POLICE ACADEMY
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IN SERVICE:10-8

JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

ROADSIDE PHOTO OF TRAFFIC VIOLATOR REASONABLE

R. v. Multani, 2002 BCSC 68

A police officer pulled over a van for failing to stop at a yellow light contrary to the *Motor Vehicle Act (MVA)*. Following a request by the officer, the accused provided the vehicle's insurance but was unable to produce his driver's licence. After obtaining the driver's name, address and date of birth, the officer returned to his patrol car to get his Polaroid camera. The officer approached the accused, told the accused to look at him, and took a picture. The officer printed the driver's name and the violation ticket number on the bottom of the photo. The officer testified that people who have failed to produce driver's licences in the past have given false names and to properly identify drivers he carries a Polaroid camera to take a photo of the driver to keep with his notes. After the photograph was taken the officer learned the accused was a prohibited driver under the *MVA*. The photograph was not published or circulated. The accused was convicted at trial of prohibited driving and appealed to the Supreme Court of British Columbia arguing, among other grounds, that the trial judge erred in concluding the taking of the photograph did not violate the accused's right to be free from unreasonable search or seizure.

After reviewing numerous cases concerning the taking of photographs, the appeal Court found that the accused was not charged with an indictable offence and therefore the *Identification of Criminals Act* (ICA) did not justify the taking of the photograph. However, in recognizing that not every person investigated will be charged and that "proper identification evidence assists in identifying the innocent as well as the guilty", there was "no reason to infer from the [*ICA*], that parliament meant to abolish photographing of suspects as an investigative tool in summary conviction cases". In finding the taking of the photograph reasonable, Curtis J. held, at para. 23:

> When [the officer] observed [the accused] at the scene it was his duty to identify him properly, and in the course of doing so to make and record accurate evidence of identity.
>
> In the course of doing so, he could make notes of his observations, and he could have made a sketch in his notes had he chosen to do so. Generally, a photograph will provide evidence that is more reliable than notes or sketches. Because traffic enforcement officers had frequently experienced drivers unable to produce driver's licences, giving false names, [the officer] and others had adopted a practice of taking Polaroid pictures which they did not publish, but kept solely for the purpose of their own notes. As this case does not come within the ambit of the *Identification of Criminals Act*, I find it to be distinguishable from the cases to which that *Act* applies. In those circumstances, I find the reasoning of the B.C. Court of Appeal in the *R. v. Dilling* case is applicable. There has been no unreasonable search and seizure, and the photograph is properly admissible.

The appeal was dismissed.

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

STREET CHECK & PHOTO NOT A DETENTION

R. v. Acosta-Medina, 2002 BCCA 33

The accused appealed his conviction for trafficking in cocaine by arguing his s.10(b) right to counsel was violated. Police were engaged in an undercover operation designed to clean up a notorious drug trafficking area. Police made a buy from the accused who was subsequently checked by other officers on the pretext of an immigration inquiry. The officer who made the purchase drove by, confirmed the accused as the seller, and a Polaroid photograph was taken. No *Charter* warnings were given to the accused and he was then let go until the end of the operation. The accused argued police detained him when they did the drive by confirmation and took his photograph and this identification evidence, which supported the conviction, should be excluded under s.24(2) of the *Charter* because the police failed to properly advise him of his right to counsel.

Volume 2 Issue 2
February 2002

The British Columbia Court of Appeal found the accused had not been detained. The burden of proving detention on a balance of probabilities rests with the accused and he failed to satisfy the test of physical or psychological restraint. "[A]n encounter with the police does not become a detention just because it provided an opportunity for the police to identify a subject"; simply because "a suspect is identified and photographed does not mean that he was restrained".

In recognizing that ""detention" in s. 10(b) must be understood in light of the purpose of the provision, namely to guarantee the opportunity to obtain the assistance of counsel in situations where it is reasonably required", the Court found "the police objective [in this case] could not have compromised the appellant's s. 10(b) right to counsel"; "the police secured the identification evidence without requiring any self-incriminatory participation by the [accused]". At para. 13 Donald J.A. for the unanimous Court stated:

> The [accused] was with the identification team for only about three to four minutes. He was already on the street open to view by anyone who wished to see him. In my opinion, this is not a situation where it makes any practical sense to speak in terms of the assistance of counsel.

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

ASSAULT CBH: INJURY MUST RESULT FROM UNLAWFUL ASSAULT

R. v. Lafleur, 2001 BCCA 475

The accused's stepdaughter (the victim of the alleged assault) had attempted to walk the accused to the front door of his own residence in an effort to make him leave. The accused had been drinking and was bothering the victim's mother, who was also present in the house. The stepdaughter placed her hand on the accused's back, but did not use much force. The accused did not cooperate and attempted to push his stepdaughter's hand away. At the door, the accused grabbed her shirt, swore at her, and threw her down the steps. The victim broke a bone in her finger during this incident. At trial, the accused was convicted of assault causing bodily harm. The trial judge found the accused used reasonable force when he pushed the victim's hand as she tried to evict him from his own home. However, pushing the victim down the stairs was unreasonable force, and thus an assault. On appeal, the British Columbia Court of Appeal found the evidence failed to establish whether the bone was broken at the time the accused was defending himself (pushing the victim's hand away), or at the time he assaulted the victim by throwing her down the stairs. As a result, the Court set aside the conviction for assault causing bodily harm and substituted a conviction of "simple assault".

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

PROSTITUTION DOES NOT REQUIRE PHYSICAL CONTACT

R. v. St. Onge et al., (2001) 155 CCC (3d) 517 (QueCA)

The accused were convicted of keeping a common bawdy house. They operated a business where customers would pay $40 for a 20-minute erotic dance in a private room where a dancer would masturbate herself (for an additional fee) and where the customer could masturbate himself; touching between the two was prohibited. The accused argued that sexual contact is required for the act of prostitution and because there was no such contact between the dancer and the customer the offence had not been made out. The Court recognized prostitution itself does not amount to a criminal offence, but remains prohibited in the context of solicitation, common bawdy houses, and procuring. In adopting the Supreme Court of Canada's definition of prostitution, "the offering by a person of his or her body for lewdness for payment in return", the Quebec Court of Appeal found there were clearly sexual favours (the dancer stimulated the customer by engaging in various sexual acts) rendered in return for payment for the sexual gratification of the customer (masturbating themselves in most cases); physical contact is not necessary. Furthermore, the accused argued that it must also be established that the act of prostitution is indecent. The Court rejected this assertion holding that the act of prostitution is essentially characterized as "a paid sexual activity" and "it is not inherent in the act of prostitution that it be indecent".

The appeal was dismissed.

REASONABLE GROUNDS FROM INFORMANT TIP: SEARCH INCIDENT TO ARREST REASONABLE

R. v. Warford, 2001 NFCA 64

Police received a tip from a proven and reliable informant that the accused would be driving to a local nightclub, at a particular time, to sell cocaine. The informant told police that the accused had received a shipment of cocaine on August 24, that customers would phone him for delivery, that the accused had sold a substantial amount of cocaine at a named nightclub on August 27, and that he always carried cocaine with him for sale. In addition, the informant told police that on September 3 the accused would be driving a black pickup truck from his residence at about 11:00 pm to the nightclub to sell cocaine. Police set up surveillance of the accused's home at 9:00 pm to corroborate the information of the informant. Neither between this time and 11:10 pm, when the accused left his residence driving the truck, was anyone seen entering or leaving the residence or approach the black pickup truck parked at the residence. The police followed the accused, who was driving a route consistent with going to the nightclub, and stopped him a short distance away from the nightclub because they felt they may encounter difficulties in securing the evidence if the accused was arrested at the nightclub.

The police confirmed the accused's identity, placed him under arrest for possession of cocaine for the purpose of trafficking, and conducted a frisk search that resulted in the discovery of 6 half-gram packets of cocaine. The truck was impounded and the accused's residence was later searched under a warrant where a quantity of cocaine, cash, and scales were seized.

At trial, the judge found the accused's s.8 *Charter* right to be secure against unreasonable search or seizure had been violated because the arrest was made on "the mere suspicion of drug trafficking" and not based on reasonable grounds; thus the search incident to the unlawful arrest was unreasonable. Furthermore, the evidence from the search could not be relied upon to support the search of the accused's home; the warrant was tainted by the improper search of the accused's person. As a result, the evidence was excluded under s.24(2) of the *Charter* and the accused was acquitted.

The Crown appealed the ruling to the Newfoundland Court of Appeal which concluded the trial judge erred in failing to apply the proper analysis in assessing whether the arrest was lawful. The unanimous appellate Court applied the threefold test in assessing the reasonableness of the search incidental to arrest:

- Was the arrest lawful?
- Was the search incidental to arrest?
- Was the search conducted in a reasonable manner?

Was the arrest lawful?

An arrest under s.495(1)(a) of the *Criminal Code* requires a belief based on reasonable grounds. Although the evidence of a tip itself is insufficient to establish reasonable grounds, hearsay information can provide reasonable grounds if it is sufficiently reliable and credible (which cannot be provided by the results of the search), and the proper two prong analysis for reasonable grounds is satisfied:

1. Does the police officer from a subjective perspective have reasonable grounds for arrest? and
2. Could a reasonable person in the position of the officer conclude there were reasonable grounds for the arrest?

In this case, the officer, from a subjective perspective, had reasonable grounds to believe the accused was about to commit an indictable offence (trafficking in cocaine at the nightclub). The information provided by the informant and some of its verification by surveillance was sufficient from a subjective viewpoint that reasonable grounds existed.

The objective test was also satisfied based on the totality of the following factors:

- The information provided a significant amount of detail including when the shipment was received, the price the accused was selling it for, the mode of delivery, that the accused drove a black pickup truck, that the accused always carried cocaine with him for sale, and that the accused would be going to a named nightclub and would be arriving there at 11:00 pm.
- The police confirmed much of the information prior to acting on it such as a truck matching the description was parked in the driveway, the truck was driven by the accused when he was stopped, the accused left his residence at 11:10 pm, and the accused was followed

by police on a route consistent with going to the nightclub.

- The police regarded the informant as a credible and reliable source who had previously provided information proven to be reliable on numerous occasions over the past 18 months.

Succinctly, both the subjective and objective components of reasonable grounds were satisfied and the arrest was held to be lawful.

Was the search incident to arrest?

This phase involves assessing whether "the police [had] an objectively reasonable rationale, related to the arrest, for conducting the search". In this case, the purposes of the search were to protect the police through the detection of weapons and to discover evidence (cocaine); both valid objectives of a search incidental to arrest.

Was the search conducted in a reasonable manner?

The frisk search conducted would be an appropriate manner of proceeding in this case and there was no suggestion by the accused that the search was not carried out in a reasonable manner.

Since the arrest was lawful and the resultant search reasonable, the evidence seized as a consequence could properly be used to support the issuance of a search warrant for the accused's home. In allowing the appeal the Court remitted the matter back to the Supreme Court for a new trial.

RIGHT TO COUNSEL: UNDERSTANDING YOUR DUTIES

Part 2 of 2

Sgt. Mike Novakowski

IMPLEMENTATIONAL DUTIES

Duty to Accommodate

Once the police have complied with the informational requirements of s.10(b)[1] there are no correlative duties triggered which require the police to provide an opportunity **unless** the person indicates a desire to exercise their right[2]. The police are not obligated to assume that a person will exercise the right to counsel nor can the police be expected to guess whether a decision has been made to exercise or to waive the right[3]. If the person does not claim or assert in a comprehensible way their right to counsel, the right to counsel is deemed to be waived[4] and the police may continue with their investigation.

Waiver

A detainee or arrestee may waive their right to retain and instruct counsel either **explicitly** or **implicitly**. Where the waiver is implicit, the standard will be very high[5]. Simply responding to questions after being advised of the right to counsel cannot normally be taken to be a waiver of that right[6]. Nor is there an implicit waiver where, despite the person requesting counsel, the police persist with questioning and the person responds by answering. Where a person positively asserts their desire to contact counsel and the police ignore the request and proceed to question the person, a person is likely to feel that their right has no effect and that they must answer. In such a case the person has the right not to be asked questions and will not be deemed to have implicitly waived their right simply by answering the questions[7].

The waiver of the right to counsel must pass an **awareness of consequences** test. If this test has not been met, continued questioning will constitute a violation of s.10(b). There is an obligation on the police to delay questioning until the person is of sufficient capacity to exercise their right to counsel or is aware of the consequences of waiving that right[8]. Therefore, s.10(b) requires that a person be advised of their right to counsel at a time when they can understand their right[9]. For a waiver to be effective, the Crown must prove that the person had a full understanding of the

[1] See Volume 2 Issue 1

[2] R. v. Baig [1987] 2 S.C.R. 537 (S.C.C.), R. v. Woods (1989) 49 C.C.C. (3d) 20 (Ont. C.A.) at p. 29-30.
[3] R. v. Hollis (1992) 76 C.C.C. (3d) 421 (B.C.C.A.) at p.435.
[4] R. v. Baig (1985) 20 C.C.C. (3d) 515 (Ont.C.A.) affirmed [1987] 2 S.C.R. 537 (S.C.C.) at p.523, R. v. Hollis (1992) 76 C.C.C. (3d) 421 (B.C.C.A.) at p.435.
[5] R. v. Brydges [1990] 1 S.C.R. 190 (S.C.C.).
[6] R. v. Whittle (1994) 92 C.C.C. (3d) 11 (S.C.C.) at p.36.
[7] R. v. Manninen [1987] 1 S.C.R. 1233 (S.C.C.).
[8] R. v. Clarkson [1986] 1 S.C.R. 383 (S.C.C.) .
[9] R. v. Cotter (1991) 62 C.C.C. (3d) 423 (B.C.C.A.) at p.430.

right to counsel and an awareness of the consequences associated with waiving that right[10].

Where the person to whom the police seek to question does not meet the awareness threshold, it is incumbent on the police to cease questioning until the person is of sufficient capacity to meet the test. Certain types of people will generally be found not to have the capacity to waive their right to counsel due to their state of mind or limited ability to understand the nature of their jeopardy or their right to counsel. An **operating mind** requires the limited cognitive capacity of a person to[11]:

- communicate with counsel,
- understand the function of counsel, and
- understand that the right to counsel can be waived even if this is not in their best interests.

It is not necessary that the person possess analytical ability. The inquiry does not go so far as to determine whether the person is capable of making a good or wise choice or a choice that is in their best interests. However, it is incumbent on the police to make sure that the person fully understands the right to counsel and the consequences of waiving it. Diminished capacity may include circumstances where the person suffers from:

- intoxication
- mental illness
- emotional distress
- lack of sophistication.

Although the police are to respect the right to counsel[12] they are not the guardians of the solicitor client relationship[13] and are not "required to insist on consultation with counsel[14]". However, the police are required to provide the person with a reasonable time period, dependent on the circumstances, within which to decide whether to exercise the right to counsel[15]. In most cases the decision to contact counsel will be made reasonably quickly. If a person chooses to invoke or exercise their right to counsel, the police have two corresponding **implementational** obligations[16]:

- **to provide the person a reasonable opportunity (except in urgent and dangerous circumstances) to retain and instruct counsel without delay; and**
- **to cease questioning or otherwise eliciting evidence until this opportunity has been provided**

It is important to recognize that the right to counsel under s.10(b) is not absolute. The implementational duties are not triggered unless and until the person indicates a desire to exercise their right to counsel[17]. The standard question "do you want to call a lawyer?" provides the person an opportunity to assert their desire to contact counsel. Where the person clearly and unequivocally says "No" when asked whether they want to call a lawyer, no further obligations are triggered under s.10(b)[18] beyond advising the person of their rights[19]. Unless the person invokes the right to counsel and is reasonably diligent in exercising it, the duty to provide an opportunity and cease questioning will not arise or will be suspended[20].

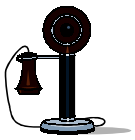
In circumstances where the person is uncertain whether to contact counsel, the police are obligated to pursue the issue further and either obtain a clear and unequivocal waiver or afford the person a reasonable opportunity to exercise their right[21].

Reasonable Opportunity

A person in the control of the police cannot exercise their right to counsel unless the police provide a reasonable opportunity to do so. Section 10(b) imposes a duty on the police to provide a person with a reasonable opportunity and sufficient time to retain and instruct counsel[22]. This duty requires the police to facilitate the person's realization of their right[23]. A person in the control of the police cannot exercise their right to counsel unless the police provide a reasonable opportunity to do so. The duty to provide a reasonable opportunity imports two aspects[24]:

- **the person must be afforded the means to contact counsel.** This includes the duty of the police to offer

[10] See also R. v. Nugent (1988) 42 C.C.C. (3d) 431 (N.S.C.A.) at p.455., R. v. Evans [1991] 1 S.C.R. 869.
[11] R. v. Whittle (1994) 92 C.C.C. (3d) 11 (S.C.C.) at p.30-31.
[12] R. v. Nugent (1988) 42 C.C.C. (3d) 431 (N.S.C.A.) at p.460-461.
[13] R. v. Bain (1989) 47 C.C.C. (3d) 250 (Ont.C.A.)
[14] R. v. Charron (1990) 57 C.C.C. (3d) (Que. C.A.) at p.254, see also R. v. Ferron (1989) 49 C.C.C. (3d) 432 (B.C.C.A.) per Taggart J.A. at p. 441.
[15] R. v. Hollis (1992) 76 C.C.C. (3d) 421 (B.C.C.A.)
[16] R. v. Bartle [1994] 3 S.C.R. 173 (S.C.C.), R. v. Manninen (1987) 34 C.C.C. (3d) 385 (S.C.C.), R. v. Ross [1989] 1 S.C.R. 3 (S.C.C.), R. v. Cho 2000 BCCA 658 at para. 43.
[17] R. v. Bartle [1994] 3 S.C.R. 173 (S.C.C.)
[18] R. v. Matheson [1994] 3 S.C.R. 328 (S.C.C.)
[19] R. v. Rube (1992) 10 B.C.A.C. 48 (B.C.C.A.)
[20] R. v. Bartle [1994] 3 S.C.R. 173 (S.C.C.), R. v. Black [1989] 2 S.C.R. 138 (S.C.C.), R. v. Tremblay [1987] 2 S.C.R. 435 (S.C.C.), R. v Brydges [1990] 1 S.C.R. 190 (S.C.C.)
[21] R. V. Small 1998 ABCA 85
[22] R. v. Barbon (1986) 33 C.C.C. (3d) 259 (B.C.C.A.) at p.263, R. v Brydges [1990] 1 S.C.R. 190 (S.C.C.), R. v. Naugler (1986) 27 C.C.C. (3d) 257 (N.S.C.A.) at p.263.
[23] R. v. Kennedy (1995) 103 C.C.C. (3d) 161 (Nfld.C.A.) at p.184
[24] See R. v. Smith (1988) 43 C.C.C. (3d) 379 per McLachlin J.A. in dissent.



the use of a telephone that is operative[25] and to assist the person in making the telephone call where the accused is physically unable to do so. An injured person, such as an impaired driver involved in a motor vehicle accident and transported to hospital, may require special arrangements to exercise their right to counsel[26].

- **the person must be afforded a reasonable time within which to contact counsel.**  What constitutes a reasonable time varies with the circumstances of each case. The amount of time permitted for contacting counsel must not be arbitrarily curtailed to meet the convenience of the police or the desire to obtain incriminating evidence. Relevant circumstances in determining what constitutes a reasonable time include the condition of the person (eg. drunkeness), the presence or absence of urgency in proceeding immediately with the investigation or questioning, and the availability of counsel at the time of arrest or detention. For example, if it is apparent that further efforts in retaining counsel will be futile, the person can no longer refuse to provide a breath sample by invoking their rights under s.10(b) of the *Charter*[27].

Cease Questioning

Once a person has asserted the right to counsel, the police cannot compel the person to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise their right[28]. One important reason of retaining legal advice without delay is linked to the protection against self-incrimination. For this reason there is a duty to cease questioning until the person has had a reasonable opportunity to retain and instruct counsel[29]. For the right to counsel to be effective, the person must have access to the legal advice before they are questioned or otherwise required to provide evidence[30]. The police are obliged to "hold off" from attempting to elicit incriminatory evidence such as confessions, identification line-ups[31], and breath or blood samples from the person until they have had a reasonable opportunity to reach counsel[32].

Circumstances may arise where a sense of urgency may justify the police in questioning the person without providing that person with a reasonable opportunity to consult counsel. Where questioning is imperative to counter the risk of harm to others, questioning without affording a reasonable time to consult counsel may be justified[33].

Right to Be Afforded Privacy

The police must afford an arrested or detained person the right to speak in private to counsel when they exercise their right to speak to a lawyer[34]. Providing a person with a reasonable opportunity presumes an adequate measure of privacy being provided to the person in exercising their right to counsel[35]. There is no obligation on the person to request or inquire as to the right to consult in private[36]. The right to privacy includes the following two elements[37]:

- **the right to privacy is inherent in the right to counsel**[38] (the onus is on the police to provide privacy regardless of whether privacy is explicitly requested)
- **the right to privacy begins after the person has contacted counsel for advice** (i.e. once the lawyer is in a position to offer advice).

The right to privacy however, is not an entitlement to absolute privacy. It simply means that the person has the right to consult counsel under circumstances where the conversation cannot be overheard or where there is no reasonable apprehension of being overheard[39]. A

[25] R. v. Manninen (1987) 34 C.C.C. (3d) 385 (S.C.C.), R. v. Roseman (1986) 41 M.V.R. 274 (B.C.C.A.).
[26] R. v. Nesheim (1998) Docket:CA022056 (B.C.C.A.)
[27] R. v. Dunnett (1990) 62 C.C.C. (3d) 14 (N.B.C.A.) at p.23.
[28] R. v. Black [1989] 2 S.C.R. 138 (S.C.C.), R. v. Ross [1989] 1 S.C.R. 3 (S.C.C.), R. v. Prosper [1994] 3 S..R. 236 (S.C.C.).
[29] R. v Brydges [1990] 1 S.C.R. 190 (S.C.C.).
[30] R. v. Manninen [1987] 1 S.C.R. 1233 (S.C.C.).
[31] R. v. Ross [1989] 1 S.C.R. 3 (S.C.C.).
[32] R. v. Prosper [1994] 3 S.C.R. 236 (S.C.C.).
[33] See R. v. Smith (1988) 43 C.C.C. (3d) 379 per McLachlin J.A. in dissent at p.394
[34] R. v. R. (P.L.) (1988) 44 C.C.C. (3d) 174 (N.S.C.A.) per Macdonald J.A. at p. 180.
[35] R. v. Kennedy (1995) 103 C.C.C. (3d) 161 (Nfld.C.A.) at p.184, see also R. v. Manninen [1987] 1 S.C.R. 1233 (S.C.C.), R. v. Young (1987) 38 C.C.C. 452 (N.B.C.A.) per Ryan J.A.
[36] R. v. Jackson (1993) 86 C.C.C. (3d) 233 (Ont.C.A.) at p.240.
[37] R. v. Standish (1988) 41 C.C.C. (3d) 340 (B.C.C.A.) at p.343.
[38] See also R. v. Rees [1986] B.C.J. No. 1730 (B.C.S.C.), R. v. Playford (1987) 40 C.C.C. (3d) 142 (Ont.C.A.) at p.158, R. v. McKane (1987) 35 C.C.C. (3d) 481 (Ont.C.A.) at p.481.
[39] R. v. Miller (1990) 25 M.V.R. (2d) 170 (Nfld.C.A.).

person who believes that their conversation will be overheard by the police will be substantially prejudiced in making use of their right to counsel unless it can be shown that the person was in fact able to retain and instruct counsel in private. Proof that the person could have consulted in private only by whispering or by some other unusual device does not meet the test of privacy[40]. Privacy ensures full and frank disclosure between the person and their lawyer and permits proper legal advice and assistance being rendered[41].

Providing the person with access to a telephone room in the police detention area may satisfy this right of privacy. Often these rooms have a door which closes and a viewing window to maintain a "watch" over the person for security reasons. This type of telephone facility will ensure complete confidentiality of communication with counsel without compromising the security and integrity of the investigation.

Circumstances will arise where a telephone is immediately available, such as at an arrestee's home or a cellular telephone is available at the roadside of an impaired driving arrest. Although the phrase "without delay" in the text of s.10(b) connotes immediacy, there will be occasions where the police will have the discretion to defer access to counsel to a police controlled environment to ensure privacy. Frequently, threats to officer safety are objectively unpredictable and the destruction of evidence and escape are far from speculative risks when a person is left unsupervised in a non-police facility when exercising their right to counsel in private[42]. Police officers who make an arrest in potentially volatile situations may be justified in denying the right to immediately make a telephone call in order to prevent new factors from entering the situation[43]. Where however, there is a telephone at the place of arrest and there is no other reason (eg. security considerations, privacy, integrity of the investigation) which justifies delay, the police should let the person use the telephone[44].

If the police delay contact with counsel to facilitate privacy in a controlled environment, the implementation obligation requiring the police to refrain from eliciting evidence continues until access to counsel in private is granted[45].

Reasonable Diligence and Right to Counsel

A person who seeks to exercise their right to counsel must do so with reasonable diligence[46]. Just as there is an obligation imposed on the police to provide a person with a reasonable opportunity to contact counsel, there is corresponding obligation on the person to exercise reasonable diligence in exercising their right. The immediate need for legal advice may often be addressed by the police officer's obligation to inform the person of the availability of duty counsel and Legal Aid. The existence of duty counsel services may affect the determination of "reasonable diligence", which in turn may affect the length of time during which the police cease eliciting evidence[47].

Occasions may arise where it appears a person is taking an unreasonably long period of time to contact counsel and may even appear the person is feigning attempts to contact counsel. This type of behaviour may arise in impaired driving investigations where the person may make efforts to delay the taking of breath samples (stalling tactic) in hopes that their blood/alcohol readings will decrease over time. If the person is not reasonably diligent in exercising their right to counsel, the correlative duties of providing a reasonable opportunity and holding off in eliciting incriminating evidence are suspended[48]. In *R. v. Smith* [1989] 2 S.C.R. 368 (S.C.C.), the police provided the accused with a telephone book and telephone to contact his counsel. The accused decided not to call because it was 9:00 p.m. and the only telephone number appearing in the book was for his lawyer's office number. Police suggested the accused attempt to call his lawyer since it was possible that somebody would be at the office or an answering machine would indicate a second telephone number where the lawyer could be contacted. The accused refused and decided to wait until morning. Lamer J. found the police were justified in continuing their questioning in obtaining a statement because the accused was not reasonably diligent in the exercise of his rights.

[40] R. v. Playford (1987) 40 C.C.C. (3d) 142 (Ont.C.A.).
[41] R. v. Rees [1986] B.C.J. No. 1730 (B.C.S.C.).
[42] R. v. Van Wyk [1999] O.J. No.3515 (Ont.S.C.J.).
[43] R. v. Taylor (1990) 54 C.C.C. (3d) 152 (N.S.C.A.) .
[44] R. v. Gyori (1994) 19 C.R.R. (2d) 331 (Alta.C.A.) leave to appeal to S.C.C. refused [1994] 1 S.C.R. vii.
[45] R. v. Gilbert (1988) 40 C.C.C. (3d) 423 (Ont.C.A.) at p.428, R. v. Gyori (1994) 19 C.R.R. (2d) 331 (Alta.C.A.) leave to appeal to S.C.C. refused [1994] 1 S.C.R. vii.
[46] R. v. Dunnett (1990) 62 C.C.C. (3d) 14 (N.B.C.A.) at p.23, R. v. Luong (2000) 149 C.C.C. (3d) 571 (Alta.C.A.) at p. 575.
[47] R. v. Prosper [1994] 3 S..R. 236 (S.C.C.).
[48] R. v. Ross [1989] 1 S.C.R. 3 (S.C.C.), R. v. Tremblay [1987] 2 S.C.R. 435 (S.C.C.), R. v. Smith [1989] 2 S.C.R. 368 (S.C.C.) per Lamer J.

Right to Counsel of Choice

Section 10(b) entitles an arrested or detained person the right to consult with a lawyer of their choice[49]. If however, their choice of counsel necessitates an unreasonable delay, the arrested or detained person has an obligation to accept another lawyer[50]. Reasonable diligence in exercising the right to choose one's counsel depends upon the context in which the person finds themselves. It is the need for immediate legal advice, not the need to seek the best lawyer to conduct a trial, that underlies the right to counsel imposed under s.10 of the *Charter* and the corresponding obligation to exercise reasonable diligence.

As a consequence of having the right to counsel of choice, the person may contact a long distance number to obtain that legal advice. The police must pay the cost of the long distance billing if exercising the right to counsel is dependent on a third party accepting the call (calling collect) or if the person has an inability to charge to their own number[51]. Where a person has diligently exercised their right to counsel and is awaiting a return call from their lawyer (such as is the case where answering services take calls during late evening hours), the police are obligated to let the return call go through to the person in police custody.

Obtaining Counsel Through an Intermediary

A person who requests to call someone, other than a lawyer in connection with instructing counsel, is asserting the desire to exercise their right[52]; seeking contact with counsel by requesting to call a third party is not a waiver of the right to counsel[53]. There may be circumstances where the only course of action to retain and instruct counsel and obtain advice will be through an intermediary[54]. For example, where a person does not specifically request to speak to a lawyer but does request to speak to his wife to determine whether she has been successful in contacting a lawyer, he is asserting a desire to exercise his right to counsel and the necessary arrangements to enable the accused to call his wife for the purpose of retaining counsel must be afforded[55]. Any questioning commencing after a person asserts their right, but before a reasonable opportunity is afforded, will result in a *Charter* violation.

Dissuasion

The police must not attempt to dissuade a person from attempting to exercise their right to counsel[56]. Section 10(b) of the *Charter* prohibits the police from belittling a person's lawyer with the express goal of undermining the person's confidence in, and relationship with, counsel. Police will violate a person's s.10 right to counsel if they are able to[57]:

- undermine the person's confidence in their lawyer, such as denigrating the integrity of the lawyer or making disparaging comments concerning the lawyer's loyalty, availability, or legal fees, or
- undermine the person's relationship (solicitor-client) with their counsel.

Offering Deals

If the police offer a plea bargain or "deal", such as charging with second degree murder instead of first degree murder in exchange for a statement, this deal must be offered either to the person's counsel or to the person in the presence of their counsel unless the person has expressly waived their right to counsel. A s.10(b) breach will occur when the police coercively offer a person a deal for a limited time only knowing that the person's counsel of choice is unavailable[58].

Change of Mind After Asserting Rights

Occasions may arise where a person has asserted their right to counsel and has been reasonably diligent in exercising their right but indicates that they have

[49] R. v. Ross [1989] 1 S.C.R. 3 (S.C.C.)
[50] R. v. Black [1989] 2 S.C.R. 138 (S.C.C.), R. v. Ross [1989] 1 S.C.R. 3 (S.C.C.)
[51] R. v. David [1990] B.C.J. No. 1242 (B.C.Co.Ct.)
[52] R. v. LaPlante (1987) 40 C.C.C. (3d) 63 (Sask.C.A.) per Vancise J.A. at p.74.
[53] R. v. Tremblay [1987] 2 S.C.R. 435 at para.8.
[54] R. v. Crossman [1991] B.C.J. No. 729 (B.C.C.A.)
[55] R. v. LaPlante (1987) 40 C.C.C. (3d) 63 (Sask.C.A.)
[56] R. v. Smith (1999) Docket:C23659, C31758 (Ont.C.A.).
[57] R. v. Burlingham [1995] 2 S.C.R. 206 (S.C.C.) per Iacobucci.
[58] R. v. Burlingham [1995] 2 S.C.R. 206 (S.C.C.) per Iacobucci.

changed their mind and no longer want legal advice. In these circumstances, the police are obligated to inform the person of their right to a reasonable opportunity to contact counsel and the police obligation in holding off from obtaining incriminating evidence, whether by statement or participating in any process[59]. This additional informational requirement ensures that the person has given a free and voluntary informed waiver of their right to counsel[60].

Delay in Providing Opportunity of Right to Counsel

There may be cases of urgency where the police need not provide a reasonable opportunity to contact counsel[61]. Circumstances will occur where there is a necessity to bring a potentially volatile situation under control. The presence of unknown persons or weapons in a home while police are executing a search warrant is one example. The police will be justified in delaying providing an opportunity to contact counsel when the police are preventing any new factors from entering a situation until the unknowns are clarified. Once the police are clearly in control of a situation a reasonable opportunity must now be provided[62]. "Urgency" in this context does not refer to investigatory or evidentiary expediency; mere expediency or efficiency of an investigation is not sufficient to create enough urgency to permit a s.10(b) breach[63]. Such a delay is only appropriate until such time as matters are under control. After which, access to counsel must then be provided.

In search cases the police, as a general rule, are not obligated to suspend a search and provide a person the opportunity to retain and instruct counsel. Although a person has the right to be informed of the right to retain and instruct counsel upon arrest or detention, police who seek to search a person incident to arrest are not required to suspend the search until the person has had an opportunity to contact counsel. However, where a search is dependent upon a detained persons choice to participate in a process, such as a consent search, the person must have been afforded a reasonable opportunity to exercise their right to counsel[64].

Continued Questioning Following Access to Counsel

The police are entitled to question a person who has chosen to exercise their right to counsel provided the person has had a reasonable opportunity to retain and instruct counsel[65]. Once a person has consulted counsel in full measure, the duty imposed on the police to cease questioning is removed and the police are entitled to elicit evidence from the person[66]. Furthermore, police are not prevented from questioning the person without first receiving permission from counsel or without counsel being present even though the police are aware the person has been advised by their counsel not to say anything[67]. To this end, police are entitled to pursue legitimate means of persuasion to encourage persons to speak in the absence of counsel provided the person is in a position to make an informed choice by having had the opportunity to consult counsel[68]. In *R. v. Ekman* 2000 BCCA 414 appeal to S.C.C. refused, Newbury J. concluded the police obligation as follows:

> In summary, whilst an accused has the right to counsel and the right to remain silent in response to questioning by the state, he or she does not have an absolute right, after consulting counsel, to be free from police questioning. Conversely, the police are not bound to refrain from interviewing a suspect (again within reasonable limits), nor bound to advise counsel they intend to question the detainee. (emphasis added)

Similarly, there is no duty on the part of the police to prevent a person, who had been advised of their *Charter* rights, from making a voluntary statement unless there was some indication that the earlier *Charter* warning had not been understood or that the person had changed their mind and now wanted to speak to a lawyer[69]. An adult person[70] does not have the right to the presence of their lawyer at a police interview[71]. The police are free to question a person in absence of counsel as long as the person has been afforded the informational (right to counsel and

[59] R. v. Prosper (1994) 92 C.C.C. (3d) 353 (S.C.C.) at p.378-379, R. v. Luong (2000) 149 C.C.C. (3d) 571 (Alta.C.A.) at p.576.
[60] R. v. Smith (1999) Docket:C23659, C31758 (Ont.C.A.).

[61] R. v. Manninen [1987] 1 S.C.R. 1233 (S.C.C.), see also R. v. Gilbert (1988) 40 C.C.C. (3d) 423 (Ont.C.A.) at p.429.
[62] R. v. Strachan (1988) 2 S.C.R. 980 (S.C.C.)
[63] R. v. Burlingham [1995] 2 S.C.R. 206 (S.C.C.) per Iacobucci J.

[64] R. v. Debot [1989] 2 S.C.R. 1140 (S.C.C.) per Lamer J.
[65] R. v. Playford (1987) 40 C.C.C. (3d) 142 (Ont.C.A.) at p.168.
[66] R. v. Ekman 2000 BCCA 414 at para. 22, see also R. v. Hebert [1990] 2 S.C.R. 151 (S.C.C.) per McLachlin J., see also R. v. J.T.J (No.2) (1988) 40 C.C.C. (3d) 97 (Man.C.A.) per Huband J.A., R. v. Cuff (1989) 49 C.C.C. (3d) 65 (Nfld. C.A.) at p. 72-73.
[67] R. v. Emile (1988) 42 C.C.C. (3d) 408 (N.W.T.C.A.) at p.430.
[68] R. v. M.C. [1998] B.C.J. No.1582 (B.C.S.C.) at para.53.
[69] R. v Gray (1993) 81 C.C.C. (3d) 174 (Man.C.A.) per Scott C.A. at p.185.
[70] See s.56(2) of the Young Offenders Act in cases of young persons.
[71] R. v. Mayo (1999) 133 C.C.C. (3d) 168 (Ont.C.A.).

availability of Legal Aid and duty counsel) and implementational (reasonable opportunity and holding off) components[72]. A person does however, have the right to remain silent and may therefore impose or insist on having their lawyer present as a precondition to waiving their right to silence.

Similarly, a lawyer cannot insist on being present when the police question a person who has obtained counsel. Detained persons themselves must decide whether to speak to the police on their own or not at all[73]. The police are permitted to use appropriate perseverance in questioning a person, provided the questions are non-coercive or oppressive. Questioning which commences as a legitimate form of persuasion may, because of the degree of emotional or psychological pressure brought to bear, render the statement involuntary and thus inadmissible[74].

Once the right to counsel has been exercised, different considerations apply to the granting of subsequent access to counsel than before counsel had been consulted. The pressing need to cease questioning until counsel's advice has been obtained no longer exists. Although the right to counsel must be "reactivated" in certain circumstances, once the obligation of the police has been met the police may attempt to elicit evidence[75]. For example, the police are not required to defer their investigation of a person arrested in Alberta for offences in Ontario when the person expresses a desire to talk to particular legal counsel when he is escorted back to Ontario by police[76].

Limitation of Right to Counsel

Motorists

Stopping of a motorist by the police related to traffic control enforcement (ie. speeding, the inspection of documents, mechanical condition, detection of impaired drivers), although a detention for the purposes of the *Charter*, does not require that the motorist be advised of their *Charter* rights under s.10.

[72] R. v. Gormley (1999) Docket:AD-0680 (P.E.I.C.A.) at para.42.
[73] R. v. Ekman 2000 BCCA 414.
[74] R. v. Ballantyne (1997) Docket:10929 (B.C.S.C.) at para.28.
[75] See for example R. v. Ballantyne 1997 Docket:10929 B.C.S.C. at para.24.
[76] R. v. Wells (2001) Docket:C13744 (Ont.C.A.)

This suspension of the right to counsel is a reasonable limit under s.1 of the *Charter*.

Roadside Screening Device Demand

A person who is requested to submit to an immediate breath sample by means of an approved screening device at the roadside under s.254(2) of the *Criminal Code* is not required to be advised of their right to counsel under s.10 of the *Charter*. Provided the focus of the stop is restricted to highway safety and compliance with the demand, the suspension of the right to counsel is a reasonable limit under s.1 of the *Charter*. This is even the case where a person has ready access to a cellular telephone. The existence or non-existence of a constitutional right cannot vary on the basis of how far a person is from a telephone at the time the demand is made[77].

Sobriety Tests

When requesting the performance of sobriety tests, the police need not inform the suspected impaired driver of their right to counsel if the purpose is to assess suspicion and thus permit the officer's formulation of reasonable grounds of impairment. However, the results of the sobriety tests are only admissible for the purpose of establishing the officer's reasonable grounds for the breath demand and are not admissible for the purpose of incriminating the person at trial. However, once the police form reasonable grounds for the demand, there is nothing which prevents the police from providing the person with their s.10(b) rights and then repeating the tests for the purposes of obtaining court admissible incriminating evidence[78] (provided the driver waives this right).

Summary

The police obligation imposed by s.10(b)[79] includes:

- Clearly and properly informing the person by a method of communication and in terms the person can understand at a time they are capable of understanding or comprehending they have the right to retain and instruct (obtain) counsel without delay and of the existence and availability of Legal Aid and duty counsel. If there are special circumstances which suggest a lack of

[77] R. v. Sadlon (1992) 36 M.V.R. (2d) 127 (Ont.C.A.) leave to appeal to S.C.C. refused [1992] 3 S.C.R. viii., see also R. v. Smith (1996) 105 C.C.C. (3d) 58 (Ont.C.A.).
[78] R. v. Barlow 1996 Docket:8141 B.C.S.C.
[79] See for example R. v. Luong (2000) 149 C.C.C. (3d) 571 (Alta.C.A.) at p.574-575.

understanding such as shock, drunkenness, or mental deficiency, the police officer must go further in explaining the right

- If the person chooses to exercise their right to counsel the police must
  - Provide the person the opportunity to exercise the right without delay (This may require assisting the person in their efforts to obtain a lawyer and includes ensuring privacy).
  - Stop eliciting evidence prior to affording them the reasonable opportunity to retain and instruct counsel. If the person is not diligent, this "holding off" obligation is waived

The Crown has the burden of establishing that the person who invoked their right to counsel was provided with a reasonable opportunity to contact counsel. The person has the burden of establishing that they were reasonably diligent in the exercise of their right. If the person was not reasonably diligent then the implementational duties of s.10(b) do not arise or will be suspended[80] and the police may continue with their investigation.

DID YOU KNOW…?

…in 2000 the average time between the filing of an application for an appeal before the Supreme Court of Canada and the decision on whether the appeal will be heard is 5.4 months. From the time of the decision to the time of the hearing takes another 12.5 months. Finally, on average an additional 5.8 months will elapse between the hearing and the judgment of the Court. In short, it takes 23.7 months, or 10 days short of 2 years, for a case to make it through the Supreme Court. Remember this the next time you need to make that decision in a moments notice without a second opinion, judicial review, or appellate process!!![81]

Note-able Quote

"*In the APEC and Hyatt matters, the police directly interfered [with the protests] and have been roundly criticized for doing so. In truth, the police will be damned if they do act and damned if they don't*[82]." BCCA Justice Southin.

[80] R. v. Luong (2000) 149 C.C.C. (3d) 571 (Alta.C.A.) at p.575.
[81] Source: the Supreme Court of Canada's Bulletin of Proceedings: Special Edition available at www.scc-csc.gc.ca/information/statistics/index_e.html
[82] R. v. Clark 2001 BCCA 706

CLASS 85 GRADUATES

The Police Academy is pleased to announce the successful graduation of recruit Class 85 as qualified municipal constables on February 8, 2002.

ABBOTSFORD
Cst. Jodi Christie
Cst. James Gerrits
Cst. Ryan Reed
Cst. Gary Reid
Cst. Linley Steeves

DELTA
Cst. Craig Burridge
Cst. Gwyneth Nichols
Cst. Richard Peeler

SAANICH
Cst. Marco Berton
Cst. Heather O'Connor

STL'ATL'IMX
Cst. Cheryl Simpkin

VANCOUVER
Cst. Mark Bradshaw
Cst. Richard Coulthard
Cst. Shaun Deans
Cst. Jocelyn Deziel
Cst. John Fillippelli
Cst. Anna Grigoletto
Cst. Gabriel Kojima
Cst. Lene MacKay
Cst. Darin McDougall
Cst. David Moe
Cst. Daniel Murphy
Cst. Ana Oproescu
Cst. Dale Quiring
Cst. Conrad Van Dyk

VICTORIA
Cst. Sergei Babakaiff

WEST VANCOUVER
Cst. Lisa Alford

Congratulations to Cst. Shaun Deans (Vancouver), who was the recipient of the British Columbia Association of Chiefs of Police Shield of Merit for best all around recruit performance in basic training. Cst. Dale Quiring (Vancouver) received the Abbotsford Police Association Oliver Thomson Trophy for outstanding physical fitness. Cst. Richard Coulthard (Vancouver) was the recipient of the Vancouver Police Union Excellence in Academics award for best academic test results in all disciplines. Cst. James Gerrits (Abbotsford) received the British Columbia Federation of Police Officers Valedictorian award for being selected by his peers to represent his class at the graduation ceremony. Cst. Richard Coulthard (Vancouver) was the recipient of the Abbotsford Police Recruit Marksmanship award for highest qualification score during Block 3 training (50/50).

ASSAULT CBH: INCLUDED OFFENCE OF AGGRAVATED ASSAULT

R. v. Soluk, 2001 BCCA 519

The accused appealed his conviction of assault causing bodily harm after he was charged with aggravated assault when he threw ammonia in the victim's face. The accused argued that he could not be convicted of assault causing bodily harm as an included offence within an unparticularized charge of aggravated assault. Under s.662 of the *Criminal Code*, an offence may be included in the other if it is described in the enactment creating it or if it is included in the offence as charged in the count. Because the wording of the charge did not explicitly reference "bodily harm", the issue on appeal was whether assault causing bodily harm is included in the offence of aggravated assault in the enactment creating it. The British Columbia Court of Appeal held that assault causing bodily harm is included in 3 of the 4 ways (wounding, maiming, or disfiguring) in which an aggravated assault may be committed and dismissed the appeal.

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

LIVING OFF THE AVAILS: PARASITISM DOES NOT REQUIRE COERCION

R. v. Barrow,
(2001) Docket:C30789 (OntCA)

The accused ran an escort agency and arranged dates between male clients who called the agency and the female escorts she employed. The accused kept 1/3 of the fee that ranged between $150-$180. Although the accused did not coerce the escorts and was supportive of them, she was aware that the escorts would on occasion engage in sexual activity and counseled them on how to deal with such requests and what precautions to take. The accused was convicted of several prostitution related offences, including three counts of living off the avails, on the evidence of two female undercover police officers posing as potential employees and four of the escorts.

The accused appealed her convictions arguing "she should not be convicted of the living off the avails offence because her relationship with the escorts was supportive rather than exploitive"; there was no proof of the required element of a parasitic relationship. The accused submitted "she provided services that allowed the women to remain off the streets in relative safety. No escort was forced to take a particular job, nor perform any particular act, including sexual acts. She provided advice and, in some cases, friendship".

In holding that the accused was properly convicted, the Ontario Court of Appeal found the element of parasitism was established by "the fact that she is in the business of rendering services to the escorts because they are prostitutes". Furthermore, the Court rejected the accused's policy argument that the escort agency relationship should not fall within the offence of living off the avails unless there was some element of coercion or control.

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

SAFETY SEARCH UNREASONABLE: POLICE EXCEED SCOPE

R. v. Shatford, 2001 NBPC 9

Police responded to a fight in front of a nightclub where an upset female who had been drinking approached and, while pointing in the direction of two people in the parking lot, alleged that "those fellows just threw a knife at me and my boyfriend". As one of the two officers responding approached the two people he observed they were arguing; a male was backing away from an angry female who said "he's one of them too". With only these two statements the officer placed his hand on the accused, took him by the arm to the police car, and ordered him to put his hands on the car. After asking "why", the officer informed the accused he had just thrown a knife into a crowd and that he was still investigating the complaint. After being granted permission to put some money in his pocket, the officer commanded the accused to place his hands on the hood of the car. The accused did not comply and after observing the accused fidgeting in his pockets, the accused was placed in an arm bar and was handcuffed. The accused was pat frisked and 12 rocks of cocaine were found in his pocket.

In summarizing the law regarding investigative detentions, the provincial court judge stated:

> The common law principle authorizing searches incidental to arrest has been extended to persons lawfully detained for investigations. The power to detain for investigative purpose exists under common law. The standard imposed for authorizing detention for investigative purposes is one of reasonable suspicion based on an articulable cause which means the officer must establish "...a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect the detainee is ..." involved in the activity under investigation.
>
> The power to conduct searches incidental to lawful arrest or detention is not limitless and must not be conducted in an abusive fashion. Cursory searches such as "frisk" or "pat down" searches for weapons undertaken for the purpose of officer safety and carried out in an inoffensive manner have been found to be minimally intrusive to the detainee and therefore reasonable in the circumstances.
>
> Courts have been mindful of the difficult and often dangerous and urgent circumstances under which police officers must exercise their discretion as to articulable cause detentions and incidental searches. Courts have allowed the police latitude and grounds to conduct investigations in safety.
>
> However, although a peace officer having articulable cause may briefly detain a person to investigate him, the officer may not search the person for contraband in the absence of reasonable and probable grounds to arrest the person for possession of the contraband.
>
> In summary, a police officer, if he or she has articulable cause, may detain a person for investigative purposes. In order to protect him or herself during the course of the detention, the officer may conduct a search of the detainee. The permitted scope of the search will depend upon the circumstances facing the officer. (references omitted)

Three reasons were advanced by the Crown to justify the police action of securing the accused in an arm bar and handcuffing him:

- failure to comply with the command to put his hands on the car,
- hand fidgeting in his pockets, and
- officer safety

The trial judge found that if the officer was really concerned about his safety he would not have initially allowed the accused to put his hands in his pockets. To this end, "the failure to obey a command and the hand fidgeting were really induced by the officer in the first place". A second officer testified that the conduct could also indicate the presence of contraband. The Provincial Court judge held:

> In my opinion, the police officer shifted his principal focus from a weapons investigation to suspicion the accused had contraband and that is probably the underlying reason that he then commanded the accused to place his hand on the hood and then placed him in an arm bar and handcuffs when the accused did not immediately comply.

And further:

> [T]here were no visual signs indicating the presence of a weapon on the accused, such as a bulge or protruding object for which s, 117.02 [of the *Criminal Code*] would allow a search for a weapon. There was no reasonable prospect apparent of securing evidence of the offence for which the accused was being detained.
>
> Did the circumstances then give the police the right to search the accused? In my opinion, they did not. In the absence of officer's safety concerns there can not be an argument that a search of his person for contraband is warranted as ancillary to investigative detention on an unrelated matter. Further there is no other basis which would justify the warrantless search.

Having found a breach of the accused's s.8 right, the evidence was excluded under s.24(2) of the *Charter*.

POLICE NEGLIGENT BUT NO CAUSATION: ACTION DISMISSED

Mooney et al. v. Attorney General et al., 2001 BCSC 419

The plaintiff brought an action against the Attorney Generals of Canada and British Columbia and a named RCMP officer alleging that the officer was negligent in failing to investigate the threatening behaviour of her common-law husband (Kruska) and that reasonable steps were not taken to protect her family. On November 5th, 1995 the plaintiff and her common-law husband separated following a brutal assault; the plaintiff was struck on the thigh and head with a walking stick after she had been choked into unconsciousness. This was the fourth time she had been assaulted by her common-law. Kruska was arrested and charged with assault with a weapon and cause bodily harm, but the plaintiff subsequently provided a second statement to police claiming she started the incident, did not want to proceed with

charges, and that the whole issue was "bullshit". This occurred after Kruska threatened suicide if he received a long prison sentence and after he had promised the plaintiff he would convey his property interest in their home to the plaintiff. Although Crown did not believe the plaintiff, a plea bargain was struck whereby Kruska pled guilty to ordinary assault and was sentenced to 21 days in jail and received a one-year probation order. Kruska had a criminal record for drug trafficking, manslaughter, and sexual assault.

Kruska had moved to live with his parents in Prince George and on March 11, 1996 called the plaintiff asking her to meet him to discuss the transfer of the home. They initially met in a restaurant, but then drove to a park. The plaintiff became concerned about Kruska's increased agitation during their conversation in his car so she exited his vehicle, entered her own and left (even though Kruska attempted to prevent her) with Kruska chasing her in his car. The plaintiff circled a friend's home honking her horn to get the friend's attention; this apparently discouraged Kruska's pursuit. The plaintiff attended the Prince George RCMP detachment to report Kruska's threatening behaviour. The investigating officer examined the plaintiff's written statement, questioned her briefly, obtained a copy of Kruska's criminal record, and took the documents to the watch commander. The watch commander agreed with the investigating officer that there were insufficient grounds to recommend a complaint under s.810 of the *Criminal Code* (peace bond application) and the plaintiff was recommended to speak with a lawyer about obtaining a restraining order.

On the morning of June 16, 1996, the plaintiff argued with Kruska on the phone (no threats were made) and the police were not called. Later that evening, Kruska attended the home of the plaintiff, smashed the sliding glass door with the butt of his shotgun, and entered the house. A friend of the plaintiff's, who had confronted Kruska, was shot dead, the plaintiff's 12-year-old daughter Michelle was shot in the shoulder. The plaintiff escaped through the bathroom window. Michelle was able to boost her sister through the same bathroom window and the two girls ran in opposite directions. Kruska set the home on fire then killed himself.

The plaintiff sued, alleging the RCMP officer investigating the previous threatening behaviour owed her a duty of care and was negligent for failing to:

- adequately inform himself of Kruska's background and propensity for violence;
- conduct an adequate investigation of the background circumstances and the complaints of violence and threats against the plaintiff;
- respond in a timely and adequate manner to the complaints of the plaintiff; and
- take reasonable steps in all the circumstances to ensure the safety and security of the plaintiff and her family after March 11, 1996.

To succeed in an action of this nature, a plaintiff must prove on the civil standard the following:

- the defendants (police) owed her a duty of care;
- the defendants (police) breached the duty of care (were negligent); and
- the negligence materially contributed to the harm caused; the damages flowed from the breach.

Before addressing the duty of care, the Court examined s. 21(1) of the *Police Act* which exempts police officers, in the absence of a finding of gross negligence, from actions for damages arising out of the performance of their duties. Even if the officer was negligent in this case, but not grossly negligent, he is protected under this section from personal liability. However, s. 11(1) of the *Police Act* imposes vicarious liability on the Province of British Columbia upon a finding of negligence.

Duty of Care

In finding that the police owed the plaintiff a duty of care, the trial judge concluded that the officer was negligent (although not grossly negligent) in his actions for failing to properly commence an investigation. The officer was well aware of current policies concerning domestic violence and an internal investigation determined the officer's handling of the complaint failed to meet investigative standards.

Causation

In assessing whether the action's of the officer, or his nonfeasance, materially contributed to the shootings, the court found "no clear connection between [the officer's] failure to act…and…Kruska's fateful trip…seven weeks later. The officer's inaction did not materially increase the risk of harm to the extent that [the officer] must bear responsibility for Kruska' acts".

Although the officer owed the plaintiff and her family a greater duty of care than was demonstrated, causation

was not established and the claim for damages was dismissed.

Editor's Note: In anticipation of an appeal, the judge released supplementary reasons for judgment (reported at 2001 BCSC 1079). Had causation been proven, the Court would have awarded damages as follows:

- plaintiff's daughter who was shot
  - pain, suffering, loss of enjoyment=$150,000
  - future care=$25,000
  - loss of future income=$100,000
- plaintiff's uninjured daughter
  - non-pecuniary damages=$15,000
- plaintiff
  - non-pecuniary damages=$75,000
  - past income loss=$90,000 (no award for future income loss)

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

FORCE USED DURING IMPAIRED INVESTIGATIVE DETENTION JUSTIFIED

Parker v. Vancouver, 2001 BCSC 1784

A Supreme Court judge dismissed a claim for damages as a result of injuries suffered during an alleged unlawful detention and assault by members of the Vancouver Police Department. A motorist, who had observed a vehicle driving erratically, running stop signs and red lights, and driving all over the road, called 911 to report the incident. By chance, the motorist spoke to a police officer he noticed nearby and pointed to the suspect vehicle. The officer closed the distance and activated the police emergency lights but the vehicle did not stop. The vehicle continued and turned down a lane after making several turns. The officer thought the vehicle was trying to evade him or the driver was going to dump the vehicle.

The vehicle stopped behind a garage and the female passenger immediately jumped out and went towards a house. The officer testified that he stopped about two car lengths behind the plaintiff's vehicle, exited as did the plaintiff, and called to the plaintiff who made a turn "as though he was going to go south." The officer said "police" and told the plaintiff to "hold on." This had "no effect" and when the officer came within an arm's length of the plaintiff the officer reached and touched him. The plaintiff muttered "get your hands off." The officer asked the plaintiff if he had seen the police vehicle but there was no response. The plaintiff was getting more agitated and the constable told him he was under investigation for impaired driving. The plaintiff's agitation increased and he took a "fighter stance" which, along with the look in his eyes and the tension in his jaw, led the officer to recognize that he anticipated resistance.

The officer ordered the plaintiff to put his hands behind his back. With the assistance of the motorist, the plaintiff was handcuffed. The plaintiff's "walking" could not be controlled so the officer placed him on the ground using a leg sweep. The plaintiff was held in this position and after two minutes settled down.

The female passenger, who had returned from the house, was hysterical and demanded to know what the officer was doing; she said she would call her lawyer. The female was ranting and pointing and poking at the officer's chest. She gave the officer no opportunity to reply to her questions and he told her to get back but it "fell on deaf ears." The officer physically moved the female; her response was to charge, swinging and flailing her arms. The officer grabbed her by the neck and pushed her back to the garage. He then put her over the hood of the motor vehicle with one arm behind her back. She continued to struggle and tried to kick the officer in the groin. When other officers arrived she was handcuffed. When the officer received information about an outstanding probation order he decided to arrest the plaintiff for breach of probation. In dismissing the suit, Justice Thackray stated in his conclusion at para. 58-62:

> Section 73 of the *Motor Vehicle Act*, … , … , provides that a peace officer may require the driver of a vehicle to stop and that a driver when signalled to stop by an officer must immediately come to a safe stop.
>
> [The plaintiff] was so signalled and failed to obey.
>
> Section 25 of the *Criminal Code*, … , provides that every peace officer is, if he acts on reasonable grounds, justified in doing what he is required to do and in using as much force as is necessary for that purpose.
>
> I am of the opinion that [the officer] was acting within his authority when he signalled [the plaintiff] to stop his motor vehicle. I am also of the opinion that in carrying out his duties to investigate [the plaintiff] for impaired

driving he was authorized to use as much force as necessary.

In carrying out those duties and responsibilities detention was the only course open to [the officer]. In effecting the detention [the officer] used no more force than necessary.

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

CHANCE "CRANE" GAME ILLEGAL: CONVICTIONS UPHELD

R. v. Balance Group International Trading Ltd., (2002) Docket:C34761 (OntCA)

The Ontario Court of Appeal dismissed an appeal from convictions resulting from the operation of two "crane games". Following the seizure of two games from the accused premises, charges were laid under s. 206(1)(f) of the *Criminal Code*, which reads:

s.206(1)(f) *Criminal Code*
Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who…disposes of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration…

The trial judge described the games as follows (2000, O.J. No. 2771 (Ont.Crt.Jus.):

> The games became operational when a player deposited money into the machine. Once this was done, the player could move a joystick. This joystick directed an overhead crane to be positioned where the player wanted it. After the crane was positioned, the player depressed a red button on the joystick thereby causing a 3-tine claw to descend into a bin containing toys and novelties. The claw then would close and the claw and prize (provided one had been secured) would ascend. The claw would move to a position over a chute. At this point, the claw opened thereby depositing the object into the chute. The player could then take possession of the selected property. It is to be noted that the player had no control over the machine once he had activated the red button on the joystick.

In dismissing the accused's appeal, a unanimous Ontario Court of Appeal held:

> In our view, the amount of control exercised by the ordinary player was so minimal that the game operated as one of chance or at best mixed chance and skill. The evidence established that the average player simply could not exercise sufficient skill to compensate for the other elements of the game that were wholly beyond the power of the player to influence. The ability of the player to control the crane's lateral movement gave the appearance of an element of skill. In reality, however, as a matter of common sense the game would be played as a game of chance. The expert evidence adduced by the Crown and accepted by the trial judge demonstrated that there were too many other variables that were far more important than the positioning of the crane that would overcome what little skill the operator might bring to the game.
>
> We agree with the [accused] that simply because a game has an increased level of difficulty does not necessarily mean the game will be viewed as one of chance or mixed skill and chance. We also accept that merely because some elements of the game are out of the control of the player does not make the game one of mixed chance and skill. Where, as in this case, however, virtually all of the elements of the game are out of the control of the player, it was open to the trial judge to conclude as he did that the game is one of mixed chance and skill. As the trial judge said, as a matter of common sense the games are "games of mixed skill and chance with an overwhelming degree of chance and merely a dash of skill". This was not a case where there were some unpredictable elements that might occasionally defeat the player's skill, but the systematic resort to chance (references omitted):

Editor's Note: These types of games are not prohibited in all circumstances. For example, s.206(3) of the *Code* exempts s.206(1)(f) while the chance games are being operated at an annual fair or exhibition.

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

TIP, SWAY, ODOUR, & BLOODSHOT EYES:REASONABLE GROUNDS SATISFIED

R. v. Costello, (2002) Docket:C36444 (OntCA)

The Ontario Court of Appeal restored the conviction of an accused who earlier had his conviction overturned by the Ontario Superior Court of Justice. In entering an acquittal, the lower appeal court (reported at [2001] O.J. No. 2109 (Ont.S.C.J.)) found the trial

judge had erred in finding that the officer had reasonable grounds to believe the accused's ability to operate a motor vehicle was impaired. Although the trial judge "correctly outlined the legal test as being one of totality of the evidence objectively viewed", it is the "whole package of evidence" which must be considered "and not just certain items that would support impairment". In noting several factors that indicated a lack of impairment, which were not given sufficient weight, the appellate court judge found the trial judge had reached an unreasonable conclusion on the existence of reasonable grounds when viewed objectively. The factors noted by the summary convictions appeal court judge were listed as follows:

- "there was no observation by the officer of erratic driving - in fact he observed reasonable driving;
- "the officer noted no difficulties with the speech of the [accused];
- "[the accused] was cooperative:
- "[the accused] responded immediately and appropriately in stopping his motor vehicle without difficulty, which is normal behaviour;
- "[the accused] produced his correct documents such as driver's licence and insurance, without problems;
- "the officer noted no difficulty with respect to the ability of the [accused] to walk, move or maintain his balance other than swaying when producing the ownership documents;
- "the only observation with respect to his physical condition was bloodshot eyes as opposed to being glassy or with dilated pupils, as a result of which the observation of his physical condition was entirely equivocal;
- "the existence of an odour of alcohol from the breath of the [accused] was consistent with consumption of some alcohol, however that's not enough to find reasonable and probable, grounds that he is unable to drive;
- "[the accused] didn't personally interview the civilian complainants - they had just pointed;
- "there were no details provided by the civilians at the restaurant as to the nature of their observations, which would enable either the officer or the learned trial Judge to evaluate the reasonableness or accuracy of such observations.

In allowing the appeal and restoring the conviction a unanimous Court of Appeal found the appeal court judge who overturned the conviction should not have re-weighed the evidence in determining whether reasonable grounds existed; the trial judge considered the relevant evidence and concluded the reasonable grounds standard had been met. Regarding factors indicating a lack of impairment listed by the appellate court judge, the unanimous Court of Appeal held:

> It was open to the trial judge to find that the officer had grounds to make the demand. The absence of some factors that are sometimes found in an impaired driver did not undermine the finding of reasonable grounds based on the tip from the civilian, confirmed by the officer's own observations that the respondent was swaying, had an odour of alcohol, and had bloodshot eyes. (emphasis added)

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

PAST POLICE PRACTICE PROVES FACT

R. v. Thomson, (2001) Docket:C32509 (OntCA)

The accused appealed his conviction of failing to comply with a demand to provide a breath sample. A police officer stopped the accused and after receiving an admission to the consumption of "one or two beers" and noting an odour of alcoholic beverage on his breath and red and bloodshot eyes, the officer made a demand for a roadside breath sample. Following three apparent attempts, the accused was arrested for failing to provide a sample. During the first attempt the officer did not hear the tone the device was supposed to make nor hear any air passing through the mouthpiece; during the second and third attempts air did enter the device but there was insufficient pressure to activate it. Among several grounds of appeal, it was argued the trial judge erred in finding that the officer checked for obstructions in the mouthpiece. The accused asserted that although the officer stated that it was her standard practice to check for obstructions in the mouthpiece, she had no specific memory of doing so and the judge should not have found that she did. In dismissing the appeal, the unanimous Court stated, at para. 9:

> If [the judge] accepted [the officer's] evidence that it was her standard practice to check the mouthpiece and that she must have done so on the occasion in question, it was reasonably open to him to find, as he did, that she had checked it on the occasion in question.

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

Note-able Quote

"Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country."[83] SCC Justice Cory

BREAKING SILENCE: POLICE PERSUASION VIOLATES CHARTER

R. v. Otis,
(2000) 151 CCC (3d) 416 (Que.C.A.) appeal to Supreme Court of Canada dismissed 2001

The accused was questioned by the police following the discovery of the body of a three-year-old girl reported missing by her mother. The girl died from violent blows causing abdominal hemorrhaging and was found near a cottage owned by the accused's father and occupied during the preceding days by the accused, the deceased girl's mother, and her two children (including the deceased). At the police station, the mother of the murdered girl provided a statement that led to the arrest of the accused. He was informed of his right to counsel and met with a legal aid lawyer for 32 minutes. Later in the evening, shortly past midnight, the accused was subject to a videotaped interrogation lasting 90 minutes by a lone police investigator who was a specialist in interrogation; during the last 45 minutes the accused confessed to the murder. At trial, the judge found the accused had an operating mind despite a difficulty in expressing himself, limited vocabulary, limited cognition, and low intellectual quotient. However, midway through the interrogation and prior to the confession, the Court found the accused experienced a "psychological disintegration, and was no longer able to resist or exercise his free choice to speak or remain silent"; at this point the accused no longer possessed an operating mind. The confession was held to be inadmissible and a jury acquitted the accused. The Crown appealed the trial judge's decision to the Quebec Court of Appeal. At the heart of the appeal was the scope of police persuasion in breaking a person's silence after they have chosen to remain silent.

Common Law Voluntariness (the Crown's Burden)

It has long been recognized that a statement obtained by the police that is not voluntary, i.e. induced through promises or threats, is inadmissible under the common law. More recently, an emphasis has also been placed on the "mental state" of the suspect resulting from the circumstances under which the statement was made which may create "an atmosphere of oppression or intimidation" even though no promises or threats are made. In prescribing meaning to the term "oppression", Proulx J.A. for the unanimous Court of Appeal stated:

> "Oppression" should be understood as anything which tends to undermine or which does in fact undermine the voluntary nature required of a "voluntary" confession. The circumstances surrounding an interrogation, including the time, date and length, the frequency of interrogations, the rest time granted to the subject, feeding and personality of the subject, all constitute elements which may be taken into consideration in determining whether or not oppression exists. (footnotes omitted)

The onus on proving beyond a reasonable doubt that a statement is voluntary rests with the Crown who seeks to introduce it. Where a statement is not proven to be voluntary, the confessions rule demands its exclusion.

Charter (the Accused's Burden)

With all *Charter* rights, the onus on proving a violation on a balance of probabilities rests with the accused. Although section 24(2) of the *Charter* provides a remedy for exclusion, it is not automatic like a breach of the confessions rule. Where a person has made a choice not to make a statement, the police are not entitled to use their superior power to override the person's will and negate the person's choice. However, evidence acquired from a suspect will only amount to a s.7 violation if the method used by the police infringed the **right to choose** to remain silent. Police persuasion, short of denying the suspect the right to choose or depriving them of an operating mind, does not breach the right to silence. In providing some pragmatic guidelines, the Court of Appeal outlined the following principles in defining the scope of the police power of persuasion in convincing a person to confess to a crime despite having indicated an intention to remain silent:

[83] R. v. Bernshaw (1995) 95 CCC (3d) 193 (SCC)

- Police officers are entitled to attempt to obtain confessions during an investigation not withstanding an expressed intent to remain silent
- When a person raises their right to silence it cannot be ignored and the police cannot pursue action as if the person had waived their right
- Is assessing whether a confession is voluntary both subjective and objective factors must be examined
- Police officers cannot use their superior power as representatives of the state to override the detainee's will thereby negating their choice to speak. The police cannot "abuse [the right to silence] by ignoring the will of the suspect and denying [them the] right to make a choice".
- If a detainee exerts their right to counsel under s.10(b) of the *Charter*, the interrogation must be suspended until the person has been afforded a reasonable opportunity to retain and instruct counsel.

In this case, the accused had clearly stated on four occasions within a short period of time that he wished to "put an end to the interrogation" and consult his lawyer; there was no vagueness about the intent expressed by the accused to end the interrogation. In combination with the accused's limited cognitive and intellectual capacity, the ongoing interrogation breached the accused's right to silence and justified exclusion of the statement under s.24(2) of the *Charter*. Having found the statement inadmissible under the *Charter* it was not necessary for the Appeal Court to determine if it was involuntary. However, if it had to rule on voluntariness, the Court would have found the statement was obtained in the circumstances contrary to the confessions rule.

COURT ORDERED APOLOGY UNREASONABLE

R. v. Pine,
(2002) Docket:C36357 (OntCA)

The Ontario Court of Appeal ruled a court ordered apology imposed as part of a conditional sentence for a sexual assault was unreasonable. The condition read as follows:

> The accused shall, with the assistance of his conditional sentence supervisor, write a letter of apology to [the victim] admitting his wrong, and apologizing for the harm done to her.

The appeal Court found an apology to be "entirely subjective" and it would be fruitless and not a genuine expression of remorse if mandated by a court. The conditional sentence was varied to reflect the Court's judgment on this condition.

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

ONTARIO's HIGH COURT EXAMINES POWER OF ARREST

R. v. Asante-Mensah,
(2001) Docket:C24828/C25026 (OntCA)

The Ontario Court of Appeal recently examined a citizen's powers of arrest. In this case, the accused had earlier been acquitted of resisting arrest when an airport ground inspector attempted to arrest the accused under Ontario's provincial *Trespass to Property Act*. The trial judge held that the inspectors, who were merely civilians and not peace officers, were not entitled to use force to effect the arrest and the accused was therefore entitled to resist. Ontario's highest Court granted the Crown's appeal and entered a conviction on the resist charge. In its lengthy judgment, the Court made the following comments of interest:

- "the citizen's power of arrest preceded that of the law enforcement officer. The latter is a species of the former, not the reverse. It follows that it is not appropriate to treat a citizen's power to arrest as exceptional or as a partial derivative of the powers possessed by peace officers"
- "the right to use reasonable force is, in the eyes of the common law, simply part and parcel of the right to make an arrest"
- "it is well accepted in Canada that a police officer has the right to use reasonable force to effect an arrest"
- "s.25 of the *Criminal Code* does not confer powers upon police officers or others, but rather shields them from civil or criminal prosecution if they act on reasonable and probable grounds in the exercise of their authority and use reasonable force for that purpose."
- "[s.25 of the *Criminal Code*] serves…as a "shield" and not as a "sword", and accordingly does not represent a legislative attempt to deal exhaustively with the use of force by those conducting arrests"
- "at common law, an arrest does not end with the initial apprehension of the suspect. A private person

who effects an arrest without warrant is obliged to turn the person arrested over to the authorities to be dealt with according to law. The purpose of an arrest is to ensure the party arrested is brought to justice, and the common law defines arrest in terms of a continuing act, not just the initial apprehension and assertion of control"

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

DRUNK ARREST DOES NOT INVALIDATE SUBSEQUENT CRIMINAL CHARGES

R. v. Campbell, 2001 PESCTD 77

Police arrested the accused after they were called to a restaurant to remove a male patron from the bar. After making some initial inquiries, police found the accused sitting on the floor in the hallway outside the women's bathroom. She appeared extremely intoxicated to the arresting officer and was unresponsive to his requests for her to stand. The officer arrested the accused under Prince Edward Island's *Liquor Control Act* for being "drunk in a public place". The accused was screaming, using foul language, and physically resisted the officers.

When filling out the information in response to the incident the officer charged the accused with causing a disturbance while being drunk contrary to s.175(1)(a)(ii), causing a disturbance by screaming and using obscene language contrary to s.175(1)(a)(i), and obstructing a police officer contrary to s.129 of the *Criminal Code*. The accused was not charged with the offence that formed the basis for the initial arrest, drunk in a public place.

The accused was convicted at trial of causing a disturbance by screaming, swearing, and using obscene language and the obstruction charge, but was acquitted of the charge of causing a disturbance by being drunk. She appealed, arguing that the arrest was illegal, therefore she was lawfully entitled to resist. In rejecting the appeal, MacDonald C.J.T.D. found the initial arrest pursuant to the *Liquor Control Act* valid and charging her with another offence subsequent to that arrest did not render the initial arrest invalid. Even though the accused was acquitted of the charge of causing a disturbance by being drunk, the validity of the arrest does not necessarily affect the ensuing criminal charges flowing from and subsequent to the arrest. Following the lawful arrest, the accused did resist and obstruct the officers and therefore the conviction under s.129 of the *Code* stood. However, the Court overturned the accused's conviction for causing a disturbance because there was no evidence that a disturbance as contemplated by the section occurred or that it was the verbal outbursts, and not the police presence, that generated the curiosity of the onlookers.

Complete case available at www.gov.pe.ca/courts/supreme

CRIMINAL HARASSMENT: "THREATENING CONDUCT" DEFINED

R. v. George, 2002 YKCA 2

The accused successfully appealed his conviction of criminal harassment by engaging in "threatening conduct" directed at another person pursuant to s. 264(2)(d) of the *Criminal Code.* The Yukon Court of Appeal (which is made up of justices of B.C.'s Court of Appeal) reviewed the various case authorities concerning "threatening conduct" and defined it as follows:

> [I]n order to achieve the objective of s. 264, the threat described in s.264(1)(ii)(d), must amount to "a tool of intimidation which is designed to instill a sense of fear in the recipient." Whether or not this is the case is an **objective** question. Here, the question is as follows: did [the accused] commit an action which could be characterized as a tool of intimidation and by which he meant to instill fear in the complainant? (emphasis added)

And further:

> Instilling a sense of something undesirable to come is indeed engaging in an act designed to instill a sense of fear. Intimidation may occur as a result of restraining a person's ability to act.

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

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