POLICE ACADEMY
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JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

PROTECTIVE SEARCH VALID: OFFICERS POSSESSED A REASONABLE SUSPICION

R. v. Wade,
(2001) Docket:C36714 (OntCA)

The Ontario Court of Appeal recently dismissed, in part, the conviction appeal of the accused for a serious offence involving a firearm. Police had received a detailed, compelling, and current tip from a complainant who had identified himself by name, address, and phone number. There were sufficient similarities between the scene the officers found and the scene as described by the complainant despite a dissimilarity in clothing described by the tipster; the objective factors were sufficient to constitute a reasonable suspicion (articulable cause) that the accused had committed a serious crime involving a firearm. While there were not sufficient grounds to arrest, the officer's belief did transcend "a mere intuition or hunch based only on subjective factors" and it was the discovery of a firearm from the pat down search conducted that subsequently led to the arrest.

Complete case available at www.ontariocourts.on.ca.

BICYCLE HELMET LAW NOT DISCRIMINATORY

R. v. Warman, 2001 BCSC 1771

The British Columbia Supreme Court dismissed the appeal of an accused who had been convicted of not wearing a helmet while riding a bicycle. The accused argued the provision of the *Motor Vehicle Act* (s.184) requiring a bicycle rider to wear a protective helmet violated his right of free choice and was discriminatory because certain groups were exempted from complying with the section based on their religious beliefs. In recognizing that the law infringed on the accused's free choice, the Court concluded that the public interest occasionally must place constraints on this freedom; in this case "society's need to promote the welfare and well being of its citizens". Furthermore, although there is an exemption in the legislation permitting a rider to wear a turban instead of a helmet, the accused failed to establish that the helmet law discriminated against his religious or other rights. As the Court noted:

> Merely because exemptions from the application of legislation for reasons such as religion result in people being treated differently, does not automatically lead to the conclusion suggested…that those who fail to come within the exemption are being discriminated against. Although most legislation is of general application, some legislation does for specific reasons occasionally contain exemptions for certain groups. I conclude that such exemptions cannot lead to a person falling outside the exempt group successfully arguing that the exemption discriminates against him or her.

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

NO MAGIC FORMULA IN PROVIDING RIGHT TO COUNSEL

R. v. McKenzie, 2001 ABCA 304

The accused was interviewed by a polygraph operator to determine whether he was responsible for the killing of a missing 12 year old girl. The accused had agreed to submit to a polygraph interview and conceded that he was neither arrested nor detained during the pre-interview process. The accused was repeatedly told that he did not have to speak to the police, did not need to say anything without first speaking to a lawyer, and that the police would refrain from questioning him should he chose to speak with counsel. During the interview the accused admitted he had not been completely truthful and requested to speak with a lawyer. The accused was provided with an opportunity but was unable to contact counsel. The accused left for his bank to attend to

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some business; later returning to the police detachment where he was interviewed and admitted killing the young girl by running over her while intoxicated, burning her body, and throwing the remains off a bridge. At this point the accused was arrested for murder. The accused was reminded of his *Charter* rights and the interview continued. The accused argued that his pre-arrest statements were inadmissible because the police failed to provide the additional information component mandated in *R. v. Prosper* (1994) 92 CCC (3d) 353 (SCC). In *Prosper*, the Supreme Court of Canada held that where a person has asserted their right to counsel and has been reasonably diligent in exercising it, the police are obligated to inform the person of their right to a reasonable opportunity to contact counsel and that the police must hold off from eliciting evidence, pending the exercise of that right. This additional informational requirement ensures that the person properly understands what the rights are that they are relinquishing.

For the purpose of this case, the Alberta Court of Appeal assumed, without deciding, that the accused was both detained during the pre-arrest interview, had asserted his right, and was reasonably diligent in exercising it. The Court found that the police on at least three occasions indicated they would hold off questioning if the accused wished to call a lawyer. The accused argued the choice of words used by the police did not sufficiently satisfy this informational component. For example, the police indicated they "will" hold off questioning while the accused contended they "must" hold off questioning. In rejecting the accused's appeal, the Court found "no magic formula need be spoken" but the message must be clear. In this case, the police complied with the *Prosper* requirements in both "spirit and in substance".

Editor's Note: In British Columbia, the *Charter* card issued to police officers by the Attorney General contains the additional informational requirement, addressing the issues identified in *Prosper*. The selected wording is as follows:

> You have the right to a reasonable opportunity to contact counsel. I am obliged not to take a statement from you or to ask you to participate in any process which could provide incriminating evidence until you are certain about whether you wish to exercise that right.
> Do you understand?
> What do you wish to do?

RIGHT TO COUNSEL: UNDERSTANDING YOUR DUTIES

Part 1 of 2

Sgt. Mike Novakowski

The right to counsel is designed to ensure that persons arrested or detained are treated fairly in the criminal process. A detainee or arrestee is placed in a position of disadvantage relative to the state authorities and may be at risk of incriminating themselves. To remedy this disadvantage, the person is entitled to speak to counsel at the outset of an arrest or detention so they may obtain appropriate advice to make informed choices. One of the main functions of a lawyer at the early stage of detention or arrest is to confirm the existence of the right to remain silent and advise the person about how to exercise that right[1]. This includes the opportunity to receive instruction from a lawyer in order that the detainee may make a rational, informed choice about what to say or not to say to the police.

It is important to understand that the right to counsel does not arise from police investigation or questioning in the absence of detention[2], but arises from the fact of detention or arrest[3]. If there is no detention or arrest, there is no requirement to advise a person of their rights under s.10 of the *Charter*[4]. Consequently, the right to counsel **does not** extend to pre-detention investigations[5] such as the mere asking of questions at the start of an investigation from people who might later turn out to be involved in criminal acts[6]. In fact, a police officer is entitled to question any person from whom they believe useful information may be obtained. However, the police are not, as a general rule, entitled

[1] R. v. Manninen [1987] 1 S.C.R. 1233 (S.C.C.), R. v. Hebert [1990] 2 S.C.R. 151 (S.C.C.)
[2] R. v. Evans [1991] 1 S.C.R. 869 (S.C.C.) per Stevenson J.
[3] R. v. Prosper [1994] 3 S.C.R. 236 (S.C.C.), R. v. Debot [1989] 2 S.C.R. 1140 (S.C.C.), R. v. M.C. [1998] B.C.J. No.1582 (B.C.S.C.) at para.53, R. v. Keats (1987) 39 C.C.C. (3d) 358 (Nfld.C.A.) at p.366, R. v. Cho 2000 BCCA 658 at para. 45, R. v. Williams (1995) 98 C.C.C. (3d) 176 B.C.C.A. at p.193, R. v. Esposito (1985) 24 C.C.C. (3d) 88 (Ont. C.A.) appeal to S.C.C. refused (1986) at p. 97.
[4] R. v. Yorke (1990) 54 C.C.C. (3d) 321 (Ont.C.A.) at p.329, R. v. Esposito (1985) 24 C.C.C. (3d) 88 (Ont.C.A.) at p.97 leave to appeal to S.C.C. refused., R. v. MacDonald (1988) 41 C.C.C. (3d) 75 (N.S.C.A.) at p.78., R. v. MacLean (1987) 36 C.C.C. (3d) 127 (N.S.C.A.) at p.133, R. v. Hanneson (1989) 88 C.C.C. (3d) 467 (Ont. C.A.) at p. 472.
[5] R. v. Hebert [1990] 2 S.C.R. 151 (S.C.C.)
[6] R. v. Kay (1990) 53 C.C.C. (3d) 500 (B.C.C.A.) at p.506, R. v. D.E.M. (2001) 156 C.C.C. (3d) 239 (Man.C.A.).

to compel the person to answer nor forcibly detain the person for questioning[7].

Section 10 of the *Charter* is divided into two corresponding duties:

1. **informational duties** (the right to be informed promptly of the reason for arrest or detention and the right to be informed of the right to retain and instruct counsel without delay)

2. **implementational duties**[8] (the right to retain and instruct counsel without delay). These are the procedural aspects or duties imposed on the police to ensure that a person may exercise their constitutional right to counsel[9] .

INFORMATIONAL DUTIES

Duty to Advise

Section 10 requires the police fulfil two constitutional informational duties. Section 10(a) of the *Charter* requires the officer to inform the person of the reason for the detention or arrest and s.10(b) imposes an onus on the police to inform the person of their right to counsel. These constitutional rights are guaranteed to every person under arrest or detention (regardless of whether the person is obnoxious or agreeable; belligerent or passive; uncooperative or cooperative[10]).

Section 10(a)

Section 10(a) has a dual rationale underlying the right to be promptly advised of the reasons for detention or arrest. First, the right to be informed of the true grounds for detention or arrest is firmly rooted in the common law requiring the detainee be informed in sufficient detail so that they know in substance the reason why it is claimed that the restraint on their liberty should be imposed. A person is not obliged to submit to a detention or arrest unless one knows the reasons for it. The second rationale is its adjunct to the right to counsel conferred by s.10(b)[11]. The purpose of this information is to advise the person of the risk or jeopardy caused by the arrest or detention. A person can only make an appropriate decision as to whether or not they should contact counsel, and if the decision is to contact counsel, to obtain meaningful advice by advising counsel as to the extent of their jeopardy[12]. Therefore, the right to retain and instruct counsel is undermined if the person does not have sufficient information to assess the extent of their jeopardy[13].

In determining whether there has been a breach of s.10(a), the court will consider the substance of what the person can reasonably be supposed to understand rather than the formalism of the precise words used. The emphasis will be on the reality of the total situation as it impacts on the understanding of the person, not the technical detail, precise charge, or whether the person was aware of all the factual details of the case[14]. Thus, the proper test in finding a s.10(b) violation linked to s.10(a) is whether what the person was told, viewed reasonably in all the circumstances, undermined their right to counsel[15].

Section 10(b)

Section 10(b) encompasses two rights[16]:

- **the right on arrest or detention to retain and instruct counsel without delay,** and
- **the right to be informed of that right**

The purpose of the informational component of s.10(b) is to enable a person to make an informed choice about whether to exercise the right to counsel and to exercise other rights protected by the *Charter* such as the right to silence[17]. The detainee or arrestee has the right to be **properly informed** (including clear communication[18]) and the responsibility for conveying the advice in comprehensible terms rests with the police effecting the detention or arrest[19]. Simply stated, the person has the right of being informed in

[7] R. v. Moran (1987) 36 C.C.C. (3d) 225 (Ont.C.A.) at p.258.
[8] See next issue for part 2 where the implementational duties of the police are examined.
[9] R. v. Logan et al (1988) 46 C.C.C. (3d) 354 (Ont.C.A.) affirmed 58 C.C.C. (3d) 391 (S.C.C.)
[10] R. v. Young (1987) 38 C.C.C. (3d) 452 (N.B.C.A.) per Ryan J.A. at p.467.
[11] R. v. Evans (1991) 63 C.C.C. (3d) 289 (S.C.C.).
[12] R. v. Wong (1998) Docket:CA022945 B.C.C.A., R. v. Black [1989] 2 S.C.R. 138 (S.C.C.)
[13] R. v. Power (1993) 81 C.C.C. (3d) 1 (Nfld.C.A.) per Goodridge J.A. at p.6.
[14] R. v. Smith [1991] 1 S.C.R. 714 (S.C.C.), see also R. v. Ballantyne 1997 Docket:10929 B.C.S.C. at para.21.
[15] R. v. Evans [1991] 1 S.C.R. 869 (S.C.C.) per McLachlin J.
[16] R. v. Hollis (1992) 76 C.C.C. (3d) 421 (B.C.C.A.) at p.431, R. v. McAvena (1987) 34 C.C.C. (3d) 460 (Sask.C.A.)
[17] R. v. Latimer [1997] 1 S.C.R. 217 (S.C.C.) at para.33.
[18] R. v. Hollis (1992) 76 C.C.C. (3d) 421 (B.C.C.A.) at p.431.
[19] R. v. Kennedy (1995) 103 C.C.C. (3d) 161 (Nfld.C.A.) at p.181

terms they understand[20]. For example, it would not be acceptable to a French speaking person to be advised of their rights in English if they did not understand English, or to tell a person of their rights in highly technical language. The exact language of the *Charter* need not be used as long as the person is clearly informed of every aspect of their right to counsel[21].

Ordinarily the person will acknowledge they understand their rights that have been clearly communicated to them by the police and it can be inferred from the circumstances that the person understands what they have been told[22]. The question is not whether the message communicated by the police was comprehended but whether it was comprehensible[23]. The police are not required to assure themselves the detainee fully understands s.10(b)[24]. The courts recognize that the circumstances of an arrest are frequently highly charged and do not readily lend themselves to a fine-tuned, objective analysis by the police of the extent of a person's knowledge of their rights[25].

There is no duty on the police to probe into the person's degree of understanding or comprehension **unless** there are special circumstances such as mental impairment[26] or language difficulty, or if words or conduct cause a reasonable inference that the person did not understand.[27] Failure to acknowledge explicitly that they understand their right or failed to request an opportunity to exercise their rights does not necessarily constitute a violation of the right to counsel[28]. In many circumstances, a question as to whether the person understands the right ends the officer's obligation[29]. In the absence of evidence to suggest the contrary, a constitutionally sufficient understanding of the right to counsel will be inferred from a positive response to the question "do you understand?"[30]. Where the person chooses not to retain and instruct counsel then speaks to police, the statement obtained is not inconsistent with the *Charter*[31].

Conversely, where there is a positive indication that a person does not understand their right to counsel the police cannot rely simply on the mechanical recitation of the right to counsel in order to discharge their responsibilities under s.10(b)[32]. If there are indications that the person has not sufficiently understood or appreciated their right to counsel when it has been conveyed to them, the police duty to inform will entail such steps as are necessary to facilitate adequate comprehension[33]. For example, in *R. v. Evans* (1991) 63 C.C.C. (3d) 289 (S.C.C.), the police, who were aware the accused was hampered by a mental deficiency bordering on retardation, should have taken special care to make sure he understood his right to counsel. In failing to make a reasonable effort in explaining to the accused his right to counsel, the police violated s.10(b) of the *Charter*.

In short, a person who does not understand their right to counsel cannot be expected to assert the right[34]. The police must take affirmative steps to facilitate understanding if confusion or lack of understanding exists[35]. In assessing whether a person appreciates the information provided, their oral responses and externally exhibited capacity to understand may be reasonably interpreted as coming from an individual who has appreciated the information given to them[36].

Language Barriers

Where a language barrier exists such that a person may require an interpreter to overcome an obvious difficulty with the English language, the failure of the police to provide an interpreter will result in a breach of the person's s.10(b) rights. If the person's knowledge of the English language does not permit sufficient comprehension of their rights, "special circumstances" arise requiring the officer to adequately inform the person in their native language through the assistance of a card, interpreter, or

[20] R. v. MacCormack (1988) 71 Nfld. & P.E.I. R. 347 (P.E.I. C.A.), R. v. Campbell (1989) 53 C.C.C. (3d) 93 (P.E.I. C.A.) at p. 94.
[21] R. v. Dubois (1990) 54 C.C.C. (3d) 166 (Que, C.A.) per Fish J.A.
[22] R. v. Evans [1991] 1 S.C.R. 869 (S.C.C.)
[23] R. v. Kennedy (1995) 103 C.C.C. (3d) 161 (Nfld.C.A.) at p.181
[24] R. v. Bartle [1994] 3 S.C.R. 173 (S.C.C.)
[25] R. v. Butler (1995) 104 C.C.C. (3d) 198 (B.C.C.A.) leave to appeal to Supreme Court of Canada refused 105 C.C.C. (3d) vi.
[26] See R. v. Johnny [1984] B.C.J. No. 749 (B.C.S.C.) where the court found a breach because he was not capable of understanding the information provided by police. The accused's vocabulary was assessed as that of a 6 year old, his reading comprehension a grade 4.2 level, and he was deficient in intellectual development from being totally deaf for 4 years. See also R. v. Evans [1991] 1 S.C.R. 869.
[27] R. v. Baig (1985) 20 C.C.C. (3d) 515 (Ont.C.A.) affirmed [1987] 2 S.C.R. 537 (S.C.C.), see also R. v. Kennedy (1995) 103 C.C.C. (3d) 161 (Nfld.C.A.) at p.182.
[28] R. v. Baig (1985) 20 C.C.C. (3d) 515 (Ont.C.A.) affirmed [1987] 2 S.C.R. 537 (S.C.C.)
[29] R. v. Anderson (1984) 10 C.C.C. (3d) 417 (Ont.C.A.) at p.422., R. v. Hollis (1992) 76 C.C.C. (3d) 421 (B.C.C.A.) at p.432.
[30] R. v. Hollis (1992) 76 C.C.C. (3d) 421 (B.C.C.A.) at p.433
[31] R. v. Anderson (1984) 10 C.C.C. (3d) 417 (Ont.C.A.) at p.422.
[32] R. v. Evans [1991] 1 S.C.R. 869 (S.C.C.), see also R. v. McAvena (1987) 34 C.C.C. (3d) 460 (Sask.C.A.), R. v. Mohl (1987) 34 C.C.C. (3d) 435 (Sask.C.A.) per Vanise J.A., R. v. Dubois (1990) 54 C.C.C. (3d) 166 (Que C.A.) per Fish J.A.)
[33] R. v. Kennedy (1995) 103 C.C.C. (3d) 161 (Nfld.C.A.) at p.181-2.
[34] R. v. Evans [1991] 1 S.C.R. 869 (S.C.C.).
[35] R. v. Burlingham [1995] 2 S.C.R. 206 (S.C.C.) per Iacobucci J.
[36] R. v. Kennedy (1995) 103 C.C.C. (3d) 161 (Nfld.C.A.) at p.183.

bilingual officer[37]. Failure to do so amounts to a violation of the police obligation to provide an adequate understanding of the right to counsel[38]. Although a reasonable time arranging interpreter services will be permitted, s.10(b) rights will be breached by the failure of police to advise an arrestee of their right to counsel 11 hours after it was apparent the person did not understand their rights when the rights were read in English[39]. For the deaf this may require sign language communication or written explanation of the right to counsel.

Legal Aid and Duty Counsel

In addition to advising detainees or their general right to counsel, the police must advise the person of the existence and availability of legal aid and duty counsel[40]. Therefore, as part of the informational component **the police have a duty to advise all arrested and detained persons of**:

- **basic information about access to Legal Aid.** "Legal aid" refers to an organized program paid for by the government providing free legal advice and counsel to an accused person (they must meet the prescribed financial criteria set by the provincial Legal Aid plan).

- **basic information about access to duty counsel.** "Duty counsel" refers to immediate, although temporary, free legal advice provided to persons detained or arrested irrespective of their financial status. Duty counsel is generally intended to provide assistance to those persons who cannot afford a lawyer or who do not know a lawyer, but is available to anyone on arrest or detention who requires immediate assistance. This advice "bridge[s] the gap between a detainee's initial contact with [police] and the time the detainee is able to retain counsel, either privately or through Legal Aid"[41]. In addition, duty counsel may also inform the unrepresented person about making an application for Legal Aid. Other important functions of duty counsel include representing the person on an application for remand or bail.

To fulfil this obligation, the informational duty need consist of no more than telling a detainee in plain language that the person will be provided with a telephone number should they wish to contact counsel right away[42]. The actual 1-800 number need not be provided as part of the informational warning[43], but will be required once the person asserts the right to contact duty counsel or legal aid.

Right to Be Informed of Privacy

Although it is not clear whether there is an informational duty as a requirement of the *Charter* to advise a detainee or arrestee that they have the right to contact counsel in private, the courts have recommended that it "may be wise to provide such warning"[44]. The *Charter* Warning issued by the Ministry of the Attorney General includes the words "in private". This will address any issues arising as to whether the person was aware of their right to consult counsel in private.

Standard *Charter* Warning

It is important that the standard, or customary, *Charter* warning given to a person respecting their right to counsel be as instructive and clear as possible[45]. To this end, the Ministry of Attorney General has developed a "*Charter*" card that standardizes and addresses various court decisions to ensure the proper information is communicated to the person. Although the card ensures all the informational duties of the police are fulfilled, occasions may arise where the mere recitation of the card will not suffice. In circumstances where a particular individual may not understand the information being communicated to them, the police must take additional steps to ensure the person comprehends their s.10(b) rights[46].

[37] R. v. Vanstaceghem (1987) 36 C.C.C. (3d) 142 (Ont.C.A.) at p.147-148.
[38] R. v. Lim (No.3) (1990) 1 C.R.R. (2d) 148 (Ont.H.C.).
[39] R. Tam (1995) 100 C.C.C. (3d) 196 (B.C.C.A.) at p.209.
[40] R. v. Bartle [1994] 3 S.C.R. 173 (S.C.C.), R. v. Brydges [1990] 1 S.C.R. 190 (S.C.C.) , R. v. Cobham [1994] 3 S.C.R. 360 (S.C.C.), R. v. Harper [1994] 3 S.C.R. 343 (S.C.C.), R. v. Pozniak [1994] 3 S.C.R. 310 (S.C.C.), R. v. Prosper [1994] 3 S.C.R. 236 (S.C.C.), R. v. Kennedy (1995) 103 C.C.C. (3d) 161 (Nfld.C.A.) at p.180.
[41] R. v. Russell (2000) 150 C.C.C. (3d) 243 (N.B.C.A.) at p. 251.
[42] R. v. Bartle [1994] 3 S.C.R. 173 (S.C.C.), R. v. Cobham [1994] 3 S.C.R. 360 (S.C.C.), R. v. Poudrier 1998 Docket CA023213 B.C.C.A.
[43] R. v. Ireland [1998] B.C.J. No. 2510 (B.C.S.C.).
[44] R. v. Butler (1995) 104 C.C.C. (3d) 198 (B.C.C.A.) leave to appeal to Supreme Court of Canada refused 105 C.C.C. (3d) vi., see also R. v. Jackson (1993) 86 C.C.C. (3d) 233 (Ont.C.A.).
[45] R. v. Bartle [1994] 3 S.C.R. 173 (S.C.C.).
[46] R. v. Bartle [1994] 3 S.C.R. 173 (S.C.C.).

Any time a person is arrested or detained it is recommended that the *Charter* warning be given to that person by reading it directly from the *Charter* card. This will ensure that the person is adequately advised of the required informational components of s.10(b). Additionally, a police officer may be required to advise the court the exact words used in informing the person of their right to counsel. If the officer can testify that they read the standard *Charter* warning, this practice will ensure accuracy and avoid any problems that may arise if the officer chooses to rely on their memory. If however, the informational component is insufficient and the person nonetheless contacts counsel, any argument of the efficacy of the warning is illusory because the objective of the warning has been satisfied[47].

Interrupted Charter Warning

The fact that a person is aware of the right to counsel does not necessarily preclude the obligation of the police under s.10(b) to advise that person of their right to counsel. The right to being informed is a clear, unqualified right notwithstanding the foreknowledge of the right to counsel[48]. A detainee may explicitly waive their right to be informed of counsel provided the circumstances reveal a reasonable basis for believing the detainee in fact knows and has averted to their rights and is aware of the means by which these rights can be exercised. For example, a person may interrupt the police when the police begin to read the rights and tell the police they need not continue. The fact a person merely indicates that they know their rights will not, by itself, provide a reasonable basis for believing that the detainee in fact fully understands the extent and means by which the right to counsel may be implemented. The police have an obligation to take reasonable steps to ensure the detainee is aware of all the information they have the right to receive. The simplest way to discharge this duty is to read the standard warning to every person[49].

Delay in Informing of Right to Counsel

The police are not obliged to read a person their s.10(b) rights the instant they are detained or arrested in all cases. The police are permitted some latitude in assessing or gaining control over a situation to determine whether a potentially dangerous situation exists[50]. Delay in the interests of legitimate self-protection is permissible because the police are not expected to risk their lives or safety[51]. This type of delay is concerned with officer safety and not with investigative convenience or efficiency. A delay in informing a person of their right to counsel may also arise in circumstances of urgency or necessity. It may be necessary to obtain information prior to advising the person of their right to counsel, which is important, rather than the need to restrict a person's movements by detention or arrest[52].

Circumstances justifying a delay in informing the person may include occasions where the person is not in a position to understand their right to counsel. For example, if a person was unconscious at the time of detention, the obligation to inform would not arise until the person was in a position to understand the information. The person must be in a position to understand the advice given to them before the obligation arises to give it[53].

Right to Be Re-Informed

Section 10(b) states that the right to counsel arises "on arrest or detention". This indicates a point in time, not a continuum[54]. Although the right to counsel continues after the initial instruction and retention, s.10(b) does not deal with a continuing right to be re-instructed (informed) before every occasion on which the police elicit a statement[55]. However, there may be occasions where there is a duty on the police to advise a person of their right to counsel on a second or a subsequent occasion. This additional right to be advised of the right to retain and instruct counsel may arise where:

- **new circumstances arise indicating that the person is a suspect for a different or unrelated offence than was the case at the time of the first warning[56]** (additional charges. This includes additional offences of the same nature[57]).

[47] R. v. Ouellette (1996) 111 *C.C.C.* (3d) 336 (N.B.*C.A.*) at p.339.
[48] R. v. Greene (1991) 62 *C.C.C.* (3d) 344 (Nfld.*C.A.*)
[49] R. v. Bartle [1994] 3 S.C.R. 173 (S.*C.C.*)
[50] R. v. Feeney [1997] 2 S.C.R. 13 (S.*C.C.*) L'Heueux-Dube, Gonthier, and McLachlin JJ.
[51] R. v. Debot [1989] 2 S.C.R. 1140 (S.*C.C.*) per Wilson J.
[52] R. v. Elshaw [1991] 3 S.C.R. 24 (S.*C.C.*) per Iacobucci J.
[53] R. v. MacDonald (1988) 41 *C.C.C.* (3d) 75 (N.S.*C.A.*) at p.80.
[54] R. v. Bouchard (1994) 94 *C.C.C.* (3d) 380 (N.B.*C.A.*) at p.382, R. v. McLean (1989) 50 *C.C.C.* (3d) 326 (Ont. *C.A.*).
[55] R. v. Logan (1988) 46 *C.C.C.* (3d) 354 (Ont.*C.A.*), R. v. M.C. [1998] B.C.J. No. 1582 (B.*C.S.C.*) at para. 53, R. v. McLean (1989) 50 *C.C.C.* (3d) 326 (Ont. *C.A.*), R. V. Purdon (1989) 52 *C.C.C.* (3d) 270 (Ont. *C.A.*) at p. 275, R. v. Cuff (1989) 49 *C.C.C.* (3d) 65 (Nfld. *C.A.*) at p. 71.
[56] R. v. Evans [1991] 1 S.C.R. 869 (S.*C.C.*) per MacLachlin at pp.892-93.
[57] R. v. Witts (1998) 124 *C.C.C.* (3d) 410 (Man.*C.A.*) at p.414.

- **new circumstances arise indicating that the person is a suspect for a significantly more serious offence than the offence contemplated at the time of the first warning**[58] (a charge is raised to a more serious charge-the extent of a person's jeopardy is increased)

This additional right to be informed of the right to counsel arises because the person's original decision as to whether to consult counsel may well be affected by the new or different situation and requires a reconsideration of the person's initial waiver. This protects the individual from police manipulation whereby the police, in hoping to question a detainee without counsel present, arrest a person on a relatively minor offence (where the presence of a lawyer may not be necessary) in order to question the person regarding a more serious offence. It may not be necessary that the police officer re-read the person their rights in a "rote-like manner" but may be sufficient to simply remind the person that the rights previously extended to them are still available with respect to the new offences[59]. In the course of an exploratory investigation, this does not require that the police reiterate the right to counsel every time the investigation touches on a different offence[60]. When new offences are mentioned during the course of an investigation, some opportunity will be permitted for the police to verify some of the information so as to determine if the statements should be taken seriously[61]. A restatement of the right to counsel is required only where there is a fundamental and discrete change in the purpose or nature of the investigation or the person's jeopardy changes[62] (a substantial change[63]).

Early Warning

Although s.10(b) does not require the police to inform the person being investigated of their right to instruct counsel in the absence of an arrest or detention, the section does not prohibit the police from providing such advice at the commencement of or during an investigation. The precise moment when a detention arises is no means easy to determine and a police officer may lean towards greater caution by ensuring that a person is aware of their rights when an investigation commences or during its course, even though no detention may yet have crystallized. In *R. v. Schmautz* (1988) 41 C.C.C. (3d) 449 (B.C.C.A.) appeal to S.C.C. affirmed [1990] 1 S.C.R. 398 (S.C.C.), Wallace J.A. stated:

> When one considers the nebulous nature of the circumstances which may in law constitute a detention or arrest, one can appreciate that an officer, acting out of an abundance of caution to ensure that an accused is fully aware of his rights, may choose to give the advice at the commencement of the investigation, thereby removing any doubt that the appellant is at all times fully aware of his right to instruct counsel.

SNIFF AT CAR DOOR NOT A SEARCH

R. v. Cormack, (2001) Docket:230/00 (OntSCJ)

A uniform police officer on general patrol was randomly stopping vehicles in an area populated by licensed establishments to determine if drivers had been drinking. As a consequence of this "blitz", the officer stopped the accused who subsequently failed a road side screening test. The accused later provided breathalyzer readings at the police station that were over the legal limit. At trial, the accused was acquitted because the judge found the accused's right under s.9 of the *Charter*, to be free from arbitrary detention, was violated by the random spot check and the violation was not saved by s.1. On appeal, the Ontario Supreme Court of Justice determined the trial judge erred in finding a *Charter* infringement and that the officer targeting drivers in an area with a high likelihood of impaired drivers was related to highway traffic concerns and therefore lawful.

The accused also argued that his right to be secure against unreasonable search and seizure had been violated since the officer was not entitled to 'sniff' for an odour of alcohol to further a criminal investigation while examining matters circumscribed to highway safety (a similar argument by analogy to police entering onto private property to sniff at one's door-R. v. Evans (1996) 104 C.C.C. (3d) 23 (S.C.C.)). In rejecting this argument, the Court stated, at para. 18:

[58] R. v. Evans [1991] 1 S.C.R. 869 (S.C.C.) per MacLachlin at pp.892-93.
[59] R. v. Witts (1998) 124 C.C.C. (3d) 410 (Man.C.A.) at p.414.
[60] R. v. Evans [1991] 1 S.C.R. 869 (S.C.C.).
[61] R. v. Whittle (1994) 92 C.C.C. (3d) 11 at p.35.
[62] R. v. Whittle (1994) 92 C.C.C. (3d) 11 at p.35.
[63] Paternak v. the Queen (1996) 110 C.C.C. (3d) 382 (S.C.C.).

> As is frequently the case with attempted analogies, this one does not work. It is a necessary and inevitable aspect of the investigation which police officers are permitted to undertake in furtherance of the authority given to them by section 216(1) of the *Highway Traffic Act* that they will be able to utilize their human senses and record observations consequent thereon. Whether it is smelling the odour of alcohol, seeing glassy eyes or a flushed face or hearing slurred speech, it is all part of the investigatory function which the police officer is entitled to carry out.

And further, at para.19:

> In my view it follows from that conclusion that the actions of police officers are not transformed from a non-search to a search merely because they are able to contemporaneously make sensory observations.

The accused's acquittal was set aside.

Note-able Quote

"[T]he citizen expects police officers to have the wisdom of Solomon, the courage of David, the strength of Sampson, the patience of Job, the leadership of Moses, the kindness of the good Samaritans, the strategical training of Alexander, the faith of Daniel, the diplomacy of Lincoln, the tolerance of the carpenter of Nazareth and finally an intimate knowledge of every branch of the natural, biological and social sciences. If [they] had all these [they] might be a good [police officer]." Professor August Vollmer.

SEARCH OF DETAINED DRIVER REASONABLE

R. v. Hewlin, 2001 NSCA 16

The police had information the accused was trafficking in narcotics. As a result, the police placed his residence under surveillance. In the early evening, police observed two vehicles depart the residence. Police stopped the accused's truck and the officer immediately recognized the accused from a past encounter. The officer's original intention was to further the purpose of the surveillance but he also knew the accused to be a suspended or prohibited driver. The officer asked for a driver's licence but the accused did not have any papers with him. The officer requested the accused exit his vehicle and accompany him back to the police car. The officer told the accused there would be a pat down search of his person. As a result, the accused removed from his pants pocket money and another object. The money was moved to his other hand, but the accused tossed the other object over a guard-rail and down an embankment near a ditch. The accused was released after the officer was satisfied the accused was licensed, but was told there may be consequences if the police find anything suspicious in the ditch. Police "secured" the area, called for a police service dog, and consequently recovered a small oblong container with 16 hits of LSD.

At trial, the Court found the detention of the accused lawful but the search unreasonable. The trial judge was of the opinion that the officer lacked objective evidence of suspicious or possible violent behaviour on the part of the accused. As a consequence, there were insufficient grounds to search the accused. On appeal, the Nova Scotia Court of Appeal found the trial judge erred in law in concluding that the search was unreasonable. At para. 5, the unanimous court held:

> [W]e find that the search of the respondent was reasonable. It was authorized by a common law power of search incident to a lawful detention or arrest. This law has been found to be reasonable, and the search was reasonable in the manner in which it was carried out. In the circumstances of this case, the trial judge erred by finding that the police officer needed independent grounds to perform a search incident to detention.

The appeal court remitted the case back to the Provincial Court for the entering of a conviction and the imposition of a sentence.

ABSENT DETENTION, NO RIGHT TO COUNSEL

USA v. Fong, 2001 BCCA 684

Canadian Customs Agents executed a search warrant at the accused's warehouse. It was alleged the accused routed shipments of garlic from China through his Vancouver business bound to California. The accused declared the garlic to be from Taiwan thereby avoiding a 377% duty imposed by the US on Garlic from China. The accused was subject to an extradition proceeding by US officials alleging he deprived American Customs of $2 million.

A Canadian Customs officer presented the accused with the search warrant and the search commenced.

After finding some documents, the officer approached the accused and cautioned him about statements but did not provide the accused with the standard right to counsel warning. The accused did not respond to any of the officer's questions. Later, the officer confronted the accused with a box of garlic labeled as a product of Taiwan and also documents showing the garlic came from China. The accused then made incriminating statements. The officer then asked the accused if he wished to provide a written statement; the accused stated he wanted to talk to a lawyer.

The central issue on appeal was whether the accused was constitutionally detained during the execution of the search warrant. If he was, he was deprived of his right to counsel as guaranteed by s.10 of the *Charter*. If not, his right to counsel was not triggered. The Customs officers testified they did not restrict the accused's freedom of movement in any way before or during the incriminating statement. On the other hand, the accused testified he felt he was constrained to stay in the warehouse as the five Customs officers conducted their search. The extradition judge found the accused was not detained within the meaning of s.10(b) of the *Charter* because the accused did not establish he reasonably believed he was under detention in the circumstances and noted the following points:

- during the search, agents occasionally requested the accused move and assist in opening a drawer and a safe
- at no point did Customs officers advise the accused he was free to leave nor that he was not free to leave nor indicate that he was being detained
- the doors were not blocked and the officers were all involved in searching the premises
- the accused acknowledged that none of the officers restricted his movements
- the accused never sought clarification as to his status with the officers

The accused appealed the extradition judge's decision to the BCCA arguing that the statement was obtained in violation of his rights and therefore should be excluded. Without this statement, it was argued, the committal order of extradition was invalid; insufficient grounds remained to justify the order. Although Donald J.A. writing for the unanimous Court of Appeal recognized the issue of detention was not an easy question and acknowledged he may have come to a different conclusion on the issue, he could not say the extradition judge was wrong. As a consequence, the extradition judge's finding was found to be reasonable and the appeal was dismissed.

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

NfldCA RULES PAT DOWN SEARCH DURING TRAFFIC STOP UNREASONABLE

R. v. Power, 2001 NFCA 50

Police officers stopped the accused for crossing over the center line of a highway. One of the officers approached the accused and requested to see his driver's licence, insurance, and proof of ownership for the vehicle. No alcohol, drugs, or weapons were visible nor was there any odour of alcohol or drugs at this point. The accused advised police the vehicle belonged to his mother, produced proof of her ownership and proof of insurance, but did not have his driver's licence. The police officer asked the accused to accompany him back to the police cruiser; to check on his identity and to determine whether there were any warrants. The accused asked if he was under arrest and was told he was not. Before entering the back seat of the police car, the officer informed him he would be searched for weapons. The accused said he had none and the officer conducted a pat down search. After feeling something hard and something soft, the officer requested the accused remove his jacket. The accused complied and the officer found a packet of marihuana and a set of scales in the lining of the jacket. The accused was arrested and advised of his right to counsel.

The accused was charged with possession of a controlled substance for the purpose of trafficking and was acquitted at trial. The trial judge found that there had been a breach of the accused's s.8 *Charter* right and possibly a s.10(a) breach. The judge concluded that the accused had not been told of the reason why he was detained and that the officer had decided to search the accused on the way to the police car; not because his presence in the police car was necessary. The evidence was thus excluded.

The Crown appealed the conviction arguing that as long as there was a lawful detention, the search was authorized by the common law power to search incident

to a lawful detention and no additional reasons were necessary to justify the search. Furthermore, the Crown alleged that there was an "implied acquiescence to the search". The unanimous Newfoundland Court of Appeal noted that the Crown was erroneously equating the common law power of search incident to arrest with the powers available on the mere detention of a suspect. The Court found the accused, although initially detained legally, had been subject to an unreasonable search. Gushue J.A. for the Court:

> [T]here was no reason to remove him from his vehicle or to place him in the police car, or, for that matter, to search him. The sole issue was the checking of whether the [accused] held a valid driver's permit, which information could have been obtained with the [accused] remaining in his own vehicle. There was no legitimate suspicion of any criminal activity on the part of the [accused] and thus the police officer had no statutory authority to arrest him, nor any grounds to obtain a warrant to carry out a search. Nor was there any suspicion he carried a weapon. Even the [accused's] omission to have on his person his driver's permit was remediable by production of the licence at a police station within 48 hours (s.49(2) *Highway Traffic Act*).
>
> While the [accused] did not object to the search, obviously because he thought he had no choice, he certainly gave no informed consent to it. It was, as stated, a warrantless search and, being so, the onus was on the Crown to establish that it was reasonable… It is clear that in this matter, the search cannot be said to have been incident to the detention and there were no circumstances which would have made the search…justifiable or reasonable. (references omitted)

And further, in rejecting the Crown's argument that the evidence should none-the-less be admitted under s.24(2) of the *Charter*:

> … one cannot help but feel that the stated reason for the search, namely to look for weapons, was little more than a ruse to permit the police officer to act on an unfounded suspicion that the [accused] was carrying drugs and/or drug paraphernalia. If such a course of action by police officers were allowed, there would never be any reason for a warrant to be obtained. A driver being stopped for the most minor of Highway Traffic Act infractions could be removed from his or her vehicle and searched. Obviously, the courts cannot sanction or condone such conduct. (emphasis added)

The Crown's appeal was dismissed and the acquittal upheld.

UNTESTED INFORMANT & OTHER CIRCUMSTANCES PROVIDE REASONABLE GROUNDS

R. v. Beal, 2001 MBQB 297

A Winnipeg police Sergeant received information from an informant that two males were selling cocaine from a suite for $100 a gram, mostly to the gay community. The first names of the suspects and descriptions (Arthur: Asian male, 25 years, slim, 5'10, dark hair and Patrick: white male, 25 years, slim, blonde hair), as well as the address of the apartment unit were provided. The information also reported that the two males delivered cocaine in a red BMW convertible with a Manitoba licence plate, which was also provided to police. The informant stated he had observed the males sell cocaine on only one occasion, which was within 24 hours of the informant providing the information. Police determined that the registered owner of the vehicle (Chin Hang Ng) resided at the suite address provided by the informant and the city telephone directory also indicated a listing for an Arthur Ng at the suite.

The Sergeant briefed other members of the department and several of them set out to conduct surveillance with respect to the information. The Sergeant and his partner went to the apartment building where they located the BMW and subsequently observed a female and a male (white with blonde hair) walk to and enter the vehicle. With the female driving, police followed the vehicle for a short distance where it stopped in front of another apartment building. The female driver left the vehicle, entered the apartment building, and returned within 3-5 minutes. As the vehicle departed, the Sergeant determined that the vehicle should be stopped and the occupants arrested; he instructed the other members of his surveillance team to participate. As a result, the vehicle was boxed in by the police surveillance team. The Sergeant proceeded to the driver's side, opened the door, commanded the female driver to exit, and arrested her. The Sergeant's partner went to the passenger's side, opened the door, pulled the accused from the vehicle, placed him on the ground, and handcuffed him. In the course of the accused's removal from the vehicle, a black bag came out and fell about 2 feet

from the accused and was seized by police. The fundamental issue at trial was whether the arrest was lawful and whether the seizure of the bag was incidental to arrest.

Validity of the Arrest

The Sergeant testified that he made the decision to arrest the accused based on the information he had and his extensive experience. As a consequence, the officer believed the vehicle was being used to deliver cocaine (an indictable offence) to an apartment. In assessing whether the officer had reasonable grounds, MacInnes J. of the Manitoba Court of Queen's Bench defined reasonable grounds in these terms:

> A peace officer who arrests without warrant must subjectively have reasonable and probable grounds on which to base the arrest and, in addition, those grounds must be justifiable from an objective point of view, i.e., a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable ground for the arrest.

In finding that the officer had reasonable grounds and the subsequent arrest lawful, the Court considered the following three criteria in assessing the information:

1. was the information compelling?
2. was the source credible?
3. was the information corroborated?

The Court found the information offered much detail; it named and described two sellers, it provided an exact address, it gave the description and licence number of the alleged courier vehicle, the price of cocaine, the market sold to, and the information was provided not by one who heard about the operation or through rumor, but by a person who had actually seen a sale by the named people in the suite within the preceding 24 hours. Although the informant was untested (which sometimes may be fatal), the police corroborated a number of facts; the registered owner of the vehicle (Ng) resided at the apartment, the telephone directory indicated Arthur Ng lived at the suite, and police attended at the apartment building observing the suspect vehicle parked there. Prior to the arrest the police observed a white male with blonde hair exit the apartment building and enter the vehicle, the vehicle was driven only a short distance from the apartment building within the gay community, and the police observed the vehicle drive in front of an apartment building, the driver exit, enter the apartment building, and return within minutes.

Since the arrest was based on reasonable grounds and lawful, the black bag and its contents which came out of the vehicle concurrent with the arrest was properly seized as an incident to arrest. Furthermore, the fact that the female resided in the apartment building in which the vehicle had driven to is of no consequence since "information learned after the arrest is irrelevant to a determination" of whether reasonable grounds existed.

CHANGING MIND AFTER CONSULTING COUNSEL OF NO CONSEQUENCE: REFUSAL COMPLETE

R. v. McKeen,
(2001) 151 CCC (3d) 449 (NSCA)

A police officer responding to a complaint of an impaired driver and a fight between family members arrived on scene to find the accused and another man standing near the driver's door of a van "arm locked" and involved in a confrontation. The accused was "notably intoxicated", upset, and yelling with slurred speech. The officer was told that the accused was drunk, had moved the van, and that the people were trying to prevent the accused from driving. The officer detained the accused who became physically and verbally abusive which necessitated handcuffing. As the officer led the accused to the police car, he provided a "quick *Charter* warning" from memory. The officer locked the accused in the rear of the police car for at least 20 minutes while he spoke to witnesses.

After completing the on site investigation and because the accused was "causing quite a stir" in the back seat, the officer drove a few hundred feet from the house, stopped on the roadside, and read the complete *Charter* warning from a card indicating the accused was under investigation for impaired driving and causing a disturbance. When asked if he understood, the accused pretended he did not understand English and spoke in German. The officer also advised the accused of his right to silence. When asked if he wished to contact a lawyer the accused would not acknowledge that he understood and kept speaking German. The officer read the right to counsel advice at least three times. Next, the officer read the breath demand and

explained the consequences of refusing. The accused refused, protesting he was not behind the wheel of any vehicle.

The accused was taken to the cells at the detachment and the officer assisted the accused in arranging telephone access to a lawyer. Following the call, the accused told the officer he changed his mind and now wished to provide a sample of breath. The officer explained to the accused that he had already accepted the refusal. The accused was convicted at trial of refusing to provide a breath sample and appealed his conviction in part on the basis that his s.10(b) *Charter* right to counsel without delay was violated; he was not advised of his right to counsel after the demand was made and he was not provided the opportunity to speak to counsel before his refusal was accepted.

In dismissing the accused's appeal, the majority (2:1) of the Nova Scotia Court of Appeal found the accused had been provided one brief and three full *Charter* warnings prior to the breathalyzer demand. The demand was directly related to the investigation that the officer told the accused was occurring and arose immediately following the officer's inquiries. The jeopardy facing the accused at the time the demand arose did not change significantly from that which the officer was initially investigating and thus did not trigger an additional duty upon the officer to further advise the accused of his right to counsel. In addition, the accused had at no time given any indication that he wished to exercise his right to counsel up to the point of refusal. Had the accused expressed such a desire, the police would have been required to provide the accused a reasonable opportunity to exercise the right and to cease eliciting a response from the accused to the breath demand until that opportunity had been provided. The absence of a telephone at the roadside where the demand was taking place was irrelevant. The accused "had chosen, of his own free will, to ignore repeated opportunities to consult counsel, and he had refused to take the breathalyzer test". The fact the officer later asked the accused at the detachment if he wanted to contact a lawyer[64] had nothing to do with the breath demand and "did not revive a right" that the accused had previously refused to exercise. The evidence of the refusal was admissible.

[64] The officer testified it was always his practice to ask an arrestee he brings to the detachment cells if they wished to contact a lawyer.

POLICE ENTITLED TO QUESTION WITNESS W/O ADVISING OF COUNSEL

R.v. D.E.M., (2001) 156 CCC (3d) 239 (ManCA)

The accused drove her car to attend a drinking party at her brother's and his then partner's residence. While at the party, the accused brought up the sexual assault of her brother's and his partner's three-year-old daughter by a man named Vallieres, which angered people at the party including the accused. The people at the party felt they should find Vallieres and scare him. The accused, in company her three co-accused, drove from the party to the rooming house where Vallieres resided. At the rooming house, Vallieres was located and severely assaulted. The accused and her companions then fled the rooming house.

Two police officers in the area stopped at a pay phone to speak with the accused who had been in the process of calling the police to report the assault. The accused described the condition of Vallieres and reported she had been present when he was beaten. The officers asked the accused to accompany then to Vallieres' rooming house. During the drive, the accused described the circumstances of the beating to the officers. When they arrived at the rooming house where the beating occurred, one officer remained with the accused while the second officer went into the rooming house. When this officer returned to the police car, the accused was again asked what happened but this time gave a different version of the events of the beating. At 7:13 am, the officer cautioned the accused that she may be charged with aggravated assault and told her not to say anything. Furthermore, she was told she was a material witness and that she would have to accompany the officers to the police station. Upon arrival at the police station she was placed in a locked interview room and told the officers that she "ain't saying nothing". At 8:30 am the accused was advised of her right to counsel and expressed a desire to contact counsel, however she was not given the opportunity to contact the lawyer of her choice. At 8:34 am she advised the officer that she did not want to talk about the matter.

The accused remained in the interview room until 4:44 pm at which time a second team of officers took over the interviewing process. The accused declined to talk "on the record" or provide a formal statement Approximately 20-30 minutes later the accused was permitted to leave the police station.

Nine days later, two different police officers now investigating the incident located the accused at a Legion hall (in a different city than the assault occurred) and asked her to accompany them to the local RCMP detachment. Initially the accused expressed reluctance to go but eventually did agree to accompany the officers. At no time did the officers tell the accused that she was or was not obligated to go with them for questioning. After interviewing her for approximately 47 minutes the accused asked if she needed a lawyer, at which time the interview was terminated and she was arrested and advised of her right to counsel under s.10(b) of the *Charter*, and provided the standard caution. She immediately requested to speak to her lawyer.

At her trial on the charges of aggravated assault and break and enter, the trial judge found the accused's rights during the first interview had been violated because police had ignored both her requests to remain silent and to contact legal counsel. All statements were ruled inadmissible as evidence. However, the trial judge found that the accused rights to counsel were not violated during the second interview. The officer had not detained the accused until she had been arrested. Prior to the arrest, the accused had been requested to accompany the officers and was regarded solely as a material witness. It was not until the police regarded her as a suspect (when her story changed yet another time) during this second interview that her s.10(b) rights were triggered. All statements made prior to the arrest were admissible.

The accused appealed to the Manitoba Court of Appeal arguing that the request by police to accompany them to the RCMP detachment must be examined against the backdrop of the earlier interview where the accused's rights were clearly violated. The accused submitted that she was "psychologically detained" because she perceived she was obligated to comply with all requests made by the police at the Legion; "the "demand or direction" to accompany the police was followed by her acquiescence because she reasonably believed she had no choice to do otherwise".

In dismissing the accused appeal, the Manitoba Court of Appeal noted that not every attendance of an individual at a police station will result in a detention. In this case, the accused was not considered a suspect until part way through the subsequent interview:

> It is unrealistic to expect the police to caution each person they interview in an attempt to obtain information about a crime. It is also unrealistic to expect the police to caution a witness each time they interview her, as long as she is still viewed as a witness and not a suspect.

The onus in proving a breach of their *Charter* rights lies with the accused, who in this case did not testify. There was no evidence of the accused's state of mind or her reasons for accompanying the police to the RCMP detachment from the Legion. Furthermore, the Court rejected the argument that because the accused was detained on the first occasion and subsequently released that the second contact amounted to an immediate detention:

> There is no concept in law of "once detained, always detained," which concept the [accused] invites this court to accept.

The statements during the final interview prior to the caution of the accused were admissible.

RECKLESSNESS INSUFFICIENT SUBSTITUTE FOR KNOWLEDGE OF PSP OFFENCE

R.v. Vinokurov, 2001 ABCA 113

The accused, who was the manager of a pawn shop, was convicted of 7 counts of possession of stolen property in receiving property from a customer who stole the items from a series of break and enters. The accused completed all the required paperwork respecting the property (pawnshop sheets forwarded to police), made inquiries with his mother (the owner of the pawnshop) to determine whether he should purchase the merchandise. and denied knowing the items were stolen. The customer had produced his birth certificate and Corrections Canada release card as identification to the accused.

The Alberta Court of Appeal (2:1) quashed the accused's convictions and ordered a new trial. To prove the offence of possession of stolen property, the

Crown has the burden of proving the accused knew the property was stolen. One such way of proving this *mens rea* component is by the doctrine of willful blindness because it is the equivalent of actual knowledge. In citing *R. v. Jorgensen*, [1995] 4 S.C.R. 55), the test for willful blindness was expressed as follows:

> A finding of willful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?

In willful blindness cases the person chooses to remain ignorant because they do not wish to know the truth. Recklessness, the standard the trial judge used, is a reasonable person standard not equivalent to actual knowledge and therefore is insufficient in satisfying the *mens rea* requirement. Recklessness presupposes knowledge and arises when a person persists in their conduct knowing that there is a risk of danger; they see the risk but take the chance. In imputing knowledge on the basis of recklessness and not willful blindness, the trial judge erred.

Complete case at www.albertacourts.ca.

OVERHEARD CONVERSATION BETWEEN LAWYER & CLIENT INADMISSIBLE

R.v.Hunter,
(2001) Docket:C30902 (OntCA)

The Ontario Court of Appeal ruled an overheard conversation by a passerby between the accused and his lawyer is inadmissible. The accused had been charged with attempted murder of a police officer, use of a firearm, aggravated assault, and possession of a prohibited weapon. It was alleged that the accused pulled out a gun and attempted to shoot an officer after police pursued him on foot following a disturbance outside a restaurant in Toronto. The accused ran down a narrow passageway, and when an officer shone his flashlight, he saw the accused, crouched on his knees pointing a gun at him. The officer heard a clicking noise, the gun did not fire, and the accused again fled until he was apprehended by an officer who applied a bear hug. The gun was recovered from the accused but no fingerprints were found on the gun.

The Crown called a witness who testified that he was walking past the accused and his lawyer in an open area on the day of the preliminary hearing and heard the accused say, "I had a gun, but I didn't point it". It was acknowledged that the witness only heard part of the conversation and could not give the context of the utterance. The accused denied having a gun or telling his lawyer he had one; the lawyer also denied the conversation. The defence alleged police brutality and the possible planting of evidence.

The accused was convicted at the end of his fourth trial on these charges. The accused appealed arguing the threshold test of reliability was not met because the meaning of the overheard conversation could not be determined without its context and furthermore its meaning is so speculative its prejudicial effect outweighs its tenuous probative value. In agreeing with the defence's position, the unanimous Ontario Court of Appeal found the context of spoken words can be critical to its meaning:

> Where an overheard utterance is known to have a verbal context, but that context is itself unknown, it may be impossible to know the meaning of the overheard words or otherwise conclude that those words represent a complete thought regardless of context. Even if the overheard words can be said to have any relevance, where their meaning is speculative and their probative value therefore tenuous yet their prejudicial effect substantial, the overheard words should be excluded.

The Court provided two examples of how the accused's words could have been taken out of context and would not constitute an admission:

- "I could say I had a gun, but I didn't point it, but I won't because it is not true".
- "What if the jury finds I had a gun but I didn't point it-is that aggravated assault?

The accused's conviction was set aside and a stay of proceedings was imposed because putting the accused on trial for a fifth time would constitute an abuse of process.

Editor's Note: In addition to the number of trials the accused was subject to, the Court used other factors in deciding whether a stay of proceedings was the appropriate remedy. Among these factors, the Court noted that without the overheard evidence there was little evidence to support the Crown's case. In particular, the Crown's case relied heavily on the evidence of the three plain-clothes officers involved.

The Court highlighted several points concerning the evidence of the police witnesses which were considered in imposing the stay of proceedings; the evidence included a chase of an armed man without calling for backup, the officer who was fired at did not worn the others of this, and the officer who finally approached and grabbed the accused did so without his gun drawn nor did he make any mention of seeing the gun in his notes.

Complete case available at www.ontariocourts.on.ca.

NON-DISCLOSURE OF INITIAL WARRANT REFUSAL NOT FATAL

R. v. Colbourne,
(2001) Docket:C33748 (OntCA)

The accused, in company his passenger friend, was driving his truck on a flat, dry two lane highway during ideal driving conditions when his truck suddenly veered into the oncoming lane from behind the vehicle he was tailgating, traveled over a gravel shoulder, across a ditch, became airborne, and struck a tree killing his passenger. The investigating officer attended the scene approximately ½ hour after the accident. The accused was receiving medical attention and the officer detected a strong odour of alcohol on the accused's breath as well as observing that the accused's face was red and flushed. The accused was transported by ambulance to the hospital where samples of his blood were taken with his consent for medical purposes; there was no police involvement in the taking of these samples.

The officer arrived at the hospital and was told by the attending physician that the accused was conscious and could provide a breath sample. The officer briefly spoke to the accused, confirmed his earlier observations concerning the consumption of alcohol, arrested the accused, and read him his right to counsel. The accused asked that his oxygen mask be removed and the attending physician told the officer he would have to stop questioning the accused because further medical treatment was necessary. An attempt to take a breath sample was aborted because the breathalyzer technician mistakenly believed it was not authorized under the *Criminal Code*. Aware the blood samples had been taken, the officer was directed by a supervisor to place a seal on one of the blood samples to preserve continuity should the police decide to seize the sample. The accused was allowed to leave the hospital with his wife. The officer later made two search warrant applications to seize the blood samples from the hospital. Two days after the accident, the officer made his first application but the warrant was refused. The officer used a pre-printed form and was unaware of the practice of attaching appendices setting out the reasonable grounds. The officer put his grounds for belief within the one-inch space on the preprinted form. The information sworn was destroyed or lost prior to disclosure and the officer could not recall exactly what it stated. The officer understood the warrant was refused because of the lack of detail in the information.

After speaking with a Crown lawyer and the JP who refused the warrant, the officer prepared a second information with more detail and the use of appendices. Although the officer intended to swear this new information before the JP who had refused the first application, the courthouse was closed and the officer swore the second information before a different JP without any reference to the initial refusal. The warrant was executed and the blood alcohol analysis along with an expert interpretation showed the accused's blood alcohol level at the time of the accident to be between 232 and 255 mg%.

The accused was convicted at trial of impaired driving causing death and appealed the conviction, among other grounds, on the issue that the officer failed to disclose to the second JP the initial refusal of the warrant. The Ontario Court of Appeal held that such a non-disclosure could invalidate a warrant, despite the existence of reasonable grounds, if it was made for some improper motive or was intended to mislead the JP. However, since the reasons for the non-disclosure were not the product of an improper motive or an attempt to mislead, the "question becomes whether the second [JP] acting judicially and having been advised of the prior refusal could have issued the warrant". In this case, the second information contained much more detail than the first and the disclosure of the initial refusal would not have precluded the issuance of the warrant by the second JP. Had the second information simply been a repeat of the first information, the initial refusal would have played a significant role in how the second JP exercised their discretion. Since the informations were very different, the appeal was dismissed.

Complete case available at www.ontariocourts.on.ca.

WARRANTLESS ENTRY TO SECURE SCENE REASONABLE

R. v. Castro, Stinchcombe, & Ferretti, 2001 BCCA 507

The three accused were convicted of drug offences as a result of a reverse sting operation known as Project Eye Spy. Police intercepted telephone calls between the accused suggesting they were organizing a drug deal at a hotel. Police set up surveillance on the hotel and observed two men who appeared to be keeping watch outside two rooms (room 309 and 310) registered to the accused Stinchcombe. At 11:30 pm the accused Castro and Ferretti, carrying a brown bag, arrived and entered room 309. About one hour later, Castro and Ferretti left the room without the brown bag and were arrested. Neither drugs nor large amounts of money were found on them. At 2:40 am another man, identified as Mostell, left the hotel room and was followed by police, but they subsequently lost contact with his vehicle. It was not known whether this man left with any drugs or money. Although they did not have a warrant, police decided to enter the two hotel rooms fearing the occupants may have been alerted by Mostell of the police presence and were either destroying the evidence or barricading themselves in the rooms. In room 309 police found two people and Stinchcombe asleep in room 310. Police obtained a search warrant and under the mattress in room 310 police found a kilogram of cocaine in a duct-taped package. Stinchcombe was arrested and the other two men provided evidence implicating the three accused.

Although the British Columbia Court of Appeal ordered a new trial on a disclosure issue, the Court rejected Stinchcombe's appeal that the drugs seized in the search of the two adjoining hotel rooms should be excluded because the initial entry to the rooms was made without warrant. At para. 47, Donald J.A. for the unanimous Court held:

> It is important to note that the entry team secured the scene but did not conduct a search. The search was postponed until later that morning when a warrant was issued. After a search the police found a kilogram of cocaine under the mattress…

And further, at para. 49:

> The trial judge found that the entry was necessary to preserve evidence in exigent circumstances and that the police action did not exceed the requirements of the situation as no search occurred until a warrant was issued. The drugs were found as a result of a search authorized by a warrant. There was a real risk that Mostell, who eluded the police, could have tipped off those in the rooms. In my view, therefore, the finding of exigent circumstances was supported by the evidence. I can see no reason to disagree with the trial judge's disposition of this issue.

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

Note-able Quote

"An angry person who curses a police officer will not be condemned by people generally. The attitude will be taken that such behaviour is understandable considering the circumstances. Even if a person being arrested strikes a police officer, onlookers would probably consider it a natural response to being arrested. On the other hand, if a police officer curses at someone or strikes an individual in any other situation except obvious self defence, it becomes an entirely different matter. [The officer's] uniform, [the officer's] gun, and the organization behind [the officer] provide certain advantages that [the officer] brings into any confrontation with others. Consequently, [the officer] is required to act with restraint[65]". Anne T. Romano

WEAPON ALERT

The switchblade lighter knife is spring-loaded and opens and closes with the touch of a button. The lighter is butane refillable and has an adjustable flame!

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

[65] "Transactional Analysis for Police Personnel" (1981) Anne T. Romano (M.A.), Charles C. Thomas Publisher