief. Of that "I am not guilty" said the accused as he claimed to have acted with legal justification or excuse, or with colour of right (see section 386(2) C.C.).

The Court found that the accused had made proper inquiries re the status of the road and sought legal advice. In other words he did not just have some personal opinion on the matter. Therefore the accused's belief that he had a right to traverse the company road was an honest one. He therefore had "colour of right". However, is such right sufficient to take the law into one's own hands? Surely there must have been legal ways to gain access to that road without having to bust the gate.

The Court responded that it does not encourage the activities of the accused but taking the law into one's own hands "is not the same as saying that to do so one commits a crime". Said the Court:

> There are circumstances where it is appropriate at common law that there be an abatement of nuisance. One can think of many circumstances where conduct honestly and reasonably believed by a person to be illegal and wrong and eroding that person's public right, steps taken to remove that nuisance will not constitute a crime.

The Court concluded that although the accused may well be wrong civilly, his honest belief in a set of facts invoked the benefit of section 386(2) C.C.

Accused acquitted.

* * * * *

HOUSE PARTY - UNLAWFUL ASSEMBLY

Regina v. Poulger and Res. - 18 C.C.C. (3d) 78 County Court of Westminster, B. C.

A wild party was hosted in an apartment. Things got out of hand, beer bottles were thrown from the balcony and damage was done to the premises. Shortly after the two accused arrived and had a few beer, police came on the scene. The tenants were arrested, the names of all "guests" were taken and the two accused were convicted of:

> ... with intent to carry out a common purpose, unlawfully assemble and conduct themselves when so assembled so as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they would disturb the peace tumultuously... (s. 64 C.C.)

The accused appealed this conviction claiming that it was not supported by the evidence in that "their presence amounted to nothing more than mere passive acquiescence" to what was going on. According to the Supreme Court of Canada* such presence at the scene of a crime does not make a person a party to the crime. However, in the case before the Supreme Court of Canada, the crime was rape. The Supreme Court had held that unless a person aids, abets or encourages the principal offender, his presence alone does not render him criminally liable.

The County Court Judge held that the case the defence depended on was distinguishable from this unlawful assembly situation. The criminal act alleged against the accused was one of being part of an assembly and the conduct of that assembly. In other words, being present as part of an unlawful assembly is sufficient to convict under section 64 C.C. Quoting the Court of Appeal of England† the Court described at what stage an assembly becomes unlawful:

> The moment when persons in a crowd, however peaceful their original intention, commence to act for some shared common purpose supporting each other and in such a way that reasonable citizens fear a breach of the peace, the assembly becomes unlawful...

The common purpose was to have a party and the assembly became unlawful when beer bottles were thrown from the balcony. The accused

* Dunlop and Sylvester v. The Queen (1979) 47 C.C.C. (2d) 93
† R. v. Caird et. al. (1970) 54 Cr. App. R. 499

were part of that assembly.

Appeal dismissed.
Convictions upheld.

NOTE: This case was decided in 1982, and apparently did not surface until now. The editorial note in the "Canadian Criminal Cases" reads: "This case only recently came to our attention, but was thought to be of sufficient importance to report at this time".

* * * * *

WRITS OF ASSISTANCE

Seems that the ongoing question whether the writ of assistance is a document that can withstand a constitutional test ran into more split judicial views. It seems a race between the judiciary and parliament who is going to kill this controversial means of empowering searches. The Minister of Justice has stated that the "writ of assistance" legislation would be repealed. The Federal Court had, in pre-Charter times, already protested to have to act administratively in response to "an order" by a minister for a writ of assistance to be issued*. The Supreme Court of Canada held that all warrantless searches are unreasonable unless shown to be otherwise and added that one of the tests whether a document empowering a search is the equivalent to a warrant is that it is issued judicially**. This was seen by many as the judicial death blow to the writ of assistance as the Federal Court has no discretion in the matter and shall issue the document upon application. However, a few weeks after the Supreme Court of Canada decision, the Federal Court (trial division) came out with a surprising ruling†. Contrary to the earlier views by his brothers, this Federal Court Judge held that the granting of a writ of assistance is, despite the lack of discretion, nevertheless a judicial function. He considered the writs desirable and necessary in a free and democratic society.

One week after this Federal Court decision, the Ontario Court of Appeal†† ruled predictably in view of the test devised by the Supreme Court of Canada. The granting of the writ, said the Ontario Court, is an administrative rather than a judicial act and all relevant legislation is of no force or effect as it infringes on the right to be secure against unreasonable search and seizure. No one has ever claimed that law was a precise science!

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* See page 3 of Volume 14 of this publication
** See page 12 of Volume 18 of this publication
† Re Danielson and Sterba and Cousineau 16 C.C.C. (3d) 332
†† R. v. Noble 16 C.C.C. (3d) 146

LEGAL TIDBITS

Reasonable Search

The accused was stopped in a roadblock set up to check documents such as driver's licence and registration papers. All was found in order and the accused was free to go. Shortly after information was received via C.P.I.C. that the accused is a suspected cocaine dealer. He was overtaken and stopped. He allowed his vehicle to be searched. A quantity of cocaine was found and when asked: "What is this?" the accused gave an inculpatory statement. The accused was tried for importing and possession for the purpose of trafficking. The admissibility of the cocaine and the statement became an issue. The roadblock was not in contravention of the right to be secure against unreasonable search and seizure. However, the police were not justified in pursuing the accused and searching him on the basis of information in a computer. The search was warrantless and without reasonable and probable grounds. Therefore, the statement the accused made when the cocaine was found should not be admitted in evidence. The cocaine, however, was admitted in evidence as it was not established that admission would bring the administration of justice into disrepute.

(R. v. Moretto, 14 C.C.C.(3d) 427.)

* * * * *

Validity of Warrants for Disorderly Houses

The Criminal Code provides that a peace officer, upon a report to a justice of grounds for believing that disorderly house offences are being committed, may be issued a search warrant (s. 181 C.C.). The officer need not swear an information and the only prerequisite is that the officer and not the justice, does believe or is satisfied that such an offence is taking place. This provision, held the Ontario High Court of Justice is of no force or effect as it is inconsistent with the right to be secure against unreasonable search and seizure. The justice is simply not acting judicially when issuing a warrant under the provision of s. 181 C.C. as he does not make any decision on sworn evidence. The Court held that s. 443 C.C. sets out the normal and appropriate standards for granting a search warrant. Consequently the search warrant was quashed.

(Re Vella et. al. and The Queen 14 C.C.C. (3d) 513)

* * * * *

Is Assumption that Goods are "Hot" Enough to Convict for Possession?

A man found in possession of $1,300 worth of roof panels confessed that he knew they were "hot". This was not because the vendor told him so, but was concluded from him knowing the actual value and only having paid $150 for the goods. However, the Crown could not provide the person who sold the panels nor could it prove that they were stolen. The owner of the property and its origin was a mystery. The man was nevertheless convicted of possession of property obtained by an indictable offence. He appealed and the Alberta Court of Appeal held that the accused's belief that the goods were "hot" was inadequate to prove that they were obtained by an indictable offence. Appeal was allowed and acquittal was entered.

Please note that the Court did not negate the doctrine of "wilfull blindness" used to infer that a possessor of property had knowledge the goods were stolen. In this case there was possibly no lack of evidence to prove knowledge. But in addition the theft must be proved.

(Regina v. Elliott 15 C.C.C. (3d) 194.)

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Taking of Blood Samples from Unconscious Suspect

The Manitoba Blood Test Act states that a doctor who has grounds to believe that the patient being treated has been drinking and drove within the last two hours may take a sample of blood to determine the patient's blood-alcohol content. In this case the patient was in a one car accident, he smelled of an alcoholic beverage and he was unconscious. The doctor who had taken some blood for hospital purposes had upon request also taken some for the police. The accused claimed that the provincial Blood Test Act is inconsistent with the Charter and that the doctor's intrusion into his body for the purpose of collecting evidence was an unreasonable search and seizure.

The Manitoba Court of Appeal held that the legislation was not inconsistent with the Charter and that the doctor's action did not amount to an unreasonable search.

(R. v. Ramage 16 C.C.C. (3d) 182)

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Justices of the Peace - Independent Judiciary

On page 3 of Volume 19 of this publication is a synopsis of reasons why the Ontario High Court of Justice held that a Justice of the Peace in their province is not independent and can therefore not preside over a trial. The Ontario Court of Appeal has now reversed that decision and held that in addition to the tenure of employment arrangement, the tradition and the oath of office must be considered. It appears that it is business as usual for the Ontario J.P.'s.

(Reference re Justices of the Peace Act.)
(Re Currie and Niagara Escarpment Commission 16 C.C.C. (3d) 193)).

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Disciplining One's Child

A rebellious 13 year old boy was taken upstairs by his father who said: "I am going to learn you to grow up and be a man and not a bum". The boy was hit on his bare behind with a leather strap, four times. He then had something abusive to say to his Dad and this resulted in a further strapping. This punishment left five bruises and Dad was convicted of assault causing bodily harm. Dad submitted in his appeal that section 43 of the Criminal Code excused him as he was merely correcting his child; furthermore the assault had not caused bodily harm. The Saskatchewan Court of Appeal said that the defence of correcting a child is only available if the force used is reasonable. In this case the defence was not available. The Court did, however, agree with the father that he had not caused bodily harm. The bruises were transient and trifling. The conviction was reduced to that of simple assault.

(R. v. Dupperon 16 C.C.C. (3d) 453)

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Taking Hair Sample by Threat of Force - Admissibility of the Evidence

A home was broken into and someone was sexually assaulted in the home. A suspect was arrested and was asked for samples of his hair for comparison with hair found in the house. If he was not prepared to give the hair police threatened to take it by force, if necessary. The suspect allowed a comb to be put through his hair and did, upon request, pluck a few hairs himself. The accused appealed his conviction for B & E and sexual assault claiming the taking of the hair was an unreasonable search and seizure. Not so, held the Ontario Court of Appeal. The arrest was valid and police may search a prisoner and seize anything that will afford evidence. In any event, even if the search and seizure was unreasonable in the circumstances, admitting the hair exhibits in evidence would not bring the administration of justice into disrepute.

Conviction Upheld.

(R. v. Alderton 17 C.C.C. (3d) 204)

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Disturbing a Religious Worship Service

Communion in a Roman Catholic parish would by edict of the priest, be administered to congregation members standing up instead of kneeled down. Some members objected strongly and kneeled anyway during communication. They were not served and were convicted of disturbing a religious worship (s. 173(2) C.C.). The Supreme Court of Canada held that the section was not intended to cover situations of this kind. "Disturb" in the section means conduct that is disorderly in itself. If this was not so, then the word "anything" in the section could render the author of the most trivial distraction to be criminally liable.

Acquittal Ordered.

(Smoke - Graham et. al. v. The Queen 17 C.C.C. (3d) 289.)

* * * * *

Using Authority to Search for Liquor to Seize Drugs

Police officers observed an open liquor bottle in a car and had, consequently, power to search the vehicle under the Ontario liquor laws. Narcotics were found and charges were preferred accordingly. Officers conceded they searched for liquor but expected to find narcotics. The defence, of course, claimed the search was unreasonable and urged that the narcotics be excluded from evidence. The Ontario Court of Appeal held that the lawful search was not converted into an unreasonable search because the officers expected also to find drugs.

Evidence allowed.

(R. v. Annett 17 C.C.C. (3d) 332.)

* * * * *

Forfeiture of Firearm

The Criminal Code stipulates that a firearm used in an offence must be ordered forfeited by the Court (s. 446.1(1) C.C.). A man was convicted of carelessly storing a firearm (s. 84(2)C.C.) and the Court ordered the weapon forfeited. The accused appealed the forfeiture on the basis that the Saskatchewan Court of Appeal had held that the offence involving a firearm that triggers (no pun intended) the forfeiture must be one of active process rather than a passive one. The Alberta Court of Queen's Bench agreed that the section of the Code obviously refers to an active use of a firearm in the commission of an offence.

Weapon returned to accused.

(R. v. Annas 17 C.C.C. (3d) 383)

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Distinction Between Causing Bodily Harm and Wounding

The accused's victim suffered a broken jaw and ribs. He also suffered a ruptured eardrum and the ear canal was full of blood. The accused appealed his conviction on a charge of aggravated assault by wounding. It is well established that for wounding the breaking of the skin is an essential ingredient. The accused argued that a perforated ear drum is not sufficient to constitute wounding. Furthermore such perforation can be caused by infection and the Crown failed to show that it was the result of the assault. The Alberta Court of Appeal rejected both arguments. The breaking of the eardrum was sufficient to justify the conviction and the latter submission was rejected as conjecture.

Conviction of wounding upheld.

(R. v. Littletent 17 C.C.C. (3d) 520)

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Freedom of Religion - Carrying of Ceremonial Daggers

A man charged with assault was of the Sikh religion and appeared for his plea carrying his ceremonial dagger (kirpan). The Judge ordered the accused to take the dagger off. The case was adjourned for trial and the accused petitioned the Manitoba Court of Queen's Bench to instruct the lower trial court that the accused could wear this religious symbol in the courtroom. He claimed the order to remove the dagger infringed his freedom of religion. His religion dictates that any baptized member of the Sikh religion must wear the dagger. The Court of Queen's Bench did not issue the order the accused sought. The trial judge having the public interest in mind, may order all weapons to be removed to ensure that the process is not thwarted and to maintain security in the courtroom.

(Re Singh et. al. and The Queen 18 C.C.C. (3d) 31)

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