POLICE ACADEMY
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JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

NO ENTITLEMENT TO HAVE LAWYER PRESENT DURING INVESTIGATION

R. v. Lisi, 2001 BCCA 514

The accused driver crossed an intersection on a green light and fatally hit a pedestrian. Although he knew he had hit a person, the accused drove approximately 7 minutes to his home while he called his wife on his cell-phone and asked for her advice. His wife called 911 and advised the police of what occurred. Upon arriving home the accused consumed a substantial amount of alcohol. The police arrived at the accused's home and arrested him. The accused was transported to the police station, provided access to a telephone, and spoke with a legal aid lawyer for 9 minutes. When requested to provide breath samples the accused refused, stating he was doing so on the advice of his counsel. Upon further requests to provide a sample, the accused continued to refuse. When questioned by the breathalyzer operator whether he understood what he was doing by refusing, the accused indicated he knew what he was doing and that he had obtained legal advice but suggested he would like to sit down with his lawyer and the police and "go over everything". The trial judge was satisfied the accused was not asserting his right to counsel a second time:

> He had contacted counsel and received advice. He was thus given the opportunity to have meaningful contact with and advice from counsel. At no time did he indicate he was dissatisfied or displeased with the advice or indicate that he required further clarification. … After his first meaningful contact with counsel, at no time did he clearly indicate he wished a further opportunity to speak with counsel.

On appeal to the BCCA, the accused (among other grounds) argued his right to counsel had been violated because he had asserted his right to counsel a second time and should have been provided a further opportunity to speak with counsel. In dismissing the appeal, the BCCA agreed with Crown where it stated in its factum:

> The [Crown] says that when the conversation is looked at in the context of all the evidence it is clear that the [accused] was not making a second request for counsel, but rather was requesting that counsel come down to the police station. The [accused] had already spoken with a lawyer, he indicated that he understood the charge of refusal and knew what he was doing, and what he wanted was for everyone (himself, the lawyer and the police) to sit down and go over everything. This was not a request to speak to counsel again, but rather a request for the lawyer to come to down to the police detachment and be present during the investigation. Consequently, since the [accused] was not entitled to have counsel present during the questioning, [the breathalyzer operator] was not obliged to cease questioning the [accused] in face of such a request. (emphasis added)

Complete case available at www.courts.gov.bc.ca.

SUICIDE: SAFETY AND PREVENTION ARE TOP PRIORITIES

Part 3 of 6

Mr. Richard Dolman

The following notes are from an Internet website under development at the Justice Institute of BC to assist police in handling a psychiatric crisis and to promote wider understanding of mental illness. The project was initiated by the BC Association of Chiefs of Police Mental Health Committee, and supported by a multi-agency group. Funding is from the Ministry of Health Services and the Justice Institute. Comments and suggestions to the author are welcome at: almond@direct.ca

Suicide has many causes. Attempted suicide or threat of suicide is a frequent component of police emergency calls. The suicide impulse can be weak or strong. A subject may seem calm and rational or appear to be manipulative or there may be a relatively low-risk cry for help – which accidentally goes too far. Suicide may be partly a rational decision but is mainly compelled by depression or by psychosis with command hallucinations. Depression, in turn, can be intensified by long-term disabling effects of mental illness, by

substance abuse or stress, or by bottled-up anger, resentment or trauma. Because of these variables, suicidal impulses and actions are unpredictable and must not be ignored. Everyone including the police need to take suicide warnings seriously.

Legal action on suicide risk. Can police apprehend under s.28 of the *MHA* for apparent attempts or serious threats of suicide or serious self-harm? Yes. Such behaviour is likely to be caused by a mental disorder that requires treatment - which can only be confirmed or negated by a physician. Also, such behaviour needs s.28 intervention when it is likely to endanger; and is not an appropriate reaction to the environment (compared with seeking treatment or other help).

Safety. Obviously this includes subject safety, i.e. preventing the occurrence of a premature death by separating the subject from a knife or other weapon or potential weapon, or from an instrument of harm such as pills or poison; and not leaving the person alone until medical professionals take custody. For a bridge jumper or person locked in a room, an ERT negotiator can help. In high-risk situations, safety concerns can also include safety of interveners (get help, plan for an escape route); and third-party safety. Agitated friends/relatives should step aside. Police can offer to arrange for them to be helped by a social worker and/or grief counselor[1]. A calm and trusted friend or relative can provide collateral information, introduce police to the suicidal person, and remain in attendance if the situation is safe.

Safety of the suicidal person includes more than protection from physical harm. It includes reduction of anxiety and mental pain. In a crisis intervention, when police approach, the suicidal person is probably hypersensitive to anyone's tone of voice and body language, and needs to feel non-threatened as well as getting offers of help. Sudden appearance of police – especially in uniform – can be frightening. If possible, have yourself introduced by a trusted relative or friend of the subject. Use a friendly first name approach. (See Part Four in next issue for detailed suggestions on what to say.)

Prevention. An important challenge for police and others in the front line is to help prevent relapse and to reduce the immediate impulses of a suicidal mental state. How? By making sure that intervention provides a positive first step toward medical treatment. Collateral information can be very important here (from family, friends, a suicide note). It can help police to understand the subject's state of mind, to be more sympathetic, and to talk about getting help. Promise to speak to relatives/friends in attendance about problems. Get a commitment from them to address a specific and painful problem. Promise medical attention.

Reduce the pain. Usually part of the person wants to die; but another part wants to live: that part of the person needs to hear kind and caring words. If a subject is fairly rational, ask what are the most troublesome problems. Do not belittle them. That's not the issue. It's how badly the problems are hurting the person, whose ability to compensate and cope is temporarily impaired or lost. Do what you can by providing emotional first aid to reduce that pain. Be constructive about life in general. Do not raise false or unrealistic hopes but convey your belief that problems can be solved.

Suicide by police weapons. One of the most challenging and dangerous situations for police can lead to tragedy. The media call it "suicide by cop." It's also called "victim-precipitated homicide." Disturbed or distraught and suicidal individuals with some kind of weapon induce law enforcement personnel to kill them. They deliberately create a pressurized situation so dangerous that police are forced to shoot in self-defence. Marksmanship at the arm or leg of a moving, threatening target is not a viable option. When there is no alternative but shooting at close range, police are trained to aim at the middle of the chest. In such cases police need alternatives including less-lethal weapons.

Alternative means of force. A subject is armed, intoxicated, psychotic, suicidal, does not respond to rational conversation, and is hidden from police view. What to do? Pepper spray is seldom a good option in a psychiatric crisis. It may be possible for police to gain control by: backing off, giving the subject time and space to calm down; using an ERT negotiator and telephone; or if use of force is unavoidable, using a hi-tech Taser (stun gun) or Arwen gun (rubber or plastic bullets) which can briefly disable the subject to permit restraint.

[1] Victim services, trauma and grief counseling: During business hours, the BC Ministry of Attorney General operates a province-wide referral service at: 1-800 563-0808. A federal website operated by the Canadian Directory of Victim Services lists victim services at many BC locations, at: http://www.vaonline.org/prov_bc.html

Post-trauma Stress. A suicidal crisis does not usually present a direct danger to interveners, but a completed or nearly completed suicide is highly stressful and traumatic to everyone involved. Family, children, friends, as well as police may be traumatized. All may need therapy, no matter how "tough" or "indifferent" they appear. Stress and trauma overload can lead to flashbacks, denial, survivor's guilt, and more serious consequences if left untreated. Post-traumatic therapies include stress debriefing, and group discussion of how survivors felt about the incident at the time and how they feel about it now. Some people heal their grief and trauma by undertaking a related project, joining a support group and sharing with others in similar circumstances.

DETENTION UNLAWFUL: OFFICER LACKS ARTICULABLE CAUSE

R. v. Leminski, 2001 BCPC 121

Police received a radio dispatch of a robbery in progress at a large retail mall. Police responded and the description transmitted by the dispatcher was a 40-year-old Caucasian male, short brown hair, wearing an orange jacket, and leaving the bank carrying a black garbage bag containing the money taken from the robbery. A police officer spotted the accused, stopped him for investigation, and searched him and his backpack which lead to weapons and drug charges. In determining whether the police were justified in conducting an "investigative stop", the court recognized the officer requires "a reasonable suspicion of crime involving the suspect" (articulable cause); not a "credibility based probability of crime" (reasonable grounds). The officer agreed "the only unique feature attributable to [the accused], who was Caucasian male with short hair, [was] that he was wearing an orange jacket". The Court noted that the accused was (and looked) 20 years old (not the 40 years as reported), was traveling in the opposite direction the suspect was reported to be traveling, and was carrying nothing (the suspect was reported to be carrying a garbage bag). The Court found the Crown failed to demonstrate that the officer objectively had an articulable cause to stop the accused and therefore the detention was not justified. Since the officer lacked proper justification for the stop (and thus an arbitrary detention), the resulting search that led to the discovery of the evidence was a s. 8 *Charter* violation. The evidence was thus excluded and the accused acquitted.

Complete case available at www.provincialcourt.bc.ca.

PROTECTING PRIVACY:THE PURPOSE OF S.8 *CHARTER*

Sgt. Mike Novakowski

Canadian jurisprudence has recognized the underlying purpose of s.8 is "to secure the citizen's right to a reasonable expectation of privacy against government encroachments[2]". This privacy guarantee may be expressed in two ways. It can be expressed as a freedom from 'unreasonable' search and seizure, or alternatively, as an entitlement to a 'reasonable' expectation of privacy[3].

Privacy, in the Constitutional context, relates to privacy interests of persons, not of places[4]. For example, s. 8 would not protect an unoccupied public washroom stall. However, if a person were to occupy that same stall, it could be said that a person may have a reasonable expectation of privacy and be afforded some protection by s.8[5]. Similarly, a person who enters a public telephone booth and closes the door is entitled to assume the conversation will be kept private and free from interception by the state. In both cases, the state intrusion encompasses a particularized place, however the privacy interest of the person and the protection of s.8 is triggered because of the individual's presence and reasonable expectation of privacy in that place.

In *R. v. Edwards* (1996) 1 S.C.R. 128 (S.C.C.), the police conducted a search of the accused's girlfriend's apartment for drugs. The Court found the accused's rights under s.8 had not been violated because he could not demonstrate, on the balance of probabilities, that he had a reasonable expectation of privacy in his girlfriend's apartment. The court found the accused, who was not present in the apartment, was nothing more

[2] R. v. Dyment [1988] 2 S.C.R. 417 (S.C.C.).
[3] Hunter v. Southam Inc. (1984), 14 C.C.C. (3d) 97 (S.C.C.) at p.108.
[4] See Hunter v. Southam Inc. (1984), 14 C.C.C. (3d) 97 (S.C.C.), Edwards v. the Queen (1996), 104 C.C.C. (3d) 136 (S.C.C.).
[5] See R. v. Baker [1998] B.C.J. No. 1854 (B.C.S.C.), R. v. Sneed [1993] B.C.J. No. 1067 (B.C.S.C.), R. v. LeBeau & Lofthouse (1988), 41 C.C.C. (3d) 163 (Ont.C.A.).

than a privileged guest who stayed over occasionally, contributed nothing to the rent or household expenses, and had no authority to regulate access to the premises. The Court emphasized that s. 8 **"is a personal right and protects people and not places."** The personal right to be secure from unreasonable search or seizure may not be asserted vicariously and a person may not rely on the violation of a third parties' rights to benefit themselves. A person who is aggrieved by an unreasonable search through the introduction of evidence obtained from a search of a third parties premises or property has not had their personal s.8 right violated unless they themselves can establish a reasonable expectation of privacy in relation to the place searched or thing seized.

Contextual Approach (Case by Case Basis)

What will constitute a "reasonable" expectation of privacy will depend on the facts of the particular case and will turn on the totality of the circumstances. The "reasonableness standard under s.8 of the *Charter* fluctuates with the context"[6]. For example, at border crossings the reasonable expectation of privacy is lower than otherwise available in a wholly domestic setting[7] or a person subject to arrest must expect a significant loss of personal privacy[8]. In assessing whether a person has a reasonable expectation of privacy, many factors including the following will be considered[9]:

- **the person's presence at the time of the search;**
- **possession or control of the property or place;**
- **ownership of the property or place;**
- **historical use of the property or item;**
- **the ability to regulate access, including the right to admit or exclude others from the place;**
- **the existence of a subjective expectation of privacy;**
- **the objective reasonableness of the subjective expectation.**

In *R. v. Belnavis and Lawrence* [1997] 3 S.C.R. 341, police stopped a vehicle for speeding in which there were three occupants. While running a computer check because the driver could not produce the required documents, police questioned the passenger in the rear of the vehicle and noted three garbage bags containing new clothing with price tags attached. After obtaining conflicting stories from the occupants regarding ownership of the bags, the officer searched the vehicle. At trial the judge found a breach of s.8 and excluded the evidence under s.24(2) of the *Charter*. On appeal, the Supreme Court of Canada examined whether the driver (Belnavis) and passenger (Lawrence) had established a reasonable expectation of privacy in the vehicle.

With respect to the driver, the Crown conceded that the driver, who had the permission of the owner to be driving, had a reasonable expectation of privacy and "could advance a claim that her s.8 Charter rights were violated by the police". With respect to the passenger, the majority of the Court found that she could not demonstrate on a balance of probabilities that her privacy with respect to the vehicle or goods was violated:

> [T]he question as to whether a passenger will have a reasonable expectation of privacy in a vehicle will depend upon the totality of the circumstances. All of the relevant facts surrounding a passenger's presence in the vehicle will have to be considered in order to determine whether the passenger had a reasonable expectation of privacy. In this case, although [the passenger] was present at the time of the search, there are few other factors which would suggest she had an expectation of privacy in the vehicle. First, her connection to the vehicle was extremely tenuous. She did not own the vehicle, she was merely a passenger in a car driven by a friend of the owner of the vehicle. There was no evidence that she had any control over the vehicle, nor that she had used it in the past or had any relationship with the owner or driver which would establish some special access to or privilege in regard to the vehicle. [The passenger] did not demonstrate any ability to regulate access to the vehicle. Finally, there was no evidence that she had a subjective expectation of privacy in the vehicle.

PRIVACY ZONES

There are essentially three privacy zones encompassed by s.8 of the *Charter*[10]:

- **personal**
- **spatial**
- **informational**

Personal

Personal privacy zones involve the expectation of privacy in the bodily integrity of a person. The more serious an affront to human dignity the greater the

[6] R. v. Briggs (2001) Docket:C34813 (Ont.C.A.)
[7] R. v. Simmons [1988] 2 S.C.R. 495.
[8] R. v. Higgins & Beare (1988) 45 C.C.C. (3d) 57 (S.C.C.)
[9] R. v. Edwards (1996) 1 S.C.R. 128 (S.C.C.)
[10] R. v. Dyment [1988] 2 S.C.R. 417 per La Forest.

privacy interest. When the search or seizure "relates to the body, rather than the home, for example, the standard [warranting state intrusion] is even higher than usual[11]". The more invasive the search, such as a body cavity search, the greater the assault on a person's dignity[12], thus the greater the justification required. Personal searches may vary in degree of intrusiveness:

- frisk or pat down searches
- strip or skin searches
- body cavity searches
- bodily substance searches (biological samples/body tissue)

However, a person's reasonable expectation of privacy relative to their person will be assessed by the context. In *R. v. Briggs* (2001) Docket:C34813 (Ont.C.A.) Weiller J.A. for the Ontario Court of Appeal wrote:

> The extent to which state intrusion with bodily integrity will be tolerated under the Charter is linked to the reasonable expectation of privacy that an individual has. There is a significant difference in the reasonable expectation of privacy and, hence, the protection from interference with bodily integrity afforded to a person who is a suspect but has not been charged, a person who has been arrested and charged, a person who has been convicted, and a person who is subject to a custodial sentence. … A person who has been convicted … no longer has the benefit of the presumption of innocence. Persons convicted of serious crimes may be subject to sentences of incarceration in prison or in jail. Such persons are subjected to strip searches, body cavity searches and constant supervision.
>
> Human dignity is closely aligned with an individual's freedom of choice. A person convicted of a crime has a lesser expectation of privacy not because that person's worth as a human being is less, but because the person's right to make choices about his or her life is curtailed.

Spatial

Spatial, territorial, or geographical privacy zones involve a person's expectation of privacy in a place or surroundings such as a home, vehicle, or business. Like personal privacy zones, an arrest significantly reduces the expectation of privacy and the search of a motor vehicle, for example, is less an affront to a person's liberty, dignity, and bodily integrity than a minimally intrusive frisk search of a person authorized incidental to arrest[13].

- The public has a reasonable expectation of privacy within the sanctity of their **dwelling house**, whether it is an apartment unit, a detached home, or a hotel room[14]. The principle that "a man's home is his castle" is a bulwark for the protection of the individual and the sanctity of the home affords the individual a measure of privacy and tranquility against the state[15]. There is no place where persons can have a greater expectation of privacy than within their dwelling house and the unauthorized presence of agents of the state in a home is the ultimate invasion of privacy[16]. Thus, when the object of an unreasonable search is a dwelling house, any violation of the *Charter* will be rendered all the more serious[17]. As stated by Carthy J.A. in *R. v. Sutherland* (2000) 150 C.C.C. (3d) 231 (Ont.C.A.) at p. 239:

  > A search of a dwelling house must be approached with the degree of responsibility appropriate to an invasion of a place where the highest degree of privacy is expected.

  The "reasonable expectation of privacy includes the expectation that their personal conversations carried on in a "normal" tone of voice will not be eavesdropped upon by agents of the state[18]. Similarly, persons have a reasonable expectation of privacy in the approach to their home[19]. However, there will be occasions where the principle of inviolability of the home will yield to the legitimate requirements of law enforcement.

- A person may have a reasonable expectation of privacy in a **premise other than a dwelling house** such as a business. For example, the area of a business establishment open to the public would not be protected by s.8 of the *Charter* during regular business hours. A business "that is open to the public with an implied invitation to all members of the public to enter has no reasonable expectation of privacy from having a police officer enter the area of the premises to which the public are impliedly

[11] R. v. Dyment [1988] 2 S.C.R. 417 per La Forest at para.35.
[12] R. v. Debot [1989] 2 S.C.R. 1140 per Lamer J.
[13] Caslake v. the Queen [1998] 1 S.C.R. 51 per Bastarache J.
[14] R. v. Love (1995) 102 C.C.C. (3d) 393 (Alta. C.A.)
[15] R. v. Silveira [1995] 2 S.C.R. 297 per La Forest at para.41.
[16] R. v. Silveira [1995] 2 S.C.R. 297 per Cory J. at para. 140 and 148.
[17] R. v. Lamy (1993) 80 C.C.C. (3d) 558 (Man.C.A.) at p.570.
[18] R. v. Sandhu (1993) 82 C.C.C. (3d) 236 (B.C.C.A.)
[19] R. v. Evans (1996) 104 C.C.C (3d) 23 (S.C.C.)

invited"[20]. However, private or non-public areas such as an office in the back of the same establishment would be afforded some protection under the *Charter*[21] .

- An individual driving a **vehicle** on a public roadway, although having a reasonable expectation of privacy, has a reduced expectation of privacy in relation to a dwelling house or office[22]. Operating a vehicle is a highly licensed, regulated, and inspected activity, vehicles operate on public roadways, vehicles are parked and are serviced in public places, and vehicle interiors are highly visible. The driver of a vehicle, who either is the owner or has the permission of the owner to drive it, has a reasonable expectation of privacy with respect to the vehicle and its contents. A passenger may or may not have a reasonable expectation of privacy in a vehicle, depending on the relevant facts surrounding their presence in the vehicle[23].

Informational

Informational privacy zones involve the expectation of privacy in retained personal information (provided in confidence). Its use is restricted to the purpose for which it was divulged. For example, a person who provides personal information to a physician for medical purposes may have a privacy interest in that information. The personal medical information may not necessarily be freely provided to the police by staff. Similarly, where the police unreasonably seize hair and blood samples, the accused maintains a privacy interest in the information pertaining to these bodily samples[24]. In considering whether a person has a reasonable expectation of privacy in information, the following factors must be assessed in balancing societal interests in protecting individual dignity, integrity, and autonomy with the government's interest in advancing its goals, notably those of effective law enforcement[25]:

- the nature of the information itself,
- the nature of the relationship between the party releasing the information and the party claiming its confidentiality,
- the place where the information was obtained,
- the manner in which the information was obtained, and
- the seriousness of the crime being investigated.

In *R. v. Dorfer* (1996) 104 C.C.C. (3d) 528 (B.C.C.A.), police, hoping to acquire DNA evidence from the accused (who was a prisoner), obtained information from prison officials as to the time and place where the accused would have dental treatment. The Court found the "presence of a patient is information classified as "neutral"" and providing such information would not result in a s.8 violation:

> Divulging such information does not, by itself, breach a common law duty of confidentiality to a patient. Such information is not of such personal nature that a doctor or dentist must refuse to disclose it upon being questioned by a police officer in a criminal investigation. Thus, even in a non-prison setting there can be no reasonable expectation of privacy in respect to such information.

In *R. v. Plant* [1993] 3 S.C.R. 281, police received an anonymous tip of a marihuana grow operation being operated at a Calgary address. Police, after confirming the address, conducted a computer query of the electrical consumption records of the suspect residence on a computer located at the police office that was linked to the utility company. Police used this information to support an application for a search warrant. In finding that the police search of the electrical consumption information did not infringe the accused's right to privacy, the majority held:

> Overall, I have concluded from the nature of the information, the relationship between the appellant and the Commission, the place and manner of the search and the seriousness of the offence under investigation, that the appellant cannot be said to have held a reasonable expectation of privacy in relation to the computerized electricity records which outweighs the state interest in enforcing the laws relating to narcotics offences. As such, the appellant has failed to bring this search within the parameters of s. 8 of the Charter. This information was, therefore, available to the police to support the application for a search warrant.

[20] R. v. Fitt (1995) 96 C.C.C. (3d) 341 affirmed (1996) 103 C.C.C. (3d) 224 (S.C.C.), R. v. Spindloe 2001 SKCA 58.
[21] R. v. Kouyas (1994) 136 N.S.R. (2d) 195 (N.S.C.A.)
[22] R. v. Higgins and Higgins (1996) 111 C.C.C. (3d) 206 (Que.C.A.) at p.212.
[23] R v. Belnavis (1997), 118 C.C.C. (3d) 405 (S.C.C.)
[24] R. v. Borden (1994) 92 C.C.C. (3d) 404 (S.C.C.)
[25] R. v. Plant [1993] 3 S.C.R. 281 (S.C.C.)

COPY OF RECORDED SEXUAL ASSAULT NEED NOT BE PROVIDED TO ACCUSED

R. v. W.A.O., 2001 SKCA 64

The accused allegedly sexually assaulted the victim and while doing so recorded on videotape the assault. The videotape, seized by police, "captured the sexual acts underlying the charge of sexual assault". Crown refused to provide a copy of the tape to the accused (citing a fear the victim's personal privacy would be further compromised) but was prepared to permit a viewing of the tape by the accused, his counsel, and any defence expert at the Crown or defence counsel's office. The accused applied under s.24(1) of the *Charter* arguing he was entitled to a copy of the tape as the Crown had a duty of disclosure; allowing the accused to make full answer and defence to the charge he was facing (a right protected under s.7 of the Charter). In dismissing an appeal of the Court of Queen's Bench ruling that Crown need not provide a copy to the accused, the Saskatchewan Court of Appeal (recognizing the Crown disclosed the existence and content of the tape but chose not to provide a copy) found the Crown appropriately exercised its discretion in "protecting the privacy interests of the complainant, on the one hand, and of enabling the accused to examine, the tape on the other".

Complete case available at www.canlii.org.

OFFICER JUSTIFIED IN STRIKING SUSPECT TWICE WITH BATON

McNabb v. Regina (City) Police, 2001 SKQB 355

After a short vehicle pursuit, the plaintiff, who was the driver, jumped from his vehicle and began running down an alley. A police officer gave chase while carrying his police baton. A confrontation occurred and the plaintiff claimed he was struck approximately 31 times by the officer with his baton; 6 times prior to curling into the fetal position, 10 times while in this position, and 15 times after being handcuffed. The defendant officer testified that he attempted to strike the plaintiff's legs with the baton but the plaintiff fell and the officer slipped past him on the wet ground. After the plaintiff rose from the ground he advanced on the officer, who instructed the plaintiff to remain on the ground. The plaintiff did not comply with the officer and the officer delivered a baton strike to the plaintiff's torso. A second blow that followed struck the plaintiff on the head. The officer stated that he never intended to strike the plaintiff's head and attributed the strike to the muddy terrain in the alley and the darkness of the area. The plaintiff fell to the ground and was arrested by the officer for impaired driving, dangerous driving and suspicion the vehicle may have been stolen. The judge found the plaintiff not to be a credible witness and accepted the evidence of the officer. A police expert testified he "had no concerns about the use of force in the manner described". Barclay J. of the Saskatchewan Court of Queen's Bench recognized that "a peace officer having the right to use force must use it reasonably and not negligently or else be liable for all damages for the negligence caused" and dismissed the plaintiff's lawsuit. In this case the Court "found that [the officer] … was justified in arresting [the plaintiff] and that he used reasonable force".

DETENTION LAWFUL: ODOUR SEARCH REASONABLE

R. v. Brown, 2001 SKQB 382

A police officer was at his residence when he heard a loud noise and became suspicious because there had been many break and enters in the town. After leaving his residence, the officer stopped the only vehicle in the area which happened to be a van driven by a female and occupied by the accused passenger. While asking the driver if she had heard anything, the officer detected a strong odour of marihuana. Although denying possessing any drugs, the driver permitted the officer to search the van , which he did, with a flashlight. The officer went to the passenger side of the vehicle where he noted the odour of marihuana intensified. The officer requested the accused to exit the vehicle and to search her pockets. The accused appeared nervous and the officer observed aluminum paper in her lower right leg pocket of her army pants.

In dismissing the accused's argument that she had been arbitrarily detained, the Court stated, at para.9:

> Here the detention of the vehicle was in the course of an investigation. The undisputed evidence discloses that there had been a series of break-ins in the town… The incident occurred at 1:00 a.m. on Tuesday after [the officer] heard loud bangs. Neither the driver nor the van were familiar to [the officer] and it was the only vehicle in the area. In this case [the officer] did not randomly stop the van. He deliberately stopped it as he was investigating a potential break-in.

And further, at para.12:

> It is critical to underscore that a police officer who stops a vehicle based on a reasonable suspicion is not arbitrarily detaining a vehicle.

In finding the detention lawful, the Court addressed the legality of the arrest with respect to the sufficiency of the odour of marihuana providing reasonable grounds upon which to justify the arrest. In this case, the "strong smell of drugs gave [the officer] reasonable grounds to search the van, the operator and, had he wished to do so, the passenger". The fact that the search preceded the arrest was of no consequence because "the decision to defer the formal arrest until the results of the search were known did not affect the reasonableness to the search itself". The Court dismissed the accused's appeal and the conviction for possession of cannabis resin stood.

DRUG GROWERS SENTENCE INCREASED FROM CONDITIONAL SENTENCE TO INCARCERATION

R. Tran, 2001 BCCA 503

The accused was convicted of cultivation and possession of marihuana for the purpose of trafficking and given a conditional sentence of two years less a day. Police found 3,900 marihuana clones and 45 mother plants in a townhouse unit in which the accused was a tenant and which was described as "a sophisticated indoor marihuana growing operation known as a clone factory". The accused was arrested leaving the townhouse and entering a vehicle containing US$59,000 and CDN$22,000. The accused had also been convicted six months before this arrest for cultivation of marihuana. The accused was sentenced to 30 days in jail and received a $3,000 fine for this earlier offence.

In granting the Crown's appeal, and imposing a custodial sentence of 2 years less a day, the Court weighed the favourable circumstances of the accused (married, employed, children, overcoming cocaine abuse) with the aggravating factors.

> …this was a second offence. The [accused] was involved as a principal in a very profitable illegal business. Sentences can be viewed as a cost of doing business and lenient sentences provide little deterrent compared to the profit potential. As well as the profit potential these operations create other risks including the risks of fire hazards and violence through the involvement of organized crime…

The BCCA found the "trial judge failed to give adequate weight to the factor of general deterrence in the sentence he imposed for a second offence by a principle participant".

Complete case available at www.courts.gov.bc.ca.

Note-able Quote

"Police officers have difficult duties to perform and must often make quick decisions but if the society in which we live is to maintain its peace and tranquility, there will be occasions when innocent citizens will be put to some trouble and inconvenience by the actions of police officers acting in good faith. This is one of the small prices that we must pay for our freedom….There are, of course, occasions when police officers exceed their authority and arrogate themselves powers and privileges which legally they do not have. In those situations such officers must be dealt with according to law[26]*".* Sask.Crt.Q.B. Justice Johnson

FEEDBACK WANTED

For comments on this newsletter contact
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Past issues available online at www.jibc.bc.ca

[26] Carr v. Forbes et al. (1980) 7 Sask. R. 123 (Q.B.) at p.125.