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INVESTIGATIVE DETENTION: CANADA'S STOP AND FRISK

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Encounters on the street between the police and the citizen take on a variety of forms. These encounters range from friendly exchanges of greetings, innocuous social conversation, useful information sharing to highly charged and volatile arrest situations. Transcending the "investigative" spectrum are essentially three levels of street encounters between the police and the citizens they serve.

Consensual Encounters	Investigative Detention	Arrest

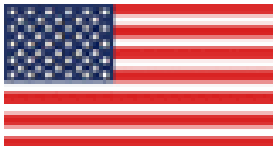
Consensual Encounters (Field Inquiries)

The law recognizes that a police officer is entitled to approach and question any person, however there is no general power for the police to detain the person for questioning[1] nor compel answers. The individual is free to ignore police questions and may exercise that right by walking (or running) away. The officer's motivation for such an encounter is often driven by curiosity and the officer seeks contact with the person, perhaps inquiring into circumstances surrounding the persons presence (a new face), chatting with people on their beat (the essence of community policing), or questioning persons of potential interest in an investigation. The officer approaches the person and contact is made through inquisitive dialogue. The person may leave at anytime and the officer must let the individual proceed. In this sense the contact is mutual, to be terminated by either the officer or the individual. A non-consensual search is not permitted during this encounter, nor may a person be compelled to remain in the presence of the officer, compelled to empty their pockets, compelled to answer questions, or compelled to identify themselves.

Arrest

A lawful arrest requires both a legal and factual basis. Firstly, the arrest must be authorized by law. The officer must be able to point to a statute or common law authority permitting the arrest. Generally, a factual predicate of reasonable grounds[2] must exist. If one or both of these criteria are not satisfied the arrest is unlawful. With an arrest, a reasonably conducted incidental protective and evidentiary search is permitted. In addition, a person may be taken into custody, subjected to an interrogation, and must identify themselves or be subject to an obstruction charge[3].

Between a field inquiry and an arrest lies an investigative detention. Like an arrest, an investigative detention requires both a legal and factual predicate. When existing, a valid investigative detention is permitted. Although an investigative detention is similar to an arrest in that it is a forced encounter, it is distinguishable in purpose, character, and extent.



THE AMERICAN EXPERIENCE

Although Canadian courts recognize that "American decisions can be transplanted to the Canadian context only with the greatest caution[4]", the BCCA held "the reasoning in *Terry v. Ohio* [392 U.S. 1 (1968)] applies equally to the Canadian experience" and "[t]he concept

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[1] R. v. Esposito (1985) 24 C.C.C. (3d) 88 (Ont.C.A.) leave to appeal to the S.C.C. refused (1986), see also R. v. Moran (1987) 36 C.C.C. (3d) 225 (Ont.C.A.) at p. 258, R. v. Willimott [2000] O.J. No. 1530 (Ont.S.Crt.Jus.),., R. v. Dedman (1981) 59 C.C.C. (2d) 97 (Ont.C.A.) at p.108-109, see also comments of Melnick J. in R. v. Arkinstall [1994] B.C.J. No.612 (B.C.S.C.) at para.37.

[2] See Volume 1 Issue 3 of this publication for a review of reasonable grounds.
[3] R. v. Moore [1979] 1 S.C.R. 195., see s.129 Criminal Code.
[4] Hunter et al. V. Southam Inc. (1984) 14 C.C.C. (3d) 97 at p. 109.

of 'stop and frisk' meets the *Waterfield* test[5][6]. Before discussing the Canadian concept of investigative detention as it has developed, it would be appropriate to first examine its U.S. counterpart; "stop and frisk". The U.S. Supreme Court recognizes the general interest of the government in "effective crime prevention and detection" warrants a police officer on the street "in appropriate circumstances and in an appropriate manner [to] approach a person for the purpose of investigating [possible] criminal behaviour even though there is no probable cause[7] to make an arrest[8]". For a stop to be lawful it must be both justified at inception and be reasonably related in scope to the circumstances.

Justified at Inception

A police officer lacking the level of information necessary for probable cause to arrest is not required "to simply shrug [their] shoulders and allow a crime to occur or a criminal escape[9]". The police may stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion[10] supported by articulable facts that criminal activity "may be afoot", even if the officer lacks probable cause[11].

The concept of reasonable suspicion is not "readily, or even usefully, reduced to a neat set of legal rules"[12]. In fact, there could be circumstances in which wholly lawful conduct might justify suspicion that criminal activity is afoot[13]. However, the relevant inquiry is not whether particular conduct is "innocent" or "guilty" but the degree of suspicion that attaches to particular types of non-criminal acts[14]. Where conduct justifying a stop is suspicious, but "ambiguous and susceptible to innocent explanation", officers may detain the person to resolve the ambiguity[15]. In *Houston v. Clark County Sheriff Deputy* 174 F.3d 809 (6th Cir.1999), the Sixth Circuit Court of Appeals reviewed the standard of suspicion required for a permissible investigative detention:

> Police may briefly stop an individual for investigation if they have a "reasonable suspicion" that the individual has committed a crime…."Reasonable suspicion" is more than an ill-defined hunch; it must be based upon "a particularized and objective basis for suspecting the particular person…of criminal activity."…It requires "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" an investigatory stop…. The standard…is not onerous. The requisite level of suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence….Moreover, reasonable suspicion can arise from evidence that is less reliable than what might be required to show probable cause. (references omitted)

In forming a reasonable suspicion, a police officer is entitled to assess the facts in light of their experience[16] and may draw inferences and make deductions that could elude any untrained person observing the same conduct[17]. It is not a requirement the suspicion be based solely on an officer's personal observation but may be based on "information supplied by another person"[18]. A person's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable suspicion a person is committing a crime[19]. However, "officers are not required to ignore relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation" and a person's presence in a high crime area is a relevant fact to be considered[20]. Similarly, unprovoked flight from the police, is insufficient on its own to warrant an investigative detention. Unprovoked flight from police, although not necessarily indicative of wrongdoing, is certainly suggestive of such and may contribute to a reasonable suspicion "based on commonsense judgements and inferences about human behaviour"[21]. In assessing reasonable suspicion, the "the whole picture" must be considered[22].

Reasonably Related in Scope

The detention must be "brief[23]" and "last no longer than is necessary to effectuate the purpose of the stop"[24]. In assessing whether the stop was too long, the Court must "examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which

[5] The Waterfield test is derived from an English case R. v. Waterfield [1963] 3 All E.R. 659, commonly referred to as the ancillary power doctrine.
[6] R. v. Ferris (1998) 126 C.C.C. (3d) 298 (B.C.C.A.) appeal to the Supreme Court of Canada dismissed [1998] S.C.C.A. No. 424,
[7] The Canadain equivalent of "probable cause" is "reasonable grounds to believe". See Hunter et al. V. Southam Inc. (1984) 14 C.C.C. (3d) 97 at p. 114.
[8] Terry v. Ohio 392 U.S. 1 (1968) at p. 22.
[9] Adams v. Williams, 407 U.S. 143, 145 (1972)
[10] Other terms used to define a reasonable suspicion include individualized suspicion, reasonable cause, specific and articulable facts, particularized and objective basis for suspecting, independently suspicious circumstances, articulable reasons, founded suspicion, particularized suspicion, substantial possibility, and individualized suspicion. Standards not amounting to a reasonable suspicion include pop guess, inchoate and unparticularized suspicion, off chance, or a hunch.
[11] See U.S. v. Sokolow 490 U.S. 1 (1989) at p.7.
[12] See U.S. v. Sokolow 490 U.S. 1 (1989) at p.7 citing Illinois v. Gates 462 U.S. 213, 238 (1983).
[13] See Reid v. Georgia 448 U.S. 438 (1980) per curiam.
[14] U.S. v. Sokolow 490 U.S. 1, 10 (1989)
[15] Illinois v, Wardlow U.S. Supreme Court No. 98-1036 decided January 12, 2000.
[16] U.S. v. Brigoni-Ponce, 422 U.S. 873 (1975) (opinion of Powell J.)
[17] Florida v. Royer, 460 U.S. 491, 524 (1983) (footnote 5) (opinion of Rehnquist J. in dissent)
[18] Adams v. Williams, 407 U.S. 143, 147 (1972)
[19] Brown v. Texas, 443 U.S. 47 (1979)
[20] Illinois v, Wardlow U.S. Supreme Court No. 98-1036 decided January 12, 2000.
[21] Illinois v, Wardlow U.S. Supreme Court No. 98-1036 decided January 12, 2000.
[22] See U.S. v. Sokolow 490 U.S. 1 (1989) at p.7 citing U.S. v. Cortez 449 U.S. 411, 417 (1981).
[23] Florida v. Royer, 460 U.S. 491, 510 (1983)
[24] Florida v. Royer, 460 U.S. 491, 501 (1983)

time it was necessary to detain"[25]. Courts must avoid "unrealistic second-guessing" and engaging in "post hoc evaluation of police conduct" by imagining some alternative means by which the objectives of the detention might have been accomplished[26]. Forcibly removing a detainee from their home or other place in which they are entitled to be, and transporting that person to a police station for an investigative purpose, even though for a brief time, is not permitted[27].

U.S. courts recognize that when a suspect is "dangerous", they are no less dangerous simply because they are not arrested[28]. If an officer is entitled to make an investigative stop and has reason to believe the suspect is dangerous, a search limited in scope for the purpose of protecting the officer may be undertaken[29]. With respect to the "frisk search", the Court in *Terry* held they could not "blind [themselves] to the need of law enforcement officers to protect themselves and other prospective victims of violence in situations where they lacked probable cause for an arrest". However, the scope of the search must be "strictly circumscribed by the exigencies which justify its initiation". To this end, a protective search of a detained person in the absence of probable cause must be limited in scope to a search necessary for the discovery of weapons that might be used to harm the officer or others nearby.

This protective search incidental to the "stop" does not carry with it the relatively extensive explorative search that accompanies a search incident to arrest (fruits or instrumentalities of the crime, or evidence). The Supreme Court made it clear that the officer need not be certain the individual is armed with a weapon, but "whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [their] safety or that of others was in danger"[30].

To engage in an area search for safety (weapons) "the officer must have an articulable suspicion that the suspect is potentially dangerous"[31]. A limited protective search authorizes the search of the passenger compartment (interior) of a motor vehicle provided the officer restricts the search to those areas where the detainee would generally have immediate control and could contain a weapon[32]. In *Michigan v. Long*, 463 U.S. 1032 (1983), the U.S. Supreme Court stated:

> Just as a *Terry* suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a Terry suspect…break away from the police control and retrieve a weapon from his automobile

If during the search, the officer should discover contraband other than weapons, the officer "cannot be required to ignore the contraband", and its seizure is lawful and does not violate the Fourth Amendment.

THE CANADIAN EXPERIENCE

Detention: The Stop

Investigative detention, as it is known in Canada, is a common law power that authorizes police officers to briefly detain individuals in the course of a police investigation (even in the absence of reasonable grounds to effect an arrest[33]) and deals with "on-the-street observations by police officer's who must act quickly"[34]. In *R. v. Dedman* [1985] 2 S.C.R. 2 (S.C.C.), Dickson C.J. stated that "short of arrest, the police have never possessed legal authority at common law to detain anyone against [their] will for questioning, or to pursue an investigation". Although this statement would appear to prohibit forced encounters other than arrest, it addressed a purely arbitrary stop (no articulable cause) and not the developed concept of investigative detention. Within the last decade, Canadian courts have recognized, largely by adopting American jurisprudence in the area of "stop and frisk", that police do have a common law authority to detain individuals for the purpose of an investigation.

Investigative detention recognizes the police have the general duties of investigating and preventing criminal activity[35]. However, "the fact that a police officer has a general duty…does not mean that [they] can use any or all means of achieving these ends[36]". As such, a valid investigative detention involves a two-prong analysis to determine its validity. The officer must have an

[25] U.S. v. Sharpe et al 470 U.S. (1985) per Buregr C.J.
[26] U.S. v. Sharpe et al 470 U.S. (1985)
[27] Hayes v. Florida 470 U.S. 811 (1985)
[28] See Michigan v. Long, 463 U.S. 1032 (1983) at p.1050
[29] Adams v. Williams, 407 U.S. 143, 146 (1972)
[30] Terry v. Ohio 392 U.S. 1 (1968)
[31] Michigan v. Long, 463 U.S. 1032, 1050 (1983) (footnote 16)
[32] See Michigan v. Long, 463 U.S. 1032 (1983)
[33] R. v. Bisson 2000 ABPC 30 at para. 21.
[34] R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.) at p.309.
[35] R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.) at p.307, R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) at p499.
[36] R. v. Dedman [1985] 2 S.C.R. 2 (S.C.C.) per Dickson C.J. at p.12.

articulable cause and the detention must be reasonably justified in the circumstances.

- articulable cause. Did the police officer who initiated the detention have an articulable cause sufficient to support an investigative detention?[37] In justifying a detention, "the police need not perform a legal analysis as to whether an offence could be made out; rather, they must determine whether there is an 'articulable cause' for such detention"[38]. An articulable cause requirement properly balances societal's interest in the police detecting and preventing crime (the need for police enquiry) and the liberty interests of the individual (to be free from police detention)[39].

- reasonably justified. Was the detention and the measures employed by the police officer in the course of the detention reasonably warranted and justified in the circumstances? The nature of the detention must be circumscribed by the reasons warranting it. A detention that exceeds the boundaries imposed by the common law may be found to be an unjustifiable use of police powers.

Articulable Cause

"Articulable cause" is a legal standard providing justification for state action (ie. detention) and is the yardstick by which an arbitrary detention is measured. "Articulable cause" is a "reasonable suspicion[40]" and has been synonymously referred to as reasonable cause to suspect[41], a reasonable basis to suspect[42], particularized and objective basis for suspecting[43], a reasonable and articulable suspicion[44], reasonably based suspicion[45], objectively based high level of suspicion[46], or reasonable grounds to suspect[47]. A reasonable suspicion lies between subjectively based suspicion (mere suspicion or curiosity), and reasonable belief[48] or grounds. It is considered a lesser but included standard of reasonable grounds and is clearly not as high[49]. A hunch[50], unfounded suspicion[51], speculation[52], intuition[53], or guess[54] do not amount to articulable cause. In articulable cause cases "the circumstances as a whole [cry] out for further investigation[55]". Doherty J.A. in *R. v. Simpson* (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) defined investigative articulable cause as:

> [A] constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.

Articulable cause, like reasonable belief, "must be both subjectively held and objectively verifiable"[56]. Objectively, a court "must be supplied with sufficient information to support an independent judgement that there was articulable cause to make the stop"[57]. The objective standard provides a constitutionally recognized basis by which a neutral arbiter may judge the conduct of the police. This is similar to the reasonable grounds standard authorizing arrest "and serves to avoid indiscriminate and discriminatory exercises of the police power[58]". Succinctly, the "police officer must be able to demonstrate an objective basis in fact that gives rise to [their] suspicion[59]". In comparing the standard of reasonable grounds to articulable cause, Osborne J.A. in *R. v. Hall* (1995) 22 O.R. (3d) 289 (Ont.C.A.) stated:

> Both "articulable cause" and "reasonable and probable grounds", as related to an investigative detention and an arrest without warrant respectively, are subject to objective assessment. That is to say there must be a constellation of objectively discernible facts amounting to articulable cause for a lawful investigative detention and a constellation of objectively discernible facts amounting to reasonable and probable grounds for a lawful arrest without warrant

Acknowledging "the officer has to make a quick judgement 'in the field' as to whether [they] should intervene", it is sufficient that the facts objectively observed "give rise to a reasonable suspicion of the existence of potentially illegal activity which would justify intervention"[60]. The combination of the facts

[37] See R. v. Hall (1995) 22 O.R. (3d) 289 (Ont.C.A.), R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.), R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.), R. v. Johnson [2000] B.C.C.A.
[38] R. v. Reid [2000] O.J. No.2969 (Ont.P.C.)
[39] R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.) at p.308, R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.)
[40] See R. v. Lal [1998] B.C.J. No. 2446 (B.C.C.A.) leave to appeal to dismissed [1999] S.C.C.A. No. 28 (S.C.C.), R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) at p503.
[41] R. v. Brisson 2000 ABPC 30 at para. 24., see also R. v. Perrault [1992] R.J.Q. 1848 (Que.C.A.) at p.183
[42] R. v. J.R. [2000] O.J. No. 930 (Ont.S.C.J.) at para.15.
[43] R. v. Lee [1993] B.C.J. No.1220 (B.C.S.C.)
[45] R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) at p503.
[46] R. v. Pena [1996] B.C.J. No.2821 (B.C.S.C.) at para.36.
[47] R. v. Burke (1997) 118 C.C.C. (3d) 59 Nfld.C.A.) per Marshall J.A. at p.76.
[48] R. v. Granston (2000) Docket: C29926 (Ont.C.A.)
[49] R. v. Pearce (1997) 120 C.C.C. (3d) 467 (Nfld.C.A.) at p.470
[50] R. v. Pearce (1997) 120 C.C.C. (3d) 467 (Nfld.C.A.) at p.470, R. v. F.L. [1996] B.C.J. No. 3010 (B.C.S.C.) Lander J. at para. 15, R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) at p.501.
[51] R. v. Arkinstall [1994] B.C.J. No.612 (B.C.S.C.) at para.40.
[52] See R. v. Cox [1999] N.B.J. No. 86 (QL) (N.B.C.A.) per Ryan J.A. at para.12, R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) at p502.
[53] R. v. Lal (1996) Docket:CC940845 (B.C.S.C.) affirmed [1998] B.C.J. No. 2446 (B.C.C.A.) leave to appeal to dismissed [1999] S.C.C.A. No. 28 (S.C.C.),
[54] See R. v. Cox [1999] N.B.J. No. 86 (QL) (N.B.C.A.) per Ryan J.A. at para.12, R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) at p502.
[55] See R. v. D.I. [1996] B.C.J. No. 2750 (QL) (B.C.YouthCt.) per Rae Youth Ct. J. at para.17.
[56] R. v. F.L. [1996] B.C.J. No. 3010 (B.C.S.C.) Lander J. at para. 15..
[57] R. v. Lal [1998] B.C.J. No. 2446 (B.C.C.A.) leave to appeal to dismissed [1999] S.C.C.A. No. 28 (S.C.C.)
[58] R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.)
[59] See R. v. Mulligan [2000] O.J. No. 59 (Ont.C.A.)
[60] R. v. Pearce (1997) 120 C.C.C. (3d) 467 (Nfld.C.A.) at p. 471-2.

and the officer's understanding of them form the objective basis of articulable cause even though levels of suspicion have not risen sufficiently to permit an arrest based on reasonable grounds. The factors are not to be isolated and looked at individually and thus said to be insufficient. The factors must be viewed collectively as a whole in determining whether the circumstances gave rise to properly constituted articulable cause[61]. In short, the validity of the detention must be determined in relation to the circumstances that were apparent to the police officer. Of course, looking suspicious is not enough. The officer must be able to articulate reasons for their actions that may be judicially reviewed.

The "constellation of objectively discernible facts" forming an articulable cause may collectively find a valid basis anchored in the following:

- **Personal observations**. Police may consider their personal observations such as the spatial proximity between the suspect and the crime[62], temporal connection between the detention and the crime[63], suspicious (peculiar) driving pattern[64], furtive movements of occupants of vehicles[65], an unnatural bulge in the clothing of the person[66], or the unannounced arrival of a person at a building devoted entirely to a marihuana grow operation[67].

- **Information**. The officer is entitled to rely on information they receive from others, such as personal observations relayed by other persons including police colleagues (which may be assumed to be reliable[68]), information provided by an informant[69], CPIC queries[70], information bulletins, or other sources of reliable second hand information. Like reasonable grounds for belief, reasonable suspicion is dependent on both the content of the information provided to the police and its degree of reliability. Since the standard for reasonable suspicion is less demanding than that for reasonable belief, articulable cause may arise from information that is less reliable than that required to show reasonable grounds[71].

- **Experience**. Experience is not to be discounted in the formulation of articulable cause[72]. The general category of experience may incorporate personal experience, corporate experience, and training[73]. "When assessing the objective grounds…it is proper to consider that the person drawing the inferences is a police officer with experience and training in investigating criminal activity"[74]. In addition, the officer may make rational inferences from the articulable facts to demonstrate the police suspected the person of unlawful behaviour.

Like reasonable grounds for belief, the reputation of the individual or the reputation of the area, may contribute to articulable cause. On the other hand, reputation alone, such as having a criminal record, would never provide articulable cause[75]. Similarly, attendance at a location of ongoing criminal activity, such as a crack house, may add to articulable cause. However, if the information about the area is of unknown age or reliability, no articulable cause exists and the police are not entitled to detain anyone who happened to be at the site of the suspected criminal activity[76].

Reasonably Justified

When detaining a person, it is not sufficient that only an articulable cause exists. In addition to articulable cause, the detention must also be reasonably justified[77]. The justifiability requirements include the following:

- **reasonable proximity**
- **reasonable duration**
- **reasonable intensity**

Reasonable Proximity

Investigative detention "is associated with unplanned … police investigations of contemporaneous crimes"[78]. With this in mind, the detention must occur sufficiently proximate with the criminal activity under

[61] R. v. Bullock [2000] O.J. No. 796 (Ont.Crt.J.) per Mossip J. at para. 24.
[62] U.S. v. Bush (2000) Case No. CR-3-99-046 (U.S.Dist.Crt.)
[63] U.S. v. Bush (2000) Case No. CR-3-99-046 (U.S.Dist.Crt.)
[64] R. v. Arkinstall [1994] B.C.J. No.612 (B.C.S.C.) at para.32.
[65] R. v. Arkinstall [1994] B.C.J. No.612 (B.C.S.C.) at para.32.
[66] R. v. F.L. [1996] B.C.J. No.3010 (B.C.S.C.)
[67] R. v. McAuley [1998] M.J. No.194 (Man.C.A.)
[68] In R. v. Lal [1998] B.C.J. No. 2446 (B.C.C.A.) leave to appeal to dismissed [1999] S.C.C.A. No. 28 (S.C.C.,). However, the officer who provided the information must demonstrate a reasonable suspicion for the detention.
[69] See for example R. v. Devine [1996] Y.J. No.26 (Yuk.S.C.) where an anonymous tip that was reasonably specific and confirmed substantially provided a sufficient bassis for articulable cause.
[70] R. v. Cheng [1995] B.C.H.J. No.2838 (B.C.P.C.),
[71] R. v. Lal {1998] B.C.J. No. 2446 (B.C.C.A.) at para.30.
[72] R. v. F.L. [1996] B.C.J. No. 3010 (B.C.S.C.) Lander J. at para. 15, R. v. Bullock [2000] O.J. No. 796 (Ont.Crt.J.) per Mossip J. at para. 24.
[73] R. v. F.L. [1996] B.C.J. No. 3010 (B.C.S.C.) Lander J. at para. 15
[74] R. v. F.L. [1996] B.C.J. No. 3010 (B.C.S.C.) Lander J. at para. 15, R. v. C.M.G. [1996] M.J. No.428 (Man.C.A.).
[75] R. v. Yau [1994] O.J. No. 60 (Ont.Crt.Jus)
[76] R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.)
[77] R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.)
[78] R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.) at p.302., see also R. v. Lee [1993] B.C.J. No.1220 (B.C.S.C.)

investigation where immediate action is required to address the suspected crime. An investigative detention may be justified when the detention occurs during[79] (engaged in), shortly after[80] (just committed), or shortly before[81] (about or poised to commit) the suspected unlawful activity. Because there is an urgency of police intervention, the reasonable suspicion of unlawful activity does not necessarily require an ascertainable crime or victim[82].

Recognizing that investigative detention involves a fluid, rapidly evolving, spontaneous, unplanned investigation, if a crime was committed in the distant past other investigative techniques should be considered by police (such as photo lineups, detailed follow-up interviews, crime scene analysis, surveillance, or informants). If nothing further arises to justify an arrest, the suspect must be left alone. The comments of Doherty J. in *Simpson* are apposite:

> [A] reasonably based suspicion that a person committed some property-related offence at a distant point in the past, while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention in an effort to quickly confirm or refute the suspicion.

Reasonable Duration

An investigative detention authorized by articulable cause is designed to be brief and must be for a reasonable duration in time[83]. The purpose of this momentary encounter is to clarify a suspicious (perhaps ambiguous) situation, and confirm or refute suspicion[84]. The length of the detention must not exceed what is necessary to effectuate the purpose, or reason, of the stop. Although there are no rigid time limitations, brevity is an important factor and each detention will be assessed on a case by case basis. In *Lal*[85], an 18 minute delay during an investigative detention while the officer was awaiting back-up required for a Code 5 procedure on a suspected armed and dangerous driver, was found to be reasonable. During the temporary detention and the expeditious investigation undertaken by police, the officer's reasonably held suspicion may be dispelled (and the individual permitted to proceed), or may be elevated to reasonable grounds (and the individual subject to arrest). However, detention is not permitted for a lengthy or prolonged investigation nor to continue indefinitely to develop reasonable grounds upon which to justify an arrest. In short, the police must act "legitimately and responsibly[86]".

Reasonable Intensity

Just as a person has an obligation to submit to a lawful arrest[87], so too does a person who is subject to a lawful investigative detention[88]. Police officers "may use reasonable force in the exercise of their duties apart from their powers of arrest"[89]. If a person refuses to submit to a lawful detention, police are entitled to physically restrain the suspect. Similarly, if the person flees from police attempting to effectuate a lawful detention, the officer may pursue and physically restrain the person[90].

The police must not engage in any more intrusive a detention than is necessary in the circumstances[91] and may detain a person only in a reasonable way[92]. The intensity, level of coercion, or use of active constraints imposed by police during an investigative detention must be reasonable under the circumstances and not unreasonably harsh. A prismatic approach to affecting an investigative detention is calculated on the underlying circumstances confronting the officer at the time the detention is initiated. Verbal commands, handcuffing[93], confinement to police vehicles[94], or displaying of a police firearm[95] may in some cases be warranted. Different variables may change the intensity of the detention and it may be necessary to engage the suspect at a more intense level at the genesis of the detention.

When using restraint, the officer must be both flexible to the underlying factual predicate that initiated the detention as well as the reasonableness in which the restraint is affected. Physical restraint may be appropriate in those cases where the officer

[79] R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.), R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.)
[80] R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.) at p.306, R. v. Johnson
[81] R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.) at p..306.
[82] R. v. Arkinstall [1994] B.C.J. No.612 (B.C.S.C.)
[83] See R. v. Dupuis (1994) 162 A.R. 97 (Alta.C.A.), R. v. Wainwright [1999] O.J. No. 3539 (Ont.C.A.)
[84] R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) at p503.
[85] R. v. Lal (1996) Docket:CC940845 (B.C.S.C.) affirmed [1998] B.C.J. No. 2446 (B.C.C.A.) leave to appeal to dismissed [1999] S.C.C.A. No. 28 (S.C.C.),
[86] R. v. Clarke [2001] O.J. No.66 (Ont.Crt.Jus.)
[87] See R. v. Whitfield [1970] S.C.R. 46 (S.C.C.) per Hall J., R. v. Richards (1999) Docket:C29243 (Ont.C.A.) at para. 12.
[88] See R. v. Wainwright [1999] O.J. No. 3539 (Ont.C.A.)
[89] See Kellins v. Grotkopp 2000 BCSC 1137
[90] See R. v. Wainwright [1999] O.J. No. 3539 (Ont.C.A.)
[91] R. v. Bullock [2000] O.J. No. 796 (Ont.Crt.J.) per Mossip J. at para. 27.
[92] See R. v. Dupuis (1994) 162 A.R. 97 (Alta.C.A.)
[93] R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.)
[94] R. v. Elshaw (1989) 70 C.R. (3d) 197 (B.C.C.A.) reversed 67 C.C.C. (3d) 97 (S.C.C.)
[95] R. v. Dupuis (1994) 162 A.R. 97 (Alta.C.A.)

encounters an uncooperative individual, the detention involves a violent crime, the individual raises a reasonable suspicion of flight or danger, or the officer is possessed with information the person may be armed. However, grossly excessive force, such as the unwarranted use of the lateral neck restraint to prevent a non violent or non threatening person from leaving an impaired driving investigation, will render the detention unlawful[96].

Searching: The Frisk

Following an arrest, a police officer is entitled to search the arrested person for legitimate safety concerns (ie. weapons) and evidence. Are the police entitled to search a person who is subject to an investigative detention based on articulable cause? The courts have recognized that "in proper circumstances, a warrantless and non-consensual search may be lawful for the purpose of completing an on-site investigation[97]". Similar to the power of search incidental to arrest, "a search incident to detention is a valid exercise of police powers at common law only if the detention itself is lawful[98]". A search incidental to investigative detention is only justified if related to officer safety. If not, such as searching for evidence, there can be no search[99]. The nature of the investigation (seriousness of the suspected offence) or the nature of the interaction (developing circumstances during the detention between the individual and the police[100]) will influence the decision to search and its intensity or scope.

Similar to having an articulable cause to warrant the detention, the police must also have an articulable cause to search the suspect. The purpose of the protective search is to allow the officer, for security reasons, to search when concerned about the possibility that a detainee may have a weapon[101] or may pose a danger or possess items that may aid in escape[102]. However, the officer must act out of a justifiable fear for personal safety and the search cannot be made vexatiously, arbitrarily or in furtherance of a collateral, ulterior, or oblique motive[103].

In *R. v. Ferris* (1998) B.C.J. No. 1415 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.) Ryan J.A. at para. 54-55 stated:

> If the police have the duty to determine whether a person is engaged in crime or is about to be engaged in crime they should not be obliged to risk bodily harm to do so. It is my view that the police are entitled, if they are justified in believing that the person stopped is carrying a weapon, to search for weapons as an incident to detention. The question for the court must be whether the search was reasonably related in scope to the circumstances which justified the interference in the first place.
>
> I have concluded that in proper circumstance the police are entitled to search for weapons as an incident to an investigative stop. The seriousness of the circumstances which led to the stop will govern the decision whether to search at all, and if so, the scope of the search that is undertaken. …Questioning an elderly shopper about a suspected shoplifting would not ordinarily require a search for weapons; questioning someone after a bank robbery might require a search of the detainee and his or her immediate surroundings. In other words, such a search can meet the reasonable necessity test depending on the circumstances.

In *R. v. Lee* [1993] B.C.J. No.1220 (B.C.S.C.), Hood J. held:

> If police officers are to effectively discharge their duties, then it is absolutely necessary that in the performance of them they feel and be as safe as the circumstances will permit. The duty to investigate, and to prevent, offenses, must of necessity have associated with it a legitimate self protection power to search. The safety and lives of officers on the street must be paramount.

The concern for safety must be examined from the point of view of the officer at the time of search[104] and must be subjectively held and objectively appropriate "in all the circumstances"[105]. A "pat down search is ordinarily resorted to in such circumstances"[106] to detect, by touch, the presence of a weapon. However, the wearing of a fanny pack[107] or bulky jacket[108] may provide justification for a more intrusive pocket search. In *R. v. Wainiandy*, [1995] A.J. No.131 (Alta.C.A.), the Court stated at para.6-7:

> What is a reasonable search for weapons turns on the precise circumstances of each case. Almost always, it will not be necessary to require the detainee to strip; sometimes it may not even be necessary to turn out pockets; sometimes, in less frantic circumstances than those here, the officers may be able to secure themselves from attack merely by means of a preliminary query of the detainee to account for his or her presence.

[96] R. v. Drda [1990] 26 M.V.R. (2d) 66 (B.C.S.C.)
[97] R. v. Osselaer (1999) Docket: X049086 (B.C.S.C.) per MaCaulay J. at para. 3.
[98] R. v. Murray (1999) 136 C.C.C. (3d) 197 (Que.C.A.) at p.212.
[99] R. v. Johnson (2000) Docket:CA025623 (B.C.C.A.)
[100] R. v. Cheng [1995] B.C.H.J. No.2838 (B.C.P.C.) In this case police initially stopped the accused for a traffic violation. During the course of the stop circumstances arose justifying a search for safety.
[101] R. v. Osselaer (1999) Docket: X049086 (B.C.S.C.) per MaCaulay J. at para. 3.
[102] R. v. Dalshaug [1991] B.C.J. No.3506 (B.C.S.C.)
[103] R. v. Murray (1999) 136 C.C.C. (3d) 197 (Que.C.A.) at p.209.
[104] R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.) at p.315.
[105] R. v. Cheng [1995] B.C.H.J. No.2838 (B.C.P.C.),
[106] R. v. Dalshaug [1991] B.C.J. No.3506 (B.C.S.C.)
[107] R. v. Ferris (1998126 C.C.C. (3d) 298 (B.C.C.A.) application for appeal to the S.C.C. dismissed [1998] S.C.C.A. No. 424 (S.C.C.)
[108] R. v. Wainiandy, [1995] A.J. No.131 (Alta.C.A.)

Succinctly, the search, although connected to the detention, requires an articulable cause to suspect the detainee is armed or poses a threat to officer safety. Furthermore, the search must be proportional to its purpose, that of the discovery of weapons, and the intensity of the search, or degree of invasion, must also respect the dignity of the person. However, the degree of a search cannot be gauged to a nicety against the urgent circumstances facing the police officer[109].

Questioning

Where the police have an articulable cause to suspect persons of unlawful behaviour, the police have the common law authority to question those persons[110] even though a person is not obligated to answer the officer's questions. The questioning carried out during the investigative detention must be pointed and direct, such as for the purpose of identification[111] or explanation of presence in the area[112]. A reasonable explanation at this point may dispel the officer's articulable cause and the individual will be free to proceed. An investigative detention, unlike a custodial arrest, does not permit a wide-ranging barrage of exploratory questions such as an extensive interrogation[113]. In *R. v. Dimitriadis* (1998) Docket: C21201 (Ont.C.A.) the Court found the brief questioning that followed detention concerning items in plain view was not an unjustifiable use of police powers.

The Right to Counsel

It is trite law that a person be informed of their s.10(b) rights upon arrest or detention[114]. Many of the appellate level Courts have not yet addressed a s.10 argument stemming from an investigative detention. Most of the *Charter* debate involves s.9 (arbitrary detention) and s.8 (search and seizure) questions. It is unclear at what point the right to counsel must be provided during the course of an investigative detention. Although the s.10(b) right to counsel imports temporal immediacy[115] and is not engaged by the length of the detention[116], some courts suggest that the right to counsel need not be provided during the early stages of an investigative detention. For example, in *R. v. Clough and Watts* 2000 BCPC 0160, Gordon J. stated, at para 24:

> [I]t seems ridiculous to suggest that a citizen who is detained briefly at the roadside such that a speeding ticket can be issued has a right to counsel. Neither does a citizen who is to be briefly detained for articulable cause such that the police can investigate an offence that is being or has been recently committed entitled to counsel. To hold otherwise would totally frustrate the day-to-day work of police officers. (emphasis added)

In *R. v. Reid* [2000] O.J. No. 2969 (Ont.Crt.Jus.), Sparrow J. suggests the immediacy of s.10(b) rights does not "necessitate unreasonable conduct on the part of the police" and the police "must be permitted to react sensibly on the spur of the moment", perhaps to ask a question or two. In *R. v. Dupuis* (1995) 162 A.R. 197 (Alta.C.A.), police entered a residence in pursuit of a suspect and at gunpoint required the occupants to lie down. The Court "concluded the police could detain while they pursued their enquiries without violating s.10(b) of the *Charter*"[117]. In light of a safety issue, the police are not required to advise the detainee of the right to counsel before they are searched. The police are entitled to pursue their investigation to a point where any risk of violence is removed before providing s.10(b) rights[118].

In the U.S., the *Miranda*[119] warning required for custodial interrogation does not apply to investigative detention. Since the purpose of the stop is to enable the police to ask a moderate number of questions to resolve (confirm or dispel) suspicion, the Courts do not want to prevent unreasonable information gathering. The detainee is not obliged to answer the questions and if probable cause does not develop, the person must be released[120].

Perhaps s.1 of the *Charter* provides the answer, similar to the reasonable limit imposed when an officer detains an impaired driver on reasonable suspicion and is not obligated to provide the right to counsel prior to administering the roadside screening device or sobriety tests[121]. A conclusive answer to this question is eagerly awaited.

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[109] R. v. Wainiandy, [1995] A.J. No.131 (Alta.C.A.) at para.6.
[110] R. v. Arkinstall [1994] B.C.J. No.612 (B.C.S.C.) at para.90.
[111] R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) at p.503.
[112] R. v. Bullock [2000] O.J. No. 796 (Ont.Crt.J.) per Mossip J. at para. 27, R. v. Wainiandy, [1995] A.J. No.131 (Alta.C.A.) ta para.7.
[113] R. v. Simpson (1993) 79 C.C.C. (3d) 482 (Ont.C.A.) at p.503.
[114] R. v. Feeney[1997] 2 S.C.R. 13 at para.56.
[115] R. v. Feeney[1997] 2 S.C.R. 13, R. v. Poloshek ( ) 134 C.C.C. (3d) 187 (Ont.C.A.)
[116] R. v Elshaw (1991) 67 C.C.C. (3d) 97 (S.C.C.) at p.125
[117] See comments of William J. in Swansburg v. Smith (1996) Docket:CA019235 (B.C.C.A.)
[118] R. v. Lal (1996) Docket:CC940845 (B.C.S.C.) affirmed [1998] B.C.J. No. 2446 (B.C.C.A.) leave to appeal to dismissed [1999] S.C.C.A. No. 28 (S.C.C.),
[119] 384 U.S. 436 (1966)
[120] Berkemen v. McCarty 468 U.S. 420 (1984)
[121] See for example R. v. Sundquist 2000 SKCA 50.