



POLICE ACADEMY

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IN SERVICE:10-8

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A newsletter devoted to operational police officers across British Columbia.

ABOUT THE NEWSLETTER

The "In Service:10-8" newsletter is a publication of the JIBC Police Academy. No glossy paper, no fancy pictures, just plain "black letter" bringing you, the front line officer, up to date and current with issues facing you on the street. It is our intention to bring you this newsletter on a regular basis. You are free to copy this publication and pass it on to your colleagues. Copies of "In Service:10-8" will soon be available online at the Police Academy website at www.jibc.bc.ca.

PLAIN VIEW: SEEING IS BELIEVING

Sgt. Mike Novakowski

The common law "plain view" doctrine authorizes the non-consensual seizure of property obtained without a warrant. The police are not expected to "turn a blind eye to things in plain view that evidence, or raise suspicions of illegality".

In a sense, plain view is an exception to the rule requiring a search warrant². This doctrine is a seizure authority only and is unconnected to the law of search³. Although plain view permits the seizure of items by police lawfully present it does not allow the officer to effect a warrantless search through areas unrelated to the reason for attendance nor into areas the police do



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¹ See *Belnavis & Lawrence v. the Queen* (1997), 118 CCC (3d) 405 (S.C.C.) at para. 57.

² *R. v. Ruiz* (1991) 68 C.C.C. (3d) 500 (N.B.C.A.) at p.509.

³ *R. v. Smith* (1998) 126 C.C.C. (3d) 62 (Alta.C.A.)

not have lawful authority to intrude or otherwise be present⁴. A plain view seizure does not involve a significant further invasion into a person's privacy beyond what initially placed the officer at the location. Plain view serves only to supplement the prior justification.

Fundamental Requirements

Plain view will justify a seizure if the following conditions are satisfied⁵:

- lawful presence at the location where the object of seizure is found⁶
- the discovery of the object of seizure is inadvertent⁷
- it must be immediately apparent the object of seizure (evidence, contraband) is subject to seizure⁸.

Lawful Presence

The police officer must have prior justification, by warrant or otherwise, to be in the location and position to view the evidence seized. Lawful prior intrusion may include the execution of a search warrant, search incident to lawful arrest, hot pursuit, consent, implied licence to enter, or some other legitimate reason for the officer's presence. Prior intrusion could be unconnected with a search of the individual altogether and may include entry into an apartment to assist the landlord with an emergency water leak⁹. Succinctly, the lawfulness of the seizure turns on the legality of the intrusion that permitted the police to view and physically seize the property in question.

⁴ *R. v. Knee* 2001 ABPC 23 at para.50.

⁵ *R. v. Kylo* [1999] B.C.J. No.717 (B.C.S.C.) at para.48.

⁶ *R. v. Belliveau* (1986) 30 C.C.C. (3d) 163 (N.B.C.A.), *R. v. Ruiz* (1991) 68 C.C.C. (3d) 500 (N.B.C.A.), *R. v. Askov* [1987] O.J. No.1626 (Ont.D.Ct)

⁷ *R. v. Belliveau* (1986) 30 C.C.C. (3d) 163 (N.B.C.A.), *R. v. Ruiz* (1991) 68 C.C.C. (3d) 500 (N.B.C.A.)

⁸ *R. v. Belliveau* (1986) 30 C.C.C. (3d) 163 (N.B.C.A.)

⁹ *R. v. Shea* (1982) 1 C.C.C. (3d) 316 (Ont.H.C.J.)

Inadvertent Discovery

The police officer must inadvertently discover the evidence. Accordingly, the officer may not know in advance the location of the evidence and, intending on seizing the evidence, use plain view as a pretext to legitimize the seizure. However, having a suspicion or even knowing in advance that evidence will be found does not necessarily render the seizure unreasonable¹⁰ provided the intrusion was not a ruse merely to cause the item to be in plain view. The discovery of an item through an affirmative search does not amount to inadvertence¹¹.

Apparently Subject to Seizure

The police must have reasonable grounds to believe the item subject to observation may be evidence of a crime¹², contraband or otherwise subject to seizure. The officer must be more than "merely suspicious"¹³. Police action in some circumstances, like opening a package, will be treated as plain view. If the contents of the container or package may be inferred from the outward appearance of the package or container, the opening does not necessarily intrude upon any reasonable expectation of privacy¹⁴.

Limitations

Because plain view is a seizure authority only and does not authorize a search¹⁵, plain view may not be relied upon to extend a search from one object of focus to another. For example, where police enter a residence under the authority of a warrant to search for stolen items, this doctrine allows the officer to seize drugs in plain view without retreating from the residence and obtaining a secondary warrant authorizing the seizure of the drugs. However, police are not entitled to expand the focus of the original search warrant from stolen property to now include drugs. If the police wish to expand the search to include the search for drugs, the officer must obtain a secondary warrant. Alternatively, the officer may continue the legitimate search for stolen property and if further drugs come into view the

officer may seize them provided the officer does not exceed the scope of the original warrant.

The police are not limited to only the officer having observed the item in plain view participating in the seizure of that item. An officer who is lawfully present in a premise may seize evidence and retain possession over the evidence while awaiting the arrival of further assistance. Entry of additional police officers to assist the seizing officer does not render the seizure unreasonable¹⁶.

"Plain smell" does not authorize the engagement of the plain view doctrine unless the odour provides the reasonable grounds to believe the item already in view is apparently evidence. When an officer who is present in a premise such as a dwelling house detects a unique smell believing marihuana is present elsewhere in another part of a dwelling, the officer is not entitled to search for the origin of the smell and then rely on the plain view doctrine to justify its seizure¹⁷.

IMPLIED LICENCE: OPPORTUNITY KNOCKS

Sgt. Mike Novakowski



Have you ever wondered why police are entitled to walk up to and talk up the occupants of a dwelling? The common law has long recognized an implied licence for all members of the public, including the police, to approach the door of a residence and knock¹⁸. Implied licence however,

relates to the approach to the dwelling, not to the premises generally¹⁹, and ends at the door of the residence²⁰. When a police officer acts "in accordance with this implied invitation, they cannot be said to intrude upon the privacy of the occupant²¹" and do not engage in unconstitutional activity²². Implied licence extends only to those activities for the purpose of

¹⁰ R. v. Fitt (1995) 96 C.C.C. (3d) 341 (N.S.C.A.) at p. 346 affirmed (1996) 103 C.C.C. (3d) 224 (S.C.C.)

¹¹ R. v. Nielsen (1988) 43 C.C.C. (3d) 548 (Sask.C.A.) at p. 556.

¹² R. v. Lalibert (1995) SKQB Q89550.

¹³ R. v. Dreysko (1990) 110 A.R. 317 (Alta.C.A.)

¹⁴ R. v. Brennan [2000] O.J. No. 3257 (Ont.S.C.J.) at para. 70.

¹⁵ R. v. Smith 1998 ABCA 418 at para 17.

¹⁶ R. v. Shea (1982) 1 C.C.C. (3d) 316 (Ont.C.H.J.)

¹⁷ R. v. Smith 1998 ABCA 418 at para 24.

¹⁸ R. v. Evans (1996) 1 S.C.R. 8 (S.C.C.) per Sopinka J. at para. 13, per Major J. at para. 40, R. v. Tricker (1995) 96 C.C.C. (3d) 198, R. v. Hallet [1967] 2 All E.R. 407,

¹⁹ Anderson v. Smith 2000 BCSC 1194.

²⁰ R. v. Tricker (1995) 96 C.C.C. (3d) 198 (Ont.C.A.) at p. 203.

²¹ R. v. Evans (1996) 1 S.C.R. 8 (S.C.C.) per Sopinka J.

²² R. v. Van Wyk [1999] O.J. No. 3515 (Ont.S.C.J.)

communicating with the occupant and anything beyond this "licenced purpose" is not authorized by implied licence. Synonymously, implied licence is known as implied invitation, invitation to knock²³, implied invitation to attend²⁴, implied licence to enter, or door knocking.

Scope of Implied Licence

In determining whether the activity of the police fell within the implied licence doctrine, the "underlying purpose or intent" of entry onto the property from the perspective of the police must be considered and carefully assessed²⁵. In *R. v. Evans* (1996) 1 S.C.R. 8 (S.C.C.), police attendance by acting on an anonymous tip and knocking at the door for the purpose of securing evidence against the owner (by sniffing for marihuana odour) exceeded the scope of implied licence. However, circumstances where the police are not investigating the occupant or are "in the legitimate pursuit of evidence"²⁶ may be lawful uses of implied licence. In *R. v. K.L. & S.L.* 1999 BCCA 37²⁷, police attendance at the residence of the accused to determine whether the accused owned a pair of shoes similar to the type of footprint left at the scene of a robbery "was a natural step in a series of enquiries in an investigation of possible suspects". The court found the "visit" of the police to the residence did not violate s.8 of the *Charter*. A circumstance where the sole purpose of the police officer is to ask questions of the homeowner, even investigative questions, does not exceed the bounds of implied right to approach and knock²⁸.

The approach to the residence will generally import the "requirement of a direct approach to the front door—not a trespassory detour elsewhere on the property to secure evidence²⁹". Since the purpose of implied licence is to enable a person, police officer's included, to reach a point in relation to the house where normal and convenient communication may occur, an open porch door may constitute an invitation to proceed past the porch door to the outer door of the house proper³⁰.

Likewise, an approach to a dwelling that necessitates driving on a driveway and through some trees leading to the residence does not fall outside the scope of implied licence³¹. However, the act of surreptitiously looking through windows of a house, amounting to a perimeter search, goes beyond any waiver of privacy rights implied through the invitation to knock doctrine³². Similarly, visual observations by police (noting a bright light and condensation) at a basement apartment window made from a side-yard at a distance of two inches, was a violation of a person's reasonable expectation of privacy³³.

A business establishment open to all members of the public impliedly invites those members to enter and there is no breach of privacy when a police officer enters the area of the premises to which the public is impliedly invited³⁴. However, the police will be restricted from accessing private, non-public areas of the business under implied invitation³⁵. The implied invitation respecting a business establishment will be dependent on the circumstances and nature of the business.

Implied licence also "extends to situations where the very purpose of entry is to protect the interests of the property owner or occupant" provided the police officer has a reasonable suspicion (articulable cause) that criminal activity is being perpetrated against the owner or occupant of the property³⁶. In *R. v. Mulligan* [2000] O.J. No.59 (Ont.C.A.) Sharpe J.A. held:

"It is plainly in the interests of a property owner or occupant that the police investigate suspected crimes being committed against the owner or occupant upon the property. For that reason, absent notice to the contrary, a police officer may assume that entry for that purpose is by the implied invitation of the owner, particularly where entry is limited to areas of the property to which the owner has extended a general invitation to all members of the public."

In *R. v. Hern* [1994] A.J. No.83 (Alta.C.A.) police entered a residence in response to a complaint of a break and enter in progress. While inside police discovered a marihuana grow operation. In determining

²³ *R. v. Peters* [1998] B.C.J. No.156 (B.C.S.C.), *R. v. Van Wyk* [1999] O.J. No.3515 (Ont.S.C.J.) at para.28.

²⁴ *R. v. Piasentini* [2000] O.J. No.3319 (Ont.S.C.J.)

²⁵ *R. v. Evans* (1996) 1 S.C.R. 8 (S.C.C.), *R. v. Mulligan* [2000] O.J. No. 59 (Ont.C.A.)

²⁶ *Anderson v. Smith* 2000 BCSC 1194

²⁷ Police attended the residence of the accused and spoke to his mother. Upon questioning of whether her son owned a pair of Converse Illusion brand shoes she presented, on request, the shoes.

²⁸ *R. v. Van Wyk* [1999] O.J. No.3515 (Ont.S.C.J.) at para.33.

²⁹ *R. v. Van Wyk* [1999] O.J. No.3515 (Ont.S.C.J.) at para.35.

³⁰ *R. v. Bushman* (1968) 4 C.C.C. 17 (B.C.C.A.)

³¹ *R. v. Johnson* [1994] B.C.J. No.1165 (B.C.C.A.)

³² *R. v. Peters* [1998] B.C.J. No.156 (B.C.S.C.)

³³ *R. v. Laurin* (1997) 113 C.C.C. (3d) 519 (Ont.C.A.)

³⁴ *R. v. Fitt* (1995) 96 C.C.C. (3d) 341 (N.S.C.A.) at p.346 affirmed (1996) 103 C.C.C. (3d) 224 (S.C.C.), *R. v. Kouyas* [1994] N.S.J. No.567 (N.S.C.A.)

³⁵ *R. v. Kouyas* [1994] N.S.J. No.567 (N.S.C.A.)

³⁶ *R. v. Mulligan* [2000] O.J. No.,59 (Ont.C.A.)

the reasonableness of the police entry and search of the residence, the Court found "an inference can be drawn that the owner would welcome police to stop a break-in and protect the residents".

Revoking Implied Licence

Implied licence may be revoked on notice by the occupant³⁷. Revocation may be done in advance of police attendance by the posting of signs³⁸ such as "No admittance to police officers"³⁹ or by oral revocation while the police are on the property. Once the occupant revokes or withdraws the implied licence, they must provide a reasonable opportunity for the police to leave⁴⁰. If a police officer is assaulted while departing, a conviction of assaulting a police officer will stand⁴¹. If circumstances arise that would otherwise permit the officer to remain on the property, such as effecting an arrest, the implied licence revocation would not require the officer to leave.

A police officer who is lawfully on property under implied licence who finds an occupant of that property committing an offence, may arrest that person and the subsequent arrest and continued custody will be lawful regardless of whether the occupant revokes the implied licence⁴². If the property owner withdraws the implied licence before the officer has grounds to make the arrest, the police officer must leave the property or risk becoming a trespasser. For example, where evidence of impairment was obtained after the implied licence was revoked causing the officer to be a trespasser, the officer is no longer acting in the lawful execution of his duty⁴³. However, if grounds for arrest came into existence before the implied licence was withdrawn, the police are lawfully entitled to arrest.

Note-able Quote

"It is the nature of police officers to be suspicious. Indeed, a suspicious nature is one of the positive attributes of a competent police officer. But the

³⁷ R. v. Johnson [1994] B.C.J. No. 1165 (B.C.C.A.), R. v. Bushman (1968) 4 C.C.C. 17 (B.C.C.A.)

³⁸ R. v. Evans (1996) 1 S.C.R. 8 (S.C.C.)

³⁹ Robson v. Hallet (1967) 51 Cr.App.R. 307 per Diplock L.J.

⁴⁰ R. v. Tricker (1995) 96 C.C.C. (3d) 198 (Ont.C.A.) at p. 205 leave to appeal to S.C.C. refused (1995) 103 C.C.C. (3d) vi.

⁴¹ R. v. Forsyth [1982] B.C.J. No. 469 (B.C.S.C.)

⁴² R. v. Mulligan [2000] O.J. No. 59 (Ont.C.A.), R. v. Johnson [1994] B.C.J. No. 1165 (B.C.C.A.)

⁴³ R. v. Smith [1999] B.C.J. No. 908 (B.C.S.C.)

*Constitution stands between suspicion and the citizen*⁴⁴". BCCA Justice Wood.

SINK or SWIM AT THE JI

Sgt. Tammy Schellenberg and Sgt. Frank Querido

Swimming has been added to police recruit physical training at the JI in partnership with the Canada Games Pool and Fitness Centre. Basic swimming and survival skills are taught. For those who can't swim, a life jacket will be provided!!!

BC COURTS ONLINE

Did you know that all three BC Court levels now have a web-site where you can access judicial decisions? Search engines are easy to use and you may query key words. Try running your own name and check for decisions of cases in which you were involved.

BC COURT OF APPEAL

www.courts.gov.bc.ca

BC SUPREME COURT

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BC PROVINCIAL COURT

www.provincialcourt.bc.ca



Note-able Quote

*"It would be impractical to expect of an officer swearing an information [to obtain a search warrant] in these circumstances the precise prose of an Oxford grammarian, the detailed disclosures of a confessional and the legal knowledge of a Rhodes scholar*⁴⁵". BCCA Justice Gibbs.

WANTED: FEEDBACK

For comments or topics you would like to see published in this newsletter contact
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⁴⁴ R. v. Martin (1995) 97 C.C.C. (3d) 241 (B.C.C.A.) affirmed S.C.C. 104 C.C.C. (3d) 224.

⁴⁵ R. v. Melenchuk (1993) 24 B.C.A.C. 97 (B.C.C.A.)