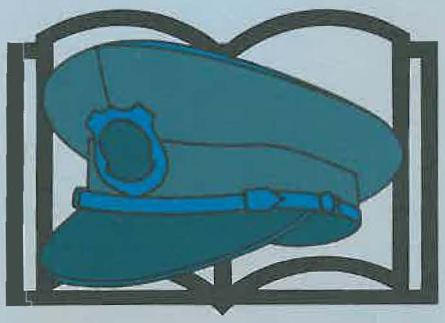

ISSUES OF INTEREST

VOLUME NO. 25

Justice Institute of British Columbia
POLICE ACADEMY
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ISSUES OF INTEREST

VOLUME NO. 25

Written by John M. Post

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Re Baker and The Queen, 26 C.C.C. (3d) 123.
Supreme Court of British Columbia.

Mr. Baker could not see anything as he faced the setting sun. Yet he continued to drive along and struck a six year old girl and her younger brother who were playing on the roadway, very near the curb. The girl died and the boy recovered from his injuries. The Crown alleged the offence of careless driving against Mr. Brown under the B.C. Motor Vehicle Act and a petition signed by 905 citizens did not alter the Crown's position that there was inadequate evidence to levy a charge of dangerous or criminal negligent driving.

The children's father then swore an information alleging both above-mentioned criminal driving offences and the Justice of the Peace, after conducting an *ex parte* hearing, issued process. The Crown promptly instructed the clerk of the court to enter a stay of the proceedings against Mr. Baker in regards to the criminal charges. The parents then turned to the Supreme Court of B.C. with a petition seeking a remedy to this impasse. The parents argued that s. 508 C.C. (the Crown's authority to stay proceedings) does not include private prosecutions. It would simply be unconstitutional to bar a citizen from access to the courts to prosecute another citizen.

The Supreme Court Justice drew the attention of the parties to the case decided by the B.C. Chief Justice in 1957* on this very issue. The Chief Justice said that a citizen had an unfettered right to do as the father (informant) did in this case, and went on to hold that when the Justice of the Peace then issues process (warrant or summons) the informant or his or her counsel has a right to carry forward the prosecution.

The Supreme Court Justice in this case found that the laws since 1957 had not changed. However, he decided that this Baker case was distinct from the one in 1957. Apparently in the latter case the Crown had not initiated any charges while in this Baker case it did. The father was simply dissatisfied with the selection. The private prosecution against Mr. Baker did not fill a vacuum, it alleged offences in addition to the one the Attorney General as the Queen's agent, had considered appropriate. The father in fact competed with the prosecutor. Regardless who the informant is, it must not be forgotten that a criminal process is a dispute between the Queen and the defendant. Her agent should not be interfered with. When he does act, his rights to prosecute are paramount to those of the private citizen. The Supreme Court Justice came to this conclusion from some historical cases on this point.

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* *R. v. Schwerdt*, 119 C.C.C. 81 (1957)

Quoting from those cases the Court reviewed how at one time, the criminal trials were, like civil cases, a means to settle disputes between individuals. Eventually the Sovereign became the prosecutor as crime was seen as a breach of the Sovereign's peace. Private prosecutions permitted by law may be a parallel role to that of the state, but is not to be a substitute.

But how has s. 15(1) of the Charter of Rights and Freedoms affected all of this. In simple language, the father's lawyer argued that the prosecutor being paramount in this matter rendered his client unequal "before and under the law". The Court rejected this submission simply by saying that there was no discrimination between persons or entities involved. Something has to be paramount and the State historically is in issues like these.

Had the Crown not laid any charge, it would not have been empowered to stay the proceedings. However, the Crown had acted and the father's private process had been superseded. Therefore the Crown was empowered to stay the proceedings.

Application dismissed.

Comment: The B. C. Supreme Court Justice did not refer to a case decided by the Supreme Court of Canada in October of 1983* which was perhaps not on all fours with this Baker case, but in which the court gave a strong indication how it saw the law in respect to the issues involved here. In that case a citizen swore informations before a justice of the peace alleging nine offences. The Justice of the Peace conducted a hearing to determine if process should issue. The prosecutor (the Crown) appeared at the hearing and ordered a stay to be entered prior to the decision if the person accused should be compelled to appear in Court to answer to the charges. The Supreme Court of Canada in essence said that the Crown jumped the gun but recognized that:

> "The Attorney General's power to stay starts as of the moment a summons or warrant is issued".

One could argue that the narrow question of law before the Supreme Court of Canada was whether the Crown could stay proceedings during the *ex parte* hearing before the Justice of the Peace. The answer was "No", but the highest Court seemed to have said, it has after process does issue. The latter portion could in law be considered gratuitous (*obiter dicta*) and not be part of the binding precedent.

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* *Damson v. The Queen*, Volume 14, page 14 of this publication. Have not seen this case reported.

Is the Crown Obliged, in the Absence of Specific Law, to Provide Identity and Whereabouts of Defence Witnesses?

Entrapment

Regina v. Gudbranson

A biker and his passenger made a meet with two men in a car. The biker approached the car by himself and asked "How much for the coke"? "Thirty-two" was the answer. The biker passed $3,200 onto the men in the car and he received a quantity of coke in return and was assured there would be no problem to "score" more later on. As a result of this transaction the accused was charged with trafficking in cocaine.

The players on the stage of the above scene were Police Constable G. (the biker), Mr. W, an *agent provocateur*, and one of the occupants of the car, the accused. The transaction was part of a larger police operation to identify, target and apprehend drug traffickers.

Mr. W was engaged by police for $50 per day for his expenses and $10,000 at the completion of the operation. He was briefed on what Police considered "acceptable and unacceptable" conduct and sent out into the community to ferret out those who sold and distributed drugs. He did this with minimal if any supervision. W was not simply to be an informer, but was to introduce Cst. G to the targets. He was not to be a witness to or have any other part in the resulting transactions. Neither was Cst. G to play any part in or be a witness to W's part of the contact with suspects. W was told that this would give him "extensive protection from his identity becoming known". The Court concluded that ..." the scheme was deliberately structured to the end that he (W) would not be required by the Crown after his services had been rendered".

The defence aimed for entrapment. It claimed there was "importuning" on the part of W. The scheme set up by police deprived the accused from cross-examining W who could have used any nefarious means to force a sale. Furthermore, the Court found about W:

> ". . . when not busying himself with the work of Her Majesty, he was conducting his infamous trade by selling drugs to others, and more particularly to young children and adolescents... which was built into the scheme by the lack of any appropriate surveillance or reporting system. ... It was a case of hiring the fox to catch the chickens".

The accused claimed that unless the Crown called W, he was deprived of making a full defence. The Judge who presided over the trial, had in 1984 stayed proceedings when it was shown that in similar circumstances police had told their *agent provocateur* (not informer) to absent herself so she could not be

subpoenaed by the defence to show entrapment*. In this case there was evidence that W had not been told to make himself scarce. He had taken that upon himself shortly after he received his $10,000. The officer in charge of the drug section was called to discover if the whereabouts of W were likely to be discovered if some efforts were made to that end. The Court concluded the defence was being "stonewalled" and the veteran policeman who testified in regard to this issue "seemed to be portraying calculated indifference or was otherwise deliberately being specious".**

The Court, to resolve the impasse as to who was responsible to locate W. promised to stay the proceedings until police had been given an opportunity to find W. Crown counsel then advised the Court that possibly W would be available in a few days and indeed he was.

W. was questioned by defence counsel (as his witness) and contradicted the police evidence about him having left for parts unknown. At the time of the preliminary hearing when defence counsel's persistence to have W produced as a witness commenced, he (W) was actively working for the police. He had been contacted a few days before his testimony and to the best of his knowledge police knew his whereabouts and had no problem contacting him. The trial judge found that the police testimony on the availability of W had been deceptive and was designed to have defence counsel consider his efforts futile. In respect to the prosecutor's role in all this, the Judge remarked that he had expected from an experienced counsel that he would have instructed police to make W available when the defence wanted him as a witness. The matter of compellability could have been argued later. In any event the trial judge remarked:

> "His (Crown Counsel's) failure to do so, apart from raising suspicions as to his honesty with Mr. ... (defence counsel) and myself, leads me to the regrettable conclusion that his conduct was far less than one has a right to expect from a leading member of the Department of Justice".

In any event, the defence reasoned that the whole case had become an abuse of the process of the Court which could be remedied by a judicial stay of the proceedings.*** To decide this the Court had to determine to what extent the Crown is obliged in the absence of specific law, to provide the defence with the details on defence witnesses. And, in addition, was W. compellable; was the Crown permitted to divulge the identity and whereabouts of a police

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* *Regina v. Ross* (1984) (3d) 177.

** Some of this dispute had been argued at the preliminary hearing.

*** See page 29, Volume 22 of this publication - Entrapment. *R. v. Mack* and *R. v. Jewitt*.

undercover agent?*

The Court referred to the now well established law. A police informer is protected. His or her name is not to be released to anyone but the police handler. However, as soon as such a person becomes active other than simply passing on intelligence from the environment in which he works, lives, or is exposed to in some way, then the protection captured by the common law may well be lost. Reiterated the Court:

> "Any scheme or plan that envisages the use of informers as opposed to *agents provocateur* can anticipate that the informer will not be required by the court to be identified, but the moment it is known that person has participated in the circumstances that have brought about the offence to the extent that he can reasonably be concluded to be a necessary and incidental witness for the defence, such protection ceases to exist."

Hence W was held to be an unprotected agent and a compellable witness.

The question remaining was whether the Crown was obliged to accommodate the defence in producing W. In a 1951 decision the Supreme Court of Canada** seemed to have said "No" to this question. However, upon closer scrutiny and particularly the way the Courts have interpreted that decision, it seems that no one can interfere with the way the Crown wishes to conduct the presentation of its case but it is not free of obligation "to make certain that all material facts pertaining to the event, which are known to the Crown, are made available if the Crown does not chose to call the witnesses itself".

Due to a lack of supervision W had in his alleged handling of prospective suppliers, triggered the issue of entrapment. The Court felt that better supervision could have prevented this. Therefore W. was a material witness for the defence. The Crown's obvious refusal to produce W was "tantamount to obstruction of justice" and the accused was deprived of making a full answer and defence". In such case a judicial stay of proceedings is something the accused is entitled to.

W. was produced and no "stay" was justified unless entrapment was established. Hence the next question was whether W's actions had entrapped the accused.

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* See Volume 15, page 3 - Supreme Court of Canada on protection of police informers.

Also Volume 12, page 40 *Biscillon v. Kibble et. al.* and *R. v. Davies* respectively.

** *Lemay v. The King* 102 C.C.C. 1

The Court heard from quite a number of witnesses about the accused's propensity or lack thereof, to traffic in drugs or narcotics. As a consequence the Court found as a fact:

> "... that when he (the accused) became acquainted with W he was not, nor was he likely to be a person who trafficked in drugs".

The accused did place evidence before the Court on how W had persisted that he supplied the narcotics. He had come on numerous occasions uninvited to the accused's home and had been relentless. Phone calls in the middle of the night were common and W did not deny having been persistent.

On one point in his case, the accused was caught with his proverbial pants in the lowest possible position. He related an incident to the Court which was supposed to have been an example of the importuning he was subjected to. The Crown did actually prove that to be a lie. However, one such an inaccuracy does not mean that all evidence from that source cannot be believed reasoned the Court.

The accused testified that, due to pressure put on him, and persistence by the "unsupervised" W he had finally agreed to co-operate and got the cocaine W wanted. He denied that he, upon delivery, had indicated that he could get more cocaine. As a matter of fact, the accused testified that he had specifically said that he would not supply more, despite the fact that he did profit from the transaction.

The Court concluded that the preponderance of evidence favoured a view that the accused was importuned on many occasions. Also that W had promised that there would be no more pressure if the accused would co-operate in the proposed sale.

W had, during his "employment" with the police, been caught stealing, and dealing in stolen property. The charges had been "mysteriously" stayed found the Court. The Court was also satisfied that W was profitably dealing in drugs while so employed. On at least two occasions cocaine was sold by him to children under the age of 15 years, was the defence's evidence.

W denied the allegation. However the Court considered his credibility "very limited". It seems reasonable to infer from the 46 page Reasons for Judgement that the trial judge was not impressed with either the police strategy or W and had grave doubts about the latter's testimony.

Police expressed doubt about the *carte blanche* the unsupervised W had in respect to criminal activities. Their intelligence network would have alerted them if W's behaviour was as the defence claimed. The Court considered that theory inadequate to rebut the defence position. Furthermore, the preparation of W by telling him what is acceptable conduct, is in this case "... tantamount to the F.B.I. reading John Dillinger the ten commandments". The Court expressed suspicion that the lecture W received was no more than to "... receive sympathetic

approbation, when it was known full well that the scheme opened the door for the commission of the very crimes that they (police) were duty bound to prevent". Concluded the Court: "They (the lectures) were ... window dressing".

Entrapment, as an aspect of the abuse of the process of the Court (resulting in a judicial stay of proceedings) may only be applied in "the clearest of cases" said our Supreme Court of Canada. It is with the following words that the trial judge summed up this law and applied it:

> "It is my view that to join the 'clearest of cases' the degree of importuning must be extreme and the offence subjectively at least, if not objectively, the last resort to rid oneself of an impossible situation, impossible to the extent that in the eyes of any reasonable well informed person to allow it the court would be associating itself with and approbating such conduct and thus bringing the administration of justice into disrepute. In this connection the seriousness of the offence must be weighed with all the other factors. For instance it would be difficult to perceive how a case of entrapment could ever be made out in a case such as murder. As the seriousness of the offence under consideration in any given situation diminishes, the possibility of success of the defence might be said to be more favourably entertained."

The Court recognized the deplorable consequences of drug trafficking, and conceded that only in the rarest of situations could importuning alone substantiate entrapment. In drug trafficking importuning would have to include compulsion before entrapment can be found. Importuning alone would in a case of this kind only be considered for the purpose of sentencing and not to determine verdict.

The court implied strongly that police had concocted a scheme that would make them look "snow white". However, despite the persuasive arguments of the Crown to the contrary, the Court held that the police could not disassociate themselves from the conduct of their agent. The conduct was oppressive, importuning and compelling, and thus any prosecution of that conduct would amount to an abuse of the process of the Court.

Judicial stay of proceedings entered on the record.

* * * * *

Statement - Admissibility and Use

Crown Using, in Cross-Examination, a Statement it did not Present in Evidence

The Queen and Brooks, B. C. Court of Appeal, Vancouver CA000321, June 1986.

This case (or a portion of it) is for lack of a better analogy, dealing with trial entrapment on the part of the prosecutor. He was in possession of damaging relevant evidence against the accused, devastating in respect to the accused's credibility. This evidence was withheld during the presentation of the Crown's case. The accused took the stand and in cross-examination that evidence was sprung on him. The accused submitted that he was lured into the box with the prosecutor laying waiting to corner him. He argued that if an accused person takes the stand, then for the purpose of attacking his credibility he may be asked questions about a criminal record, characteristics or propensities he may have displayed, activities on his part that may well affect his honesty, etc.. However if the Crown has relevant evidence that may assist in pressing its case, it is obliged to introduce it through evidence-in-chief but not by means of cross examination. In other words, if the evidence has direct and probative value, the Crown must adduce that evidence as part of its case, or, as the saying goes, forever hold its peace.

In this Brooks case, the accused had been questioned by police in regards to a rape in 1978. He was subsequently convicted and was sentenced to serve more than three years in gaol. The officers also interviewed him about the murder of a young girl. It seems that the questioning took place over a period of five days, for a total of eleven hours. On two occasions during this five day period he was interviewed by a polygraphist for a total of nine hours. Prefacing his remarks by saying that the officers had insisted that he was guilty of the murder, the accused had said to the polygraph operator that he kept having "sketchy parts" of the murder in his mind and: "Well there's things, you know, in the back of my mind that - that tell me there's definitely some involvement in the - in the matter. ... In about the murder".

In 1982, the accused was charged and tried for the murder of the girl. The Crown did not adduce any of the 1978 statements by the accused. The accused took the stand in his defence and denied to have had any part in the murder. When the prosecutor cross examined the accused he asked the Court to conduct a *voir dire* to determine the voluntariness of the accused's statement to the polygraph operator. He submitted that he had not adduced the statement as he anticipated difficulties in regard to admissibility. Portions of it related to the rape. Others were relevant to the polygraph test only. The evidence showed that all 1978 interviews had been taped. However all tapes had been lost and after 5 years the officers could not recall the content of the interviews. The polygraph operators' tapes were available. The operator had inquired from the accused how he was being treated. The accused had expressed no complaints except that the officers had insisted that he had committed the murder. He said their insistence, despite his denials, went well beyond suggestions as to his guilt.

The trial judge had held that the statements to the polygraph operator were voluntary. The crown conceded the statement was relevant and indicated guilt. Despite the fact that he had not used the evidence in presenting the Crown's case the prosecutor argued to be entitled to use the statement in cross-examination as it went to the issue of credibility.

The judge granted the Crown's application and the jury got to hear the accused's veil confession. He was convicted and appealed.

The B. C. Court of Appeal was divided on the propriety of the use of the statement in cross-examination. The dissenting reasons for judgement said that the statements taken by the investigators and the environment in which they were taken were inseparable. They were so linked that the voluntariness of the statement to the polygraphist could not be determined without the details of the investigators' interviews. The dissenting judgement also said the Crown had split its case. The statement to the polygraphist had significant value and was, if accepted, proof of guilt. The Crown should have presented the statement prior to closing its case if it wanted to use the statement and not put it in under the guise of assisting the jury to establish the accused's credibility. The dissenting Justice would have ordered a new trial.

The majority judgement saw it differently. They agreed that the Crown should not have used the statement in presenting its case. Many parts were irrelevant and would not have been admissible. The impression the accused gave the jury with his testimony was diabolically the reverse of what he told the polygraphist. Therefore the Crown became entitled to use it for cross-examination purposes. The Justices also agreed that the accused's admission to the polygraphist that he had been treated fairly by the investigators, had not received the third degree, corroborated the investigators' recollection of their interviews. That gave sufficient justification to conclude that the statement to the polygraphist was not contaminated by anything the investigators did and was hence voluntarily given.

Accused appeal dismissed.
Conviction upheld.

* * * * *

The Meaning of "Illicit" Sexual Intercourse

Deutsch and The Queen - Supreme Court of Canada, July 1986

The accused advertised for a "secretary/sales assistant" for his business, which predominantly marketed franchises. A police woman applied and wore a body pack when she went for her interview. It was made very clear to her that the assistance she was to provide "when necessary to conclude contracts" was to have sexual intercourse with prospective clients. She was promised generous remuneration for this in salary, commissions and bonuses. It would not be impossible to earn $100,000 per year the applicant was told. Police interviewed other applicants and found that they had been given the exact same conditions of the position. The accused's business was a legitimate company and was not in any way connected with prostitution as that profession is normally understood and operated.

The accused was acquitted of: (1) attempting to procure female persons to become common prostitutes; and (2) attempting to procure female persons to have illicit intercourse with another person (s. 195 C.C.). The Ontario Court of Appeal had agreed with the accused's acquittal of attempting to procure these ladies to become common prostitutes but had ordered that he be tried again for attempting to procure the applicants to have "illicit" intercourse with another person. The accused appealed the order for a new trial to the Supreme Court of Canada.

The defence had two major submissions to support its contention that the acquittal was the proper verdict. Firstly the intercourse that was part of the job was not "illicit" as there was nothing unlawful about it. Secondly, the accused was simply making preparations to gratify his clientele. His activities had not gone far enough to consider them an attempt. After all he had not made an offer of employment to any one of the applicants. Three of them had terminated the interview when they discovered the requirements of the position. The police woman (who indicated she would accept the job if it was offered to her) had been told by the accused to go home and think about it.

In regards to the semantics of this issue the Supreme Court of Canada held that the words "unlawful" and "illicit" are synonymous. Yet something "unlawful" is usually a criminal act for which one can be penalized under the law. The word "illicit" is commonly used for acts or things not necessarily prohibited by law, yet considered to be immoral. Therefore, for the purpose of section 195 C.C., illicit intercourse refers to intercourse not authorized or sanctioned by lawful marriage. Quoted the Court:

> "The wrong at which that subsection is aimed is the act of a person in procuring or attempting to procure or soliciting any girl or woman to have carnal connection with another person who has no right to engage with her in that act... Thus in the present case while the act of

> carnal connection was not shown to be an act contrary to the criminal law ... nevertheless it was not an act authorized by law and in that sense was 'unlawful' within the meaning of that word ...."

In terms of the intent of the lawmakers, the Court found that the evil the section is to prevent is *not* sexual intercourse, but, as in all subsections of s. 195 C.C., the exploitation of women. It is prohibited for instance, to procure a person to become a prostitute, yet prostitution itself is not a crime. In other words the subsection is designed to prohibit the encouragement and promotion of conduct which itself is not criminal. If the word "illicit" in respect to sexual intercourse referred to scenarios where that act was criminal then it could only be applied to procuring a female person to become a victim to sexual assaults (rape); to statutory rape; incest; to seduction under promise of marriage; being a passenger on a ship and having to submit to the master or owner; etc. All these are specifically prohibited by law and procurement for these purposes is an offence by the very sections creating those offences. Hence s. 195 would be superfluous should "illicit" mean sexual intercourse prohibited by positive enactments. Furthermore it would severely limit the protection the section obviously is intended to provide. Consequently the accused's suggestion that "illicit" in the allegation against him, refers to sexual intercourse specifically prohibited by law, was rejected by the Supreme Court of Canada.

To determine if the accused had gone beyond preparation (a prerequisite to "attempt") to procure these women as alleged, the Court reviewed the law. Section 24 C.C. in essence states that he who does "anything" for the purpose of carrying out the intention to commit an offence has attempted to commit the offence even where in the circumstances it was impossible to do so. In other words there has to be at least part of the wrongful act *(actus reus)* and the intent to commit the offence *(mens rea)* before it can be found that there was an attempt, which does not include mere acts of preparation. Where preparation ends and attempt begins is an obscure boundary that is impossible to define and should be left to "common sense judgement" decided our highest court.

For the accused to have attempted to procure these women, he must have gone beyond mere preparation "to cause, or to induce, or to have a persuasive effect upon the conduct that is alleged" (the latter quotation is the definition of procuring). To procure a person to have illicit sexual intercourse with another person requires the act of sexual intercourse to take place. Did the accused attempt to do so? After all, he indicated it was only expected from the secretary/sales assistant when it would become necessary to make a sale; some remote eventuality with a person or persons yet unidentified. Perhaps it would never be necessary. The Court found that the advertising, the straight forward sexual requirement of the job along with the holding out of the large financial reward "could constitute the *actus reus* of an attempt to procure".

The trial judge, however, had not made any finding on whether or not the accused had the criminal intent to carry out the offence of procuring "a female person to have illicit sex intercourse with another person". As a consequence

the Court unanimously dismissed the accused's appeal and ordered a new trial.

Comment: Sexual favour has been used as a form of currency all during the history of mankind. This has rendered women and children vulnerable to exploitation. Canon law was very influential on the law makers of the past found the Supreme Court of Canada and did go as far back as the middle ages to determine the meaning of the word "illicit" in the context of s. 195 C.C.. Though this was an incredibly interesting exercise in semantics, one cannot but wonder if the 20 pages of the reasons for judgement on this issue alone, do not contain phrases and statements which may change the pretty well established meaning of words like, lawful, unlawful, by law, illicit, etc. Though there may be justification to say that it only refers to the meaning and intent behind s. 195 C.C., some positive statements by the Court may make powerful arguments in other situations in which the above mentioned words are key. Considering the frequency with which these words are used in our law, any minor adjustment to their meaning could mean changes of considerable impact. For instance the Court seemed to have accepted that:

> "'Lawful' means authorized by law. The prefix 'un' may mean simply 'not', and 'unlawful' may be properly used to mean 'not authorized by law'".

This, coupled with the Court holding that "illicit" and "unlawful" are synonymous, as something not authorized or sanctioned by law, could make for an incestuous marriage of words that may have inbreeds as offsprings. Furthermore the acceptance of the above quoted statement that unlawful may mean "not authorized by law", may be an affront to the do trine that we are free to do what the law does not prohibit. If one follows the quotation to the letter, we do not act lawfully unless the law specifically authorizes what we do.

From reading many cases, I had the impression that the following was pretty well established in terms of definitions at common law: Doing something "by law", means doing something in accordance to legislation, like following prescribed procedures.

Acting "lawfully" (other than when performing a duty) means doing something that is not prohibited by law. It follows that doing something "unlawfully" means doing it despite laws that taboo the act. Needless to say that "by law" includes "lawfully" but not the other way around. A narrower version of "unlawful" is "contrary to law". The latter implies that there is specific and positive law that says "no" to what is done or intended to be done. "Illicit" had a different, broader meaning and was distinct from "unlawful" in that it had a common or "street" understanding that included things immoral and socially unacceptable. What the Court held in regard to the meaning of "illicit" is not inconsistent with that but it said in the same breath that it is synonymous with "unlawful" and that may cause some problems.

* * * * *

Invasion of Privacy

Affect on Non-Disclosure to Authorizing Judge That Information Gleaned from Interceptions Would be Shared with Revenuers

Chambers and The Queen, Supreme Court of Canada, July 1986.

The accused and two others were acquitted of conspiracy to import a narcotic. The Court of Appeal ordered a new trial and the alleged conspirators took their plight to the Supreme Court of Canada.

The issue was a deal struck between tax investigators and police. The former do not have the judicial authorizations under the Privacy Act (s. 178.1 C.C.) available to them. It was agreed that police would make intercepted information about one co-conspirator, available to tax investigators. This deal was made prior to the application for an authorization and police did not disclose this information to the Justice who granted the authorization. The trial judge had disallowed police evidence on "the conspiracy to import" charge because the failure to disclose all of the use of the information gleaned from interceptions, had invalidated the authorization. After all, had the Justice known about the agreement he might well have refused to grant the authorization.

The Supreme Court of Canada found that the deal between police and the tax investigators was irrelevant to the validity of the authorization for the purpose of investigating the criminal conspiracy to import narcotics. The application had contained all information in connection with that criminal investigation.

When and if the Crown adduces evidence gained from this authorization in a prosecution under the tax laws, then the Court will have to consider the propriety of the arrangement between police and the revenuers and the affect it will have on the admissibility of that evidence.

Accused's Appeal Dismissed.
Order for a new trial was upheld.

Note: Two of the seven justices dissented. They considered that the validity of the authorization was the issue in this case and that admissibility of the criminal evidence was only an indirect consequence. Should there be a "tax trial" the admissibility of the tax evidence would be the main issue based on the validity of the authorization.

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The Privacy Act and The Charter
Adequacy of the Authorization - Propriety of Overlapping Authorization
- Public Telephones

Regina v. Thompson et. al., B. C. Court of Appeal #004343, June 1986.

In 1985 the B. C. Court of Appeal considered the appeal of the Crown in respect to a party by the name of Le Clerc* who was acquitted of a narcotics charge. The trial judge had not admitted the evidence resulting from interceptions of private communications. He found the authorization too broad and too all catching, giving police authority to tap anything and anyone. Conversations on public phones had been intercepted as the persons mentioned in the authorization had "resorted to or used" such public phones.

The B. C. Court of Appeal disagreed with the trial judge and ordered that Le Clerc be tried again. Parliament clearly foresaw that authorizations would cause interceptions of innocent conversations. To say that an authorization that gives licence to intercept communications (besides certain specific places), also "elsewhere in the province", is not inconsistent with the provisions of the Privacy Act, even if such places that are resorted to by the persons mentioned in the authorization or persons they communicate with, are public phones.

A half year later, the Supreme Court of Canada had to judge** if an authorization with the catch clause:

> "or any other place or locality, stationary or mobile where the persons named in paragraph 3 could be found, but the nature and location of which are at present impossible to specify"

was too wide and too broad, to be in compliance with the privacy legislation.

The Supreme Court of Canada had found that this wording authorized police to intercept the communications of anyone, anywhere. The necessary "catchall-clause" removed all limitations as to persons or places and the Supreme Court of Canada held that the authorization was consequently unlawful.

This Thompson case reached the B. C. Court of Appeal some months after that Supreme Court of Canada decision. The authorization's catchall clause did read as follows in respect to places at which private communications may be intercepted

> "or elsewhere in the Province of British Columbia resorted to by the said Perry Gordon Thompson, ..." (and others).

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* *R. v. Le Clerc* (1985) 20 C.C.C. (3d) 173.

** *R. v. Grabowski*, (1985) 63 N.R. 32.

The trial judge had disallowed the evidence of the intercepted private communications on the basis of the Le Cler decision. The Crown appealed.

The B. C. Court of Appeal disagreed with the defence submissions. It found that the fatal flaws the Supreme Court of Canada found in the Grabowski authorization (as well as in another apparently similar case*) were distinct from what the trial judge in this Thompson case had held to be such flaws. Said the B. C. Court of Appeal about the above wording in the Thompson authorization:

> "... the authorizations we are concerned with are not so broadly drawn. The right to intercept is confined to named persons only and, as to places, the addresses given for them 'or elsewhere in the Province of British Columbia resorted to by' those named persons. So they are not subject to the objection stated by Mr. Justice Chouinard (Supreme Court of Canada in the Grabowski case) in his sentence: 'According to paragraph 4(b) this includes anywhere that a person mentioned in paragraph (3) may be found, thus including persons whose identity is unknown'."

("Paragraph" refers to Grabowski authorization).

The B. C. Court of Appeal concluded that the Supreme Court of Canada decision did not impair their (B. C. Court of Appeal) Le Clerc ruling. In other words, in B. C. an authorization that identifies the targets and specific places or places "elsewhere in the province" those targets may resort to is an adequate description.

Defence counsel also argued that the interception of any private communication is an infringement of our right to be secure against unreasonable search and seizure (s. 8 of the Charter). Ever since the Supreme Court of Canada said in 1984** that this section in our constitution is not only there to protect us from trespass by authorities but equally to protect us from unjustified intrusions upon our privacy, the predictions that this Charter right would not affect the authorized interceptions of private communications have become a bit of a myth. The Ontario Court of Appeal*** has held that intercepting a private communication is a search and seizure. The B. C. Court of Appeal acknowledged that due to the precedent set by the Supreme Court of Canada s. 8 of the Charter applies to interceptions of private communications.

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* *R. v. Ritch*, (1985) 16 C.C.C. (3d) 191.

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

*** *R. v. Finlay and Grelette*, (1986) 23 CCC (3d) 48.

In this Thompson authorization police were given complete discretion to "anywhere" intercept the suspect's private communication. Defence counsel argued that if a search warrant would allow such latitude to search any place the suspect resorted to, it would be inconsistent with the limitations the Supreme Court of Canada did set (*Hunter v. Southam Inc.*). The B. C. Court of Appeal agreed with defence counsel but said in the same breath that though the principles to be applied to authorizations are similar to those to be applied to a search warrant, there is still quite a distinction between the two documents. Said the Court (quoting from the Ontario Court of Appeal judgement):

> "... A search warrant authorizes the search of specified premises for specific things already in existence. The person executing a search warrant will normally know whether a particular item found on the searched premises comes within the scope of the warrant. A search warrant authorizes a single entry of the premises to be searched, and if the items sought are not found, an application for a second search warrant must be made in order to make a further entry. In contrast, an authorization to intercept private communications authorizes the interception of conversations which have not yet taken place. The interception may occur at any time during the period specified in the authorization. It will often be the case that the listener will not be able to determine whether the intercepted conversation constitutes the evidence sought until after he has heard it in its entirety in the context of other conversations similarly overheard".

The B. C. Court of Appeal concluded that by listening everywhere the suspects have their private communications, is the only way the objectives of the authorization can be met. Afterall, those places are totally unpredictable at the time the authorization is granted. Therefore giving police the discretion to intercept any place the suspects resort to is not usurping the function of the Courts.

The authorization in question was granted by an impartial member of the judiciary; it is specific in terms of places and persons as was feasible at the time it was granted; and the system devised for this method of investigation would be rendered totally ineffective if, considering the nature of persons who are subject to criminal investigations, prompt and appropriate reaction to their moves and activities were not made possible through the authorization. Such restriction would be unreasonable. As a back drop to these conclusions the Court considered the prerequisites to an authorization. Section 178.13.(1)(a) and (b) C.C. are quite specific and provide sufficient safeguards to satisfy the standards of reasonableness as determined by the Supreme Court of Canada.

In this case three authorizations were issued which overlapped a few days on each occasion, in that a new authorization was granted while the previous one had not yet expired. The trial judge had held that the "new" authorizations had been invalid and that the law (s. 178.13(3) C.C.) only provides for extensions of existing authorizations.

The B. C. Court of Appeal disagreed with the trial judge and considered that to be too rigid an application of the law which is not specific on this point. Furthermore the Court found that the prerequisites to an extension of an authorization are less onerous than those for a new authorization. Therefore the suspects are better protected by the route the Crown had chosen to take.

In respect to interceptions of conversations on a pay telephone the defence had submitted that this could only be done if the number of that public telephone is included in the authorization. In the alternative the authorizing judge should have included in the authorization "pay telephones" the suspects resort to. The Court held that the authorization was valid on its face and that the places where interceptions may be made were described as "any place" the suspects "resort to". Although specificity is preferred, the phrases used in the authorization were sufficient to include public phones if indeed the suspects resorted to them.

When suspects attend premises where public telephones are located, that by itself may well be inadequate to tap those phones. There ought to be evidence that they indeed did resort to these phones. In this case the B. C. Court of Appeal reasoned that they did not have to decide if police committed "anticipatory action" (which the Court classified as an offence) but whether or not the targets had indeed resorted to those phones. When there is proof they did, the Court must accept the resulting evidence. The Court warned however that it is an offence to randomly invade the privacy of the unsuspecting public and that if it is anticipated that public phones will be used, it would be wise to include this in the authorization.

Crown's appeal allowed unanimously.
New trial ordered.

* * * * *

Constitutional Validity of Differentiation in Treatment of Traffic Violators and Traffic Offenders in British Columbia

Attorney General of B. C. and His Honour K J. Husband and Bruce Page, Supreme Court of B.C., No 851778, Vancouver.

Mr. Page, an Albertan, allegedly changed lanes somewhere in British Columbia without giving an appropriate signal. As he held an Alberta driver's licence he was proceeded against by means of a Traffic Ticket Information instead of a Traffic Violation Report had he been a British Columbian. This is discrimination in violation of s. 15 of the Charter that is not demonstrably justified in a free and democratic society (s. 1 Charter) held the Provincial Court Judge and he declared s. 121 of the B. C. Motor Vehicle Act without force or effect. This ruling received a mixed reception by other Provincial Court Judges as some agreed while others came to a different conclusion. One Judge even held that because of the discrimination, also s. 122 of the Motor Vehicle Act (which provides for the Traffic Violation Report) was without force or effect.

The Crown petitioned the Supreme Court of the Province for an order for the Judge in this Page case to proceed with the trial.

When the law differentiates between equals one may consider that to be an infringement of the Charter. However, one of the Charter's objectives is to create equality and sometimes when dealing with unequals one may have to differentiate to meet the object of equality. Hence, differentiation between groups is not necessarily discrimination; in fact failing to differentiate can amount to discrimination. This made the key question in this case whether there was a need to discriminate. To answer this question the Provincial Court Judge had examined the practices in other provinces and had suggested a number of alternatives to the B. C. provisions in respect to traffic tickets. The Supreme Court Justice commented that such processes are outside the judiciary's jurisdiction and that provisions in other provinces were irrelevant to the sole issue which was whether differentiation between those who have a B.C. driver's licence and those who do not, offends section 15 of the Charter.

In Canada, we are all equal before and under the law, and no one shall be discriminated against, says the Charter, and "in particular" such discrimination shall not be based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". Mr. Page, the Alberta resident, was not discriminated against for any of the reasons listed above. However, the phrase "in particular" indicates that the Charter section is broader than just prohibiting discrimination in the catagories s. 15 lists. The section disallows discrimination to ensure equality. Therefore any discrimination resulting in inequality outside of the listed catagories above are included in the Charter's objectives.

The Supreme Court reasoned that if the law in question provided a different treatment for those who could not produce any driver's licence, there would clearly be no discrimination as meant by the Charter. However, many persons who are properly licenced to drive on B. C. highways, dispite the fact the licence was issued in some other jurisdiction are now being discriminated against

because of where they happen to reside. Is this discrimination capable of being included under s. 15 of the Charter? The answer to this threshold question was "Yes".

The next question to be answered was whether the different treatment of Mr. Page "as a user of our provincial highways" from that of other users, was "unfair or unreasonable, having regard for the purposes of the legislation (s. 121 M.V.A.) and its effect on the individual".

Mr. Page's lawyer pointed out that his client was, because of being a non-resident, proceeded against by summary conviction (instead of the innocuous demerit system) and would in addition (as a result of reciprocal agreements between provinces) be given two demerits in Alberta. This means that the B. C. provisions cause him to be penalized twice. The Court was quick to point out that the additional penalty was on account of Alberta practices or law and should be challenged in that province and not in B.C.

The Court found that dealing differently with unlicenced persons from licenced, persons is totally reasonable. Also that the demerit - traffic violation system is a sensible and justified alternative to plugging the court system with minor traffic offences, despite the fact that it is regrettable that non-residents are caught in the net of this legislation. However, the worthy purposes of the legislation do outweigh the adverse impact on persons like Mr. Page. Therefore the B. C. Motor Vehicle Act provisions in question were held to be reasonable and fair.

Provincial Court Judge ordered to proceed with the trial of Mr. Page.

Comment: In view of some quantum changes in judicial considerations of matters relevant to Charter provisions by the Supreme Court of Canada, one should not be too shocked if that Court will disrupt the maintenance of the *status quo* approach to s. 15 of the Charter.

In this case, for instance, the Court considers it unfortunate that in this province, B. C. licensed persons are receiving a milder procedural treatment than their fellow Canadian citizens who are non-residents. The finding that this is reasonable and fair enhances administrative convenience.

If this Court truly found it unfortunate for persons like Mr. Page to receive a harsher treatment, one wonders how that is reasonable and fair. One wonders also if it would have been possible under the provisions of s. 52 of the Charter for the Court to have declared the alleged offending enactments in the B. C. Motor Vehicle Act to be without force or effect where they are inconsistent with the Charter provisions. That would cause the section to apply to persons who are unlicensed only. That seems a reasonable remedy.

* * * * *

The Charter Right to be Tried Within a Reasonable Time - Pre-Charge Delays

Carter and The Queen[*], Supreme Court of Canada, June 1986.

A woman was allegedly sexually violated in April of 1980. The next day she made a report of the incident to police and an investigation was started. The complainant moved without leaving a forwarding address and she could not be located until 2½ years later. The investigation then continued and was completed in around the middle of December of 1982.

In the very early part of January of 1983, the accused was made aware of the complaints against him and a couple of weeks later the informations were sworn. In April of that year he appeared before a Provincial Court Judge on charges of rape, buggery and gross indecency. He promptly claimed that his rights to be tried within a reasonable time had been infringed. The Judge agreed and stayed the proceedings. As it is generally considered that the clock which measures "the reasonable time" does not begin to tick until the charges are sworn, the case ended up before the Supreme Court of Canada. The Provincial Court Judge had included the pre-charge period of time in his consideration. This as he felt that it was unfair to the accused to be expected to recall incidents of some 3½ years ago. The delay had deprived him of time to conduct a meaningful investigation to prepare a full defence.

The Supreme Court of Canada held that to determine if a person is tried within a reasonable time, the time period to be considered will "generally" be that between the time the charge is laid and the person is brought to trial. The word "generally" was used as the Court was of the opinion that exceptional circumstances may bring pre-charge time into play. If a charge is withdrawn and another substituted arising from the same facts the time from the laying of the first charge must be considered. In this case the time period between the date of the alleged offence in 1980 and the swearing of the information in January of 1983 should not have been taken into consideration and the pre-charge delays were not to be given any weight in assessing the reasonableness of time. Said the Supreme Court of Canada:

> "This is because prior to the charge, the liberty of the individual will not be subject to restraint nor will he or she stand accused before the community of committing a crime. Thus, those aspects of the liberty and security of the person, which are protected by s. 11(b) will not be placed in jeopardy prior to the institution of judicial proceedings against the individual. Hence pre-charge delay is irrelevant to those interests when they are protected by s. 11(b) (Charter)."

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[*] See Volume 16, page 27 of this publication for B.C. Court of Appeal decision in this case.

Had the police been devious or malicious in delaying the matter to deprive the accused of a full defence, the Court could have stayed the proceedings as such manipulation would have deprived the accused of a fair hearing (11(d) Charter). Police were blameless in the circumstances.

Furthermore, the Supreme Court of Canada observed that a Provincial Court Judge conducting a preliminary hearing has no jurisdiction to stay proceedings for Charter infringements. (Note that if such level of court conducts a trial the Judge has jurisdiction to stay proceedings).

Accused's appeal dismissed.
Ordered to stand trial.

* * * * *

Is an Object Carried to be Used for Protection a Weapon?

Regina v. Wilson, Vancouver County Court No. CC860003 Vancouver Registry, July 1986.

Some have the impression that where someone carries something not designed as a weapon, for the purpose of using it as a weapon should the occasion arise for self defence, the object is a weapon due to that intent (see s. 2 C.C.) and that possessing such object in those circumstances is dangerous to the public peace*. Similarly if the object is carried concealed, a conviction of carrying a concealed weapon is appropriate.

In this case the accused carried concealed at 3:00 a.m. on "skid row", a pair of 7" long scissors under his shirt. He denied to police that he carried anything, but the scissors were discovered when his shirt was pulled back. He then explained that he carried the scissors in the event he had to protect himself. When questioned about this further the accused made a comment to the effect that if he had wanted to use the scissors on the police officer "he (the officer) would have been done". He was charged with carrying a concealed weapon. The Crown depended on precedents where persons under similar circumstances had carried objects, not designed as weapons, for the purpose of self defence. However, the accused was acquitted and the Crown appealed.

Needless to say that to convict the accused, the Court would have to find that, due to the accused's intent the concealed scissors had, in law, been converted to a weapon.

Firstly the Court found that the accused's statement about the officer "being done" had he wanted to use the scissors, was of no evidentiary consequence in respect to intent. He simply said that if he had wanted to use them they could have been effective. Secondly, the County Court Judge reasoned that where a person deliberately and needlessly goes into an aggressive situation and is possibly looking for trouble and then does carry an object he intends to use as a weapon should the occasion arise (even if for self defence only) that object is a weapon despite the fact it was not designed as a weapon. Such intent is sufficient to meet the definition under s. 2 C.C.

Said the County Court:

> "The test which seems to arise out of the cases is whether at the instant of discovery the possession is for a purpose of real apprehended use, or a mere speculation of a possibility of use."

A trial judge had concluded in an undistinguishable case involving a knife:

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* See Volume 10, page 14 of this publication. *Sulland v. The Queen*, B.C.C.A.

> "To find the accused had a present intention for future use of the knife as a weapon would be simply conjecture based on nothing more than he did not want the officer to see the knife."

The same applied to this case found the County Court Judge.

Crown's Appeal dismissed.
Acquittal upheld.

For greater clarification here follows a synopsis of the decision by the B. C. Court of Appeal in November of 1982 in *Sulland v. The Queen*, B. C. Court of Appeal, CA820276.

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

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

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

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

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

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

the intent to use it responsibly, is not an offence. The Court however, recognized that it may well be unwise to prepare to defend oneself and the presence of a weapon is likely to result in greater injury. Said the court:

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

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

Appeal allowed.
Conviction set aside and acquittal entered.

* * * * *

Executing Search Warrant
Bodily Search of Person on the Premises

Regina v. Mutch, 26 C.C.C. (3d) 477
Saskatchewan Court of Appeal.

Police had a search warrant for a home occupied by persons suspected to have in their possession stolen property, including jewelry, liquor and coins. These suspects were named in the warrant. The accused, though an occupant of the home was not named in the warrant and admittedly not a suspect. The accused was home when the warrant was executed and was, along with the named suspects, searched bodily. A quantity of marihuana was found on the accused's person and he was consequently convicted.

The accused appealed arguing that the search of his person was an infringement of his Charter right to be secure against unreasonable search and seizure. The officers, though conducting a legal search of the premises, had no grounds to bodily search him. Consequently the evidence obtained by means of the infringement was inadmissible in evidence, submitted the defence.

The trial judge had held that if the search warrant had been for larger items one cannot possibly carry on one's person, the search of the accused would have been unreasonable. However, jewelry and coins can easily so be carried and the trial judge reasoned (in accordance with the common law) that police are permitted to be in control of the search scene and when the goods searched for are such in size and nature that they can be carried on the person. Bodily searching of all persons on the premises is unlawful. The Saskatchewan Court of Appeal, quoting from a law text, declared that the trial judge was simply wrong and that a search warrant only permits the search of the "building, receptacle or place" for which the warrant was issued. The search of persons was only allowed if s. 103 C.C. applied and an offensive weapon may be involved.

The search of a person is "sacred" said the Court and is only allowed if specifically provided for in law like in s. 10 of the Narcotics Control Act.

Without any consideration if the admission of the evidence would bring the administration of justice into disrepute the Court held that the search was unlawful, unreasonable and the evidence inadmissible.

Accused's appeal allowed.
Acquittal entered.

Comment: It seems not remote that this decision would not survive an appeal to the Supreme Court of Canada despite its Charter surprises of late.

There are pre-Charter cases where in similar circumstances superior courts have held police empowered to search persons found on the premises and to control these persons so the execution of the warrant is effective. The search for jewelry would become a farce if persons could not be made to at least empty their pockets or are free to move about and come and go as they pleased.

Jewelry could be moved or be right under the noses of the executing officers without them being able to do something about it. The Saskatchewan Court of Appeal found support for their ruling in the "plain view doctrine". Only contraband not mentioned in the warrant that is in plain view may be taken. However, if one searches for jewels and opens a drawer and finds other contraband, it came in plain view because it was reasonable to look in the drawer.

The Court in this case held that the contraband came in plain view on account of an unauthorized search of the accused's person. It seems that inasmuch as surreptitious placing of a bug inside a home or other private place is ancillary to carrying out an authorization to intercept a private communication (to render it effective), searching persons on premises for which a search warrant is issued is equally ancillary. This of course depends on the items the police searches for. The trial judge's view that, had the warrant been for a grand piano or like item the personal searches would have been unreasonable, seems to better reflect the precedents on this point than those of the Saskatchewan Court of Appeal.

* * * * *

Accused Marrying Crown Witness Before Trial But After the Alleged Offence Took Place - Compellability - Competency of Witness (Spouse)

Regina v. McGinty, 27 C.C.C. (3d) 36
Yukon Territory Court of Appeal (B.C. Court of Appeal)

The accused became involved in a drunken brawl with her common law husband. She struck him twice with a meat cleaver, wounding him quite severely. She was charged with assault causing bodily harm, but married her victim a couple of weeks prior to the trial date. Everyone agreed that if the husband (victim) testified he was a competent witness, but was he compellable? The trial judge said he was, he testified and was convicted. She appealed claiming that hubby was not compellable.

The Court of Appeal held that the law is clear in regards to the compellability of a victim spouse to testify against the accused spouse if his or her liberty or health had been threatened (see s. 4(4) of the Canada Evidence Act). In respect to compellability, the Court held that it comes automatically with competency. The only persons not compellable (but who may well be competent) are those immune to the court process like Royalty and foreign diplomats.

The appeal was dismissed.
Conviction upheld.

* * * * *

The Doctine of Recent Possession

Regina v. Kowlyk, 27 C.C.C. (3d) 61, Manitoba Court of Appeal

There are many predictions that the common law doctrine of recent possession would not survive a test under the Charter of Rights and Freedoms. This convenient and helpful presumption of knowledge or guilt is not used too frequently but in certain circumstances it clinches a case. The doctrine simply provides that where someone is found in possession of property recently obtained by means of an indictable offence, then, in the absence of an explanation that is capable of belief, it may be presumed that the possessor had knowledge of how the goods were obtained. It may, in the alternative, be presumed in those circumstances that he did commit the indictable offence. The doctrine of course, flies in the face of the constitutional right to remain silent. A further aggravation is the rule that the explanation capable to rebut the presumption of knowledge or guilt can only be given simultaneously to being found in possession of the goods or in the witness stand. Particularly the latter condition seems to render the doctrine vulnerable to judicial abrogation of that right.

The accused and his brother broke into three homes of persons who were deceased. The funerals were advertised and the break-ins took place during the funeral services. Nearly two months later the accused was caught in possession of all the property taken from those homes. The brother did plead guilty to all three house breaks but testified at the accused's trial that he had committed the crimes all by himself and that his brother had not been involved in any way. He was disbelieved.

The time factor was such that the possession was recent in respect to the commission of the offences. Therefore the application of the doctrine was warranted. But what is to be presumed, that the accused was the mere possessor of the stolen property and had knowledge of its origin, or that he committed the break-ins? The facts seemed consistent with both. The law is that an accused can be convicted of either offence (not both). In this case the presumption was that the accused committed the break-ins and was convicted accordingly. He appealed.

The doctrine of recent possession had been properly applied and that the convictions of breaking, entering and theft were proper.

Accused's appeal dismissed.
Conviction upheld.

Comment: The doctrine of recent possession was not tested against the Charter to determine if the abridgement of the right to remain silent when detained or during your trial is a limitation of that right that is "demonstrably justified in a free and democratic society" (see s. 1 Charter). Therefore, the case may not be confirmation that the doctrine is alive and well.

The Manitoba Court of Appeal seems to continue to subscribe to the age old doctrine that

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

After all, the doctrine of recent possession is at least a cousin to this legal adage.

* * * * *

Sexual Assault - Identification - Police Procedures

Mezzo and The Queen, Supreme Court of Canada, June 1986.

The complainant was attacked on the street shortly after midnight and dragged out of public sight. Behind a shed she was sexually assaulted. The whole encounter had taken 20 minutes. Although it was dark the complainant had been able to see the assailant's face clearly enough to give police a detailed description. Police arrested the accused Mezzo and a couple of weeks after the assault the complainant saw the accused in a court room. Due to her view being somewhat obstructed the complainant had said she could not be sure that the accused was the man who attacked her but he did look like the person who had attacked her. Two days later, again in the court room, she got an unobstructed view of the accused and she then made a positive identification. The defence had attacked the methods by which the accused was identified. The complainant had described the accused to police on three occasions and there had been minor variations. And, of course, it was strongly suggested that when the complainant saw the accused for the second time, she identified the man she saw two days before in the court room and not her attacker. Consequently the jury was directed by the trial judge to return a verdict of not guilty. The Court of Appeal disagreed and ordered that the accused be tried again. The accused took this decision to the Supreme Court of Canada.

Police had arrested the accused two weeks after the complaint of sexual assault was lodged. No identification parade was conducted but the complainant was told that an arrest had been made. She was asked to view the prisoners as they were called in to the court room for their respective appearance. The accused was the fifth prisoner. When he was ushered into the court room, the complainant reacted by shaking visibly and moving from side to side. Yet the description she gave of her assailant and the resulting composit drawing did not match the accused all that well. She had said that her attacker had "some Indian mix" but the accused had no Indian background. There was also evidence that the complainant had not been happy with the composit drawing. She could not correct it but said, "there is something missing". Another issue that complicated matters is that there was no evidence if the in-courtroom identification was made before or after the charge of sexual assault was read out? It was also conceded that none of the prisoners who preceded the accused in the courtroom had any resemblance to the description of the complainant's attacker or to the composit drawing.

When the positive identification was made on the second courtroom identification scene the accused was again the fifth prisoner and his name was called out as it was the first time. Defence counsel had argued (though he did not use these words) that when they called the accused's name they might as well have said to the complainant "here he comes". After all she knew the name from the first appearance.

The Supreme Court of Canada firstly addressed the law in relation to a trial judge's role when sitting with a jury. He can only deal with the law, the facts are the responsibility of the jury alone. If a trial judge with his experi-

ence, concludes that he would consider it dangerous to convict an accused based on the evidence before the court, then he is not always entitled to direct the jury to return a verdict of not guilty. Only if the evidence is such that in law the jury is incapable of finding facts prerequisite to a verdict of guilty. As long as there is admissible evidence which could, if believed, result in a conviction, notwithstanding any frailties, the jury must consider that evidence and render a verdict. The trial judge must point out the frailties, emphasize the burden of proof the Crown must meet, but is not in these circumstances to withdraw the case from the jury.

The withdrawal cannot be based on the trial judge's opinion in regards to the facts. It is the jury's opinion about facts that must decide the verdict. Basically the judge's function is to test if the admissible evidence, in law, is capable of proving a fact. If it is capable of doing so then the matter must remain with the jury. If a judge's opinion about admissible evidence is that it is unreliable and he withdraws the case from the jury for that reason, then he has made himself the 13th jury member with veto power. This would usurp the jury's function. In this case the identification evidence may have flaws, but it was, if accepted and believed by a jury, still capable of finding that the accused and the complainant's assailant are one and the same person. As the issue was the sufficiency of evidence (point of fact) as opposed to whether there was any evidence (point of law) the matter should have been decided by the jury.

In relation to the police procedure regarding the identification, the Court was quite silent. This probably as the case will have to be tried again.

Accused's appeal dismissed.
Order for new trial upheld.

* * * * *

LEGAL TIDBITS

Police Disciplinary Proceedings and the Charter

The August 1986 newsletter by the Ontario Police Commission, contains an interesting synopsis of a decision by the Ontario Court of Appeal regarding a police disciplinary matter. The following is a summation of the highlights of that synopsis:

The Court concluded that it is now established across Canada that professional disciplinary proceedings are not subject to the rights contained in section 11 of the Charter (Law Society - College of Physicians and Surgeons - Engineers Societies etc.). Police disciplinary matters are akin to such professional proceedings and though they are analogous to employer-employee relationships they are more rigid and formal.

The Ontario Police Act is probably silent on the burden of proof in police disciplinary matters as the Court held that it is not the criminal standard (beyond a reasonable doubt) but the one applicable in civil disputes (the balance of probabilities). Since s. 11 of the Charter does not apply, the argument that the hearings were not public and the tribunal apparently not impartial is no longer an issue.

The Ontario Court of Appeal held that double jeopardy has no application to disciplinary hearings. Disciplinary action will, in Ontario, no longer preclude criminal charges being preferred arising from the same delict or circumstances.

Note: B. C. Police Act provides for a criminal burden of proof and limits double jeopardy.

Comment: At one time the courts held, for similar reasons, that rights to counsel had no application in disciplinary matters. All the Charter rights apply, when for a minor offence, a small fine is the penalty while a disciplinary process may lead to loss of a career and livelihood. It seems predictable that eventually s. 11 of the Charter will be held to apply to disciplinary hearings (see Volume 10, page 16 of this publication). *(Trembley and Pugh and Fleming et. al.)*

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Presumption of "Care or Control" and the Presumption of Innocence

The presumption of innocence has two major components: the right to remain silent and the burden of proof being on the Crown to prove beyond a reasonable doubt that which it alleges. Any statutory provision permitting an essential ingredient to an offence to be presumed as a fact in given circumstances, takes away from the Crown's burden of proof and often forces the defendant to rebut that presumption. Consequently the presumption interferes with the

right to remain silent. Since the Charter came into effect in 1982, many of these presumptions did bite the dust. The Courts have now given an indication what the limits of such presumptions are. Firstly the facts prerequisite to the presumption must make what may be presumed a probable consequence. There simply must be a rational connection between the two. Secondly, for a presumption to be constitutional it must withstand the test described in section 1 of the Charter in that the presumption must be "demonstrably justified in a free and democratic society". Included in the justification test is the need for the presumption to be part of a remedy to a sociological ill. We do not have law for the sake of law, but for the purpose of remedying something. If the inevitable infringement of the presumption of innocence a statutory or common law presumption creates, is unjustified and out of balance with what it is designed to remedy, it (the presumption) will likely be declared to be "without force or effect"*.

Although these decisions are not binding on any Court in B.C., two Ontario decisions on presumptions are reported in volume 26 C.C.C. (3d). A Provincial Court Judge struck down the often used presumption included in s. 237 C.C. that someone who occupies the seat ordinarily occupied by the driver, may be presumed to have the care or control of a motor vehicle**. A County Court Judge did likewise with s. 306(2) C.C., which provides that we may presume an intent to commit an indictable offence when a person attempts to break into a place***.

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Taking Statement from Adult re an Offence Committed When he was a "Young Person"

G.R.J. allegedly committed an offence when he was 16 years old. When G.R.J. was 18 years old he was questioned by police, After the normal cautions given to adult suspects (including right to counsel) G.R.J. confessed. The youth court trial judge would not allow the statement into evidence as the statement was not taken in compliance with s. 56 of the Young Offenders Act. The trial resulted in an acquittal and the Crown appealed to the Manitoba Court of Appeal. This Court found that there was nothing in the Young Offenders Act in general, or in s. 56 of the Act in particular that would justify extending the protection the section provides to a person who is an adult when questioned.

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* See *R. v. Oakes*, Volume 23, page 16 of this publication.

** *R. v. Headley*, 26 C.C.C.(3d) 271.

*** *R. v. Smith*, 26 C.C.C. (3d) 278.

Said the Court in concluding that G.R.J. must stand trial anew:

> "A distinction between the admissibility of the statement of an adult charged with an offence committed while he was a 'young person' and that of an adult charged with a similar offence committed when he was an adult, is difficult, if not impossible, to rationalize."

Regina v. G.R.J. 26 C.C.C. (3d) 471

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Police Officer Acting as Prosecutor

A Mr. Hart was tried for "over 80 mlg.". The Crown proceeded by summary conviction and a police officer appeared to represent the Attorney General. The accused took offence and claimed that he was deprived of his right to a fair and impartial trial. The trial judge agreed and this matter reached the Newfoundland Court of Appeal. That Court found that if the Attorney General appointed a police officer to represent him in a criminal trial, that does not offend the Charter and does not affect the impartiality of the judiciary or fairness of the trial. However, the police officer who was there routinely to prosecute all summary conviction offences, could not show he was appointed by the Attorney General to represent him. He had been appointed by a superior officer only and did therefore not have the status to prosecute.

Re *Regina v. Hart* 266 C.C.C. (3d) 438

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Discharge and Double Jeopardy

In August the accused received a conditional discharge for "over 80 mlg.". In November he was convicted of impaired driving and sentenced to gaol. The Crown applied that the discharge be revoked and the accused also be sentenced for the "over 80 mlg.". The accused agreed with the Crown's interpretation of s. 662.1(4) C.C. that the Court upon a subsequent conviction may also convict the accused of an offence for which he received a conditional discharge. But where the condition of the discharge is an imposition of anything then subsequent sentencing amounts to double jeopardy argued the accused. In his case the accused had completed 40 hours of community work and he was to be sentenced again if the Court complied with the Crown's request. The trial judge agreed with the accused and the Crown took its plight to the Alberta Court of Appeal. This Court held that the case against the accused was simply not over when the Crown applied for him to be convicted and sentenced. Therefore there was no double jeopardy. Only when a person has been finally punished can he claim double jeopardy for additional punishment. The Crown may well appeal a sentence and if that results in a heavier sentence than was dished out originally,

that does not amount to double jeopardy. Crown's appeal was allowed and the accused was convicted and fined for the "over 80 mlg." charge.

R. v. Elendiuk, 27 C.C.C. (3d) 94.

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