POLICE ACADEMY
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REBUTTING THE WARRANTLESS PRESUMPTION:A REVIEW

Sgt. Mike Novakowski

Although there is no constitutional warrant requirement, all warrantless searches are prima facie unreasonable[1]. Rather than justifying a search after it occurs (subsequent validation), the warrant requirement serves as a means of preventing unjustified searches before they occur (prior authorization). When a warrantless search occurs, the police bear the burden of justifying the search[2]. The warrantless/ unreasonable presumption may be rebutted provided the search satisfies the following criteria[3]:

- **the search must be authorized by law**
- **the law authorizing the search must be reasonable**
- **the search must be conducted in a reasonable manner**

Authorized by Law?

Under both the *Charter* and the common law, police "can only enter onto or confiscate someone's property when the law specifically permits them to do so[4]". The right of the police to search, without a warrant, is subordinated to the existence of a rule of law[5]. If a search is to be authorized by law, the following three elements must be met[6]:

- The police officer conducting the search must resort to a specific statute or common law rule that authorizes the search. For instance, if the police enter a house without the authority of statute or common law, the police commit a trespass[7]. Two sources of authority are[8]:
  - **common law** (search without warrant)
  - **statute law** (search with or without warrant)

  A departmental policy in itself does not have the force of law[9]. However, a policy may be written in accord with the law and by satisfying policy requirements police will also be complying with the law. The true source of authority is the law, not policy.

- The search must be carried out in accordance with the procedural and substantive requirements of the authorizing law. The court must determine whether the provisions of the statute or the requirements of the common law have been satisfied. A search, which does not comply with these requirements, is not a search authorized by law. For example, a search authorized under the conventional search warrant provision of s.487 of the *Criminal Code* requires issuance on the basis of a sworn information establishing reasonable grounds. If the justification for initiating the search (reasonable grounds) is insufficient, the search warrant will be invalid. Similarly, a search incidental to arrest requires a lawful arrest and a reasonably conducted search related to the arrest.

- The scope of the search must be limited to the area and those items for which the law has granted authority to search. For example, if the police are

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[1] Hunter v. Southam (1984) 14 C.C.C. (3d) 97 (S.C.C.)
[2] R. v. Lamy (1993) 80 C.C.C. (3d) 558 (Man.C.A.) at p.562.
[3] R. v. Collins (1987) 33 C.C.C. (3d) 1 (S.C.C.)
[4] Caslake v. the Queen [1998] 1 S.C.R. 51 (S.C.C.) at para. 12.
[5] R. v. Higgins and Higgins (1996) 111 C.C.C. (3d) 206 (Que.C.A.) at p.211.
[6] Caslake v. the Queen [1998] 1 S.C.R. 51 (S.C.C.)
[7] R. v. Silveria [1995] 2 S.C.R. 297 (S.C.C.) per La Forest at para. 50.
[8] R. v. Wiley (1993) 84 C.C.C. (3d) 161 (S.C.C.) at p.168.
[9] R. v. Flintoff (1998) 126 C.C.C. (3d) 321 (OntC.A.), R. v. Nicolosi (1998) 127 C.C.C. (3d) 176 (Ont.C.A.), Caslake v. the Queen [1998] 1 S.C.R. 51 (S.C.C.), R. v. Kalin [1987] B.C.J. No.2580 (B.C.Co.Ct.)

executing a search warrant they must only act within the scope and ambit of the warrant having regard to the description of the premises and the range and type of items listed in the warrant. The police may only search those areas that might contain the evidence specified in the warrant. Similarly, a plain view seizure does not permit an affirmative search. If the search exceeds the boundaries recognized under the authorized law, the search is not authorized to the extent that the search exceeds the limits.

Reasonable Law?

If the law authorizing a search is itself unreasonable, any resultant search from that unreasonable law will too be unreasonable. The question of whether the law itself is reasonable cannot be adjudicated by the police officer in the field unless the officer knows the law has been previously rendered unconstitutional. The courts must determine if the authorizing law complies with the *Charter*. If the court concludes that the law violates the *Charter,* the law will be ruled unconstitutional and will be of no force or effect.

Reasonable Manner?

Legality alone will not save a search that is excessive in its execution[10]. A search authorized by a reasonable law may be rendered unreasonable by the manner in which the search is conducted. The manner in which the search is conducted must be reasonable and "relates to the physical way in which it is carried out[11]". Generally, the police maintain exclusive control of how a search is conducted. Manner includes the nature of the search, the scope of the intrusion, the place in which the search was conducted, or whether it was abusive. The extent or intrusiveness of a search must be proportionate to the underlying objectives served by the search and the relevant circumstances of the situation. For example, a person arrested for an outstanding traffic offence should not routinely be subjected to a strip search. Furthermore, an unlawful search will not be retroactively rendered reasonable even though the search is conducted in an inoffensive fashion[12].

The reasonableness test (a search authorized by a reasonable law conducted reasonably) acts as a template for assessing whether a search runs afoul of s.8 of the *Charter*.

EXIGENT CIRCUMSTANCES:
JUSTIFICATION or MITIGATION?

Sgt. Mike Novakowski

Exigent circumstances frequently arise in search and seizure cases. The existence of exigent circumstances becomes important for two reasons. Firstly, exigent circumstances may justify a warrantless search where statutory authority authorizes a search without warrant. Secondly, if a search is found to be unreasonable by the court, exigent circumstances may mitigate the seriousness of a *Charter* violation and therefore be an important factor in determining the admissibility of evidence under s.24(2) of the *Charter*.

What are Exigent Circumstances?

Exigent or urgent circumstances, sometimes referred to as emergent or exceptional circumstances, are those situations necessitating immediate police action. Such circumstances are not restricted to those that rarely arise, but rather to circumstances that are so compelling that the right to privacy is outweighed by legitimate state interest[13]. These circumstances generally fall under two categories:

- protection of life
- protection of property

Exigent circumstances concerning the protection of life involve those situations requiring immediate police action or aid to preserve life or protect persons from imminent harm.

Exigent circumstances respecting the protection of property involve an imminent danger of the loss, removal, destruction, or disappearance of evidence if a search or seizure is delayed[14]. Often, exigent circumstances will be created by the presence of evidence on a moving conveyance such as a motor vehicle, water vessel, aircraft or other moving vehicle. In this sense, there is a moveable crime scene. However, the capability of these conveyances to move away rapidly will not in all cases

[10] R. v. Greffe (1988) 41 C.C.C. (3d) 257 (Alta.C.A.) per McClung J.A. at p.267 reversed [1990] 1 S.C.R. 755.
[11] R. v. Debot [1989] 2 S.C.R. 1140 (S.C.C.) per Lamer J.
[12] R. v. Moran (1987) 36 C.C.C. (3d) 225 (Ont.C.A.) at p.241.
[13] R. v. Golub (1997) 117 C.C.C. (3d) 193 (Ont.C.A.) at p.209.
[14] R. v. Grant (1993) 84 C.C.C. 173 (S.C.C.) at p.189.

create a situation making it impracticable in obtaining a warrant. For instance, an unattended vehicle will not create the same urgency as a vehicle about to be driven away.

Justifying a Warrantless Search

An exigent circumstance does not in itself furnish an exception where the law requires a warrant[15]. However, exigent circumstances will justify a warrantless search authorized by statute. In cases where a warrantless search provision is silent on whether exigent circumstances are required for its operation, exigent circumstances are to be read into the provision creating the authority[16]. In this sense, where the obtaining of a warrant would not be practicable the search may proceed without a warrant[17]. If exigent circumstances are absent, a warrant is required.

Mitigating a Charter Violation

Exigent circumstances are one factor that the court uses in assessing whether evidence should be excluded under s.24(2) of the *Charter*[18]. The Court will consider whether the urgency of the situation mitigated the seriousness of the breach and therefore favours admission of the evidence.

Threshold Inquiry

The presence of exigent circumstances will involve an assessment of whether or not the police officer executing the search had reasonable grounds exigent circumstances existed. This assessment will involve the subjective good faith belief of the officer and whether that belief was supported by objective criteria[19].

Note-able Quote

"*No one but lawyers and judges would have any difficulty deciding that the appellant, whom I shall call "the accused", imported nearly a pound of heroin into Canada when he arrived at the Vancouver Inter-national airport…This would be so especially so when, upon being informed by a customs officer that he would be X-rayed, the accused admitted, as was later confirmed, that he had that quantity of packaged heroin in his stomach and intestines[20]".* Chief Justice McEachern.

APPREHENDED BREACHES: PREVENTING THEM BEFORE THEY OCCUR

Sgt. Mike Novakowski

What is a Breach of the Peace?

The term "breach of the peace" is not defined in the *Criminal Code.* It is therefore necessary to consider the common law definition[21]:

> *[W]henever harm is actually done or is likely to be done to a person or in his presence to his property, or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.*

Generally, "a breach of the peace contemplates an act or actions which result in actual or threatened harm to someone[22]" and may be a situation where there is some kind of a disturbance by one or more people involving unruly behavior and actual or potential violence. Other definitions include:

> *… a violent disruption of public tranquillity, peace, and order.*[23]

or

> *… when either an actual assault is committed on an individual or public alarm or excitement is caused. Mere annoyance or insult to an individual stopping short of actual personal violence is not a breach of the peace.*[24]

A "breach of the peace" must be sufficiently substantial to cause concern that more serious conduct may erupt (e.g. an assault, mischief or riot) unless the police intervene and effect an arrest. In *R. v. Khatchadorian* (1998) 127 C.C.C. (3d) 565 (B.C.C.A.) police responded at the request of the occupant to a noisy house party.

[15] R. v. Martin (1995) 97 C.C.C. (3d) 241 affirmed 104 C.C.C. (3d) 224 (S.C.C.) per Gibbs at p.249.
[16] R. v. Grant (1993) 84 C.C.C. (3d) 173 (S.C.C.)
[17] R. v. Lamy (1993) 80 C.C.C. (3d) 558 (Man.C.A.) at p.567
[18] See R. v. Collins (1987) 33 C.C.C. (3d) 1 (S.C.C.), R. v. Silveira [1995] 2 S.C.R. 297 (S.C.C.)
[19] R. v. McCormack 2000 BCCA 57 at para. 25.
[20] R. v. Oluwa (1996) 107 C.C.C. (3d) 236 (B.C.C.A.) at p.240.
[21] R. v. Howell [1981], 3 All E.R. 383 approved by Canadian courts (see R. v. Lefebvre (1982) 1 C.C.C. (3d) 241 (B.C.Co.Crt.) affirmed 15 C.C.C. (3d) 503 (B.C.C.A.)
[22] See Brown v. Durham (Regional Munivcipality) Police Force (1998) 43 O.R. (3d) 223 (Ont.C.A.) appeal to S.C.C. granted [1999] S.C.C.A. No. 87 then discontinued.
[23] See R. v. S.S. (1999) 138 C.C.C. (3d) 430 (Nfld.C.A.)
[24] See the statement in Clerk & Lindsell on Torts, (10th ed.) accepted by Kerwin J. in Frey v. Fedoruk [1950] S.C.R. 517 (S.C.C.).

The accused attempted to interfere in the conversation between the police and the person in charge of the premises, questioned the authority of the police, and endeavored to dissuade persons from leaving the party. The accused persisted in his interfering conduct as several officers assisted in shutting down the party. The accused was arrested for breach of the peace, searched, and cocaine was found on his person. The Court found the situation as one of an ongoing breach of the peace and that the police were entitled to arrest[25].

Although many breaches of the peace constitute criminal offences, not all do. For example, causing a disturbance, which is a criminal offence, is also a breach of the peace[26]. An assault, threats, riot, and unlawful assembly on their face would also appear to constitute breaches of the peace. However, there may be circumstances where the behaviour, albeit non-criminal, will nonetheless constitute a breach provided the conduct creates the fear as contemplated by the definition.

Anticipated Breaches

At common law, clear authority exists that a police officer is entitled to make a lawful arrest of someone "who it is anticipated may shortly engage" in a breach of the peace[27]. This authority is similar to the warrantless power of arrest under s.495(1)(a) of the *Criminal Code* for a person "about to commit an indictable offence". The arrest for an apprehended breach of the peace is exercised in circumstances where the officer has reasonable grounds for believing the anticipated conduct which would amount to a breach of the peace, will likely occur if the person is not arrested. Unlike section 31 of the *Criminal Code* requiring the police witness a breach of the peace before they arrest, the officer need only be concerned with a breach reasonably expected to occur (future). There are two requirements that the police officer must consider when exercising the power to arrest for an apprehended breach[28]:

- The apprehended breach must be **imminent.** The possibility that a breach will occur at some unknown point in time will not be sufficient. The breach must be impending and likely to occur in the immediate future[29].

- The apprehended breach must be **substantial**. The mere possibility of an unspecified breach will also be insufficient. The likelihood of a breach must be real and reasonably apprehended.

Provided the imminent and substantial criteria are satisfied, police may arrest provided they reasonably believe the breach of the peace will result if an arrest is not made.

Officer Created Breaches: Bad Faith

A police officer may not create a breach of the peace and then claim to have a proper basis for arrest[30]. A circumstance where the police, through there own conduct, deliberately and willfully cause a person to participate in a breach of the peace and follow up with an arrest is improper.

FITNESS EXCELLENCE AT THE JI

Sgt. Tammy Schellenberg and Sgt. Frank Querido

In addition to the POPAT, the Police Academy has introduced a fitness test designed to measure a recruit's overall fitness level. Testing includes a mile and a half run, pushups, situps, bench press, grip strength, and flexibility. New recruits are tested at the beginning of BLK I and again at the end of their BLK III to measure progress. The test is skewed by age and gender and recruits attaining an "A" (86%) are awarded with a "Fitness Excellence-A" t-shirt.

Also in BLK III, the POPAT is conducted in full duty gear including vest, boots, and equipment belt.

For comments or topics you would like to see published in this newsletter contact Sgt. Mike Novakowski at the JIBC Police Academy at (604) 528-5733 or e-mail at mnovakowski@jibc.bc.ca

[25] The search incidental thereto was valid and the cocaine admissible as evidence.
[26] See R. v. Biron (1975) 23 C.C.C. (2d) 513 (S.C.C.).
[27] See R. v. Khatchadorian (1998) 127 C.C.C. (3d) 565 (B.C.C.A.), R. v. Lefebvre (1984) 15 C.C.C. (3d) 503 (B.C.C.A.), Hayes v. Thompson (1985) 18 C.C.C. (3d) 254 (B.C.C.A.), R. v. Faulkner (1988) 9 M.V.R. (2d) 137 (B.C.C.A.), Brown v. Durham (Regional Munivcipality) Police Force (1998) 43 O.R. (3d) 223 (Ont.C.A.) appeal to S.C.C. granted [1999] S.C.C.A. No. 87 then discontinued.
[28] See Brown v. Durham (Regional Munivcipality) Police Force (1998) 43 O.R. (3d) 223 (Ont.C.A.) appeal to S.C.C. granted [1999] S.C.C.A. No. 87 then discontinued.
[29] See Lynch v. Canada (R.C.M.P.) 2000 BCSC53
[30] See R. v. Khatchadorian (1998) 127 C.C.C. (3d) 565 (B.C.C.A.)