POLICE ACADEMY
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JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

INCOMPLETE INVESTIGATION RESULTS IN ACQUITTAL

R. v. Egresits, 2002 BCCA 163

While investigating a break and enter in progress, police discovered a 21 plant marihuana grow operation in the basement of a home and consequently obtained a search warrant. Although the trial judge found that the police should have done more to fully investigate the matter, he nevertheless found there existed a minimum amount of circumstantial evidence warranting a conviction. In addition to the testimony from the accused's mother that he had keys to the house and sometimes stayed there, police found an undated envelope addressed to the accused and a transcript in the name of the accused at the house. The accused appealed, arguing that the evidence could not reasonably support the guilty verdict.

In overturning the conviction and entering an acquittal, the British Columbia Court of Appeal (BCCA) held that the evidence against the accused was not any greater than evidence linking three other persons to the house. It was noted that the police also located documents addressed to another male and a telephone bill in the name of the accused's brother. Furthermore, the accused's mother had a key to open the padlocked door to the basement area of the house and did in fact do so when assisting the police in executing their warrant. The search warrant application included also information that it did not appear the house was being lived in at the time. In allowing the appeal, Huddart J.A. for the unanimous Court stated at para. 8:

> The trial judge commented on the lack of a full investigation of this offence, but concluded that it would be pure speculation as to what such an investigation might have turned up. I do not agree with his implicit suggestion that it would be pure speculation to suggest someone else might have been responsible for the grow operation. While [the accused] might be the most likely perpetrator, the circumstantial evidence linking him to the grow operation is not sufficiently greater than that linking his mother, his brother, or [the other male] to exclude them from the realm of reasonably possible perpetrators of the production offence. It may well be that a more thorough investigation would have uncovered sufficient evidence to exclude the others and to spin a sufficient web to permit the inference of the appellant's guilt, but that is to speculate. (emphasis added)

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

RIGHT TO ENTER TO PROTECT INTERESTS OF OCCUPANTS: REASONABLE SUSPICION SUFFICIENT

R. v. Kingbell, 2002 SKQB 69

At about 3:20 am an unknown female flagged down two city police officers patrolling the area and turned in a purse found on a city street. After examining the contents of the purse and finding a driver's licence with a name and address, police attended the address to return the purse to the owner. Police found lights on at the home and could see in through the window from the doorstep, noting a "disheveled" front room, contents strewn about, and a duffle bag on the floor. Police suspected a break in. One officer went to the back door and found it to be slightly ajar although there was no evidence to suggest it had been forced open. The officers informed their dispatcher that they were going to enter to check for a break and enter or to see if anyone was injured. The officers went to the back door, announced their presence and after receiving no response, entered.

Inside the officers found open cabinets and drawers, items strewn about, a number of tools gathered together in the kitchen, and a number of plants (some marihuana) growing in one of the bedrooms under fluorescent lights. The officers proceeded into the basement where they moved aside a partition and discovered a complete marihuana grow operation. The officers called their sergeant who attended and was shown the discovery. While the two officers waited at

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and remained parked on the property to ensure its security, a search warrant was applied for and subsequently executed.

The accused argued that the search and seizure was unreasonable and the evidence should be excluded under s.24(2) of the *Charter*. It was suggested that although a warrant was executed, the information relied upon to obtain the warrant was itself tainted by the entry and search of the premises by the officers. Furthermore, the sergeant's entry into the premises to be shown the discovery further compounded the s.8 violation. Finally, it was contended, the officers could not remain on the property to secure the premises while the search warrant was obtained.

In summarizing the evidence, Smith J. of the Saskatchewan Court of Queen's Bench stated:

> [The officers] entered the residence…on the basis of a bona fide suspicion that a break and enter could have occurred, and a reasonable concern that the perpetrator or an injured innocent party might still be inside. … They did not enter for the purpose of seeking or obtaining evidence of a criminal act as against the persons who owned or resided in the property in question, but only for the purpose of protecting their property or safety. No one responded to their announcement of who they were on entry, and no one asked them not to enter. There is no evidence that they were aware of the presence of a marihuana grow operation on the premises or that they were looking for evidence to support the within charge.

The Law

Section 8 of the *Charter* is only triggered if the accused can establish a reasonable expectation of privacy. If no such privacy interest can be established, s.8 is not violated and there is no need to consider the exclusionary mechanism under s.24(2) of the *Charter*. In this case, the Court applied the Ontario Court of Appeal judgment in *R. v. Mulligan*[1] which recognizes an implied licence at law that permits a police officer acting on a "bona fide belief that gives rise to a reasonable suspicion of criminal activity being perpetrated against the owner or occupant or property" to enter onto the property where a person would normally have an expectation of privacy. Since "it is entirely reasonable to expect a police officer to investigate" in these circumstances, the occupant of the home waives their expectation of privacy. In finding no s.8 *Charter* breach, Smith J. concluded at para. 20:

> [T]he initial entry of [the officers] was lawful, and did not violate a reasonable expectation of privacy on the part of the occupant of the premises in question. Their discovery of the marihuana grow operation was the result of an inadvertent discovery of evidence clearly visible in their attempt to assure themselves that neither an intruder nor an injured occupant was inside the premises. The criminal nature of the evidence was immediately apparent. Thus the requirements of the plain view seizure of the evidence was at this point established and the officers were fully entitled to remain on the premises to secure the scene while awaiting a search warrant.

The application for the exclusion of evidence was thus dismissed.

Complete case available at www.lawsociety.sk.ca

Editor's note: Officers must be aware that this implied licence or invitation differs from the implied waiver that gets an officer from the sidewalk to the doorstep to communicate with the occupant, much like a door to door sales person. Although they both waive the privacy expectation of the homeowner or occupant, the former concerns legitimate police enquiries in gathering information, such as neighbourhood enquiries following a break and entry (gets you to the door[2]), while the latter involves the occupants expectation in the police acting on a reasonable suspicion (something more than a hunch but less than a reasonable beleif) to protect the homeowner's interests (gets you onto the property and in some cases into the premise). Furthermore, homeowner interest waiver recognizes the need to investigate criminal activity perpetrated against the occupant, not by the occupant. Ultimately, the analysis will examine the motives of the police at the time of entry onto the property. In either case, the intention of the police is not to secure incriminating evidence against the homeowner. However, if while acting within the ambit of implied licence incriminating evidence is found, the entry and search is not turned into an unreasonable one merely because such evidence is discovered.

Note-able Quote

"*Policy manuals are a poor substitute for training and should not be used as such*[3]". Richard N. Holden.

[1] (2000) Docket: C32948 (OntCA)

[2] See Volume 1 Issue 1 for a detailed discussion on implied licence.

[3] (1986). Modern police management. Englewood Cliffs, NJ: Prentice-Hall Inc. at p. 242.

CRASHING ON COUCH: NO STANDING TO ARGUE *CHARTER* BREACH

R. v. Schwingenschlegel, 2002 ABQB 251

The accused was lying on the couch in the front room of a friend's trailer home when police entered while executing a search warrant. Surprised by the police raid, the accused started to get up when he spilled several packages of methamphetamine off his chest onto the floor. He was taken into custody after reaching under the cushions of the couch where police later found a weapon. The accused had met the owner of the trailer two days earlier and had been previously invited to spend the night. The owner further invited the accused to use the trailer as "a place to crash" if needed. In the early morning of the raid, the accused had found the trailer locked and entered through a window. The owner was unbothered by the accused's presence or mode of entry and left for an appointment; it was during the owner's absence that police entered the trailer.

The accused argued that the search warrant was defective and that the evidence should be excluded. However, the trial judge found that the accused did not have a reasonable expectation of privacy and therefore did not have standing to complain that his personal right under s.8 of the *Charter* was violated; hence it was unnecessary to rule on the validity of the search warrant.

The accused appealed arguing that he should have been able to contest the validity of the warrant because he did have a reasonable expectation of privacy. On appeal, Wilson J. framed the question as: "Do we have an expectation of privacy when, as house guests of our friends, we are, in their absence, staying inside their locked homes?" In rejecting the accused's appeal, the Alberta Court of Queen's Bench noted the following factors:

- the accused was offered "a place to crash";
- the accused did not have keys to the trailer; the owner had the only keys ;
- when police entered, there was another male present who had been admitted by the owner before his departure for the appointment; the owner did not ask the accused if this person's presence was acceptable or not;
- the owner did not admit the accused as a guest or at all;
- the accused had "crashed" at the trailer one night previously and the night before the police raid;
- the owner's use of the term "crashed" does not carry with it any degree of permanence to the accused resting there or that he kept any personal belongings there other than what he had on his person; and
- the accused had no propriety or possessory interest in the trailer.

The Court held that on the totality of the circumstances the trial judge made no error is his assessment of the privacy interest of the accused and the appeal was dismissed. The evidence was admissible and the conviction upheld.

Complete case at www.albertacourts.ca

Y.O. PEACE BOND INVALID: YOUTH COURT LACKS JURISDICTION

R. v. J.L.S., 2002 BCCA 174

The BCCA ruled that a youth court judge cannot order a young person to enter into a recognizance under s.810 of the *Criminal Code*. In this case, a young offender was placed on a one-year peace bond with conditions including abstinence from the consumption of alcohol. The accused later violated this condition and was charged under s. 811 of the *Code* for breaching the recognizance. At the trial, the accused admitted all the essential elements of the breach allegation but argued that the court did not have jurisdiction to place the accused on a peace bond in the first place. The Court agreed and the breach charge was dismissed. The Crown successfully appealed the acquittal to the Supreme Court of British Columbia suggesting that the accused was not entitled to challenge the validity of the recognizance as a defence to the charge of breach of recognizance. In other words, the accused should have challenged the peace bond on appeal from the original order, not during the breach of recognizance proceedings (also known as a collateral attack). The accused further appealed to BC's highest court.

Although the BCCA dismissed the accused's appeal on the "collateral attack" issue, it did hold that a youth court does not have the jurisdiction under the *Young Offenders Act* (*YOA*) to bind a young person with a recognizance under s.810 of the *Criminal Code*. Section 5(1) of the *YOA* gives a youth court exclusive jurisdiction with respect to "offences" committed by young persons. However, s.810 of the *Criminal Code* does not create an offence even though an information is sworn, but is a form of preventative justice. Therefore, the wording used in s.5 of the *YOA* prevents a youth court from imposing such an order.

Editor's note: The Court noted that a youth court judge does have the power to place young persons on recognizances other than a s.810 *Code* recognizance such as those found in s.49 of the *YOA*. Furthermore, the new *Youth Criminal Justice Act*, which is expected to come into force in the spring of 2003, includes a specific provision allowing a youth court to bind a young person with a s.810 recognizance.

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

PROSECUTORIAL DISCRETION IN NOT CHARGING OFFICER UPHELD

Meyer v. Attorney General et al., 2002 BCSC 257

The plaintiff alleged she was assaulted after being approached by a CPR police officer investigating a trespass violation contrary to the British Columbia *Railway Safety Act*. After complaining to a local RCMP detachment, she was directed to lodge her complaint with the CPR Police which was ultimately dismissed. During this time, the accused was convicted of trespassing and sentenced to 10 days in prison. Although her subsequent conviction appeal was dismissed, her sentence was varied to an absolute discharge. The plaintiff returned to the local RCMP detachment and was told to complain to the RCMP Office of the Police Complaint Commissioner but was told by the Commission that they lacked jurisdiction to investigate complaints against the CPR police.

The plaintiff returned to the local RCMP detachment where a complaint of assault was taken but nothing was done until almost a year later when a report was submitted to Crown Counsel for consideration of assault charges. Of course, this precluded a summary conviction prosecution due to the six-month statute of limitations under s. 786(2) of the *Criminal Code* for summary offences. Although the Crown could proceed by way of indictment, it was decided that there were "no exceptional or compelling circumstances" to warrant this process. The plaintiff sought an order from the Court compelling the Attorney General of British Columbia to prosecute the CPR police officer.

In dismissing the plaintiff's application, the court held that a judge may only interfere with prosecutorial discretion in cases of "flagrant impropriety" which can "only be established by proof of misconduct bordering on corruption, violation of the law, [or] bias against or for a particular individual or offence ". In this case, McKinnon J. found no evidence that the prosecutor conducted himself in such a manner when deciding not to prosecute.

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

CONSENT SEARCHES: SIMON SAYS OR MOTHER MAY I?

Sgt. Mike Novakowski

Warrantless searches conducted **without consent** are presumptively unreasonable because, *prima facie*, they encroach on a person's expectation of privacy[4]. However, a person may **waive** their privacy rights protected by s.8 of the *Charter*[5]. If a search is consensual, no search warrants are necessary and a consent search or seizure is no search or seizure at all for the purposes of s.8[6]. The question becomes whether, having regard to all the circumstances, permission was in fact given[7]. The burden in establishing consent on the balance of probabilities rests with the Crown (police).

[4] R. v. Blinch (1993) 83 *C.C.C.* (3d) 158 (B.C.C.A.) at p.169.
[5] R. v. Wills (1992) 70 *C.C.C.* (3d) 529 at p.541, R. v. Glasgo 2000 BCSC 1140 at para. 23.
[6] R. v. Wills (1992) 70 *C.C.C.* (3d) 529 at p.549, see also R. v. Fowler (1990) 61 *C.C.C.* (3d) 505 (Man.C.A.) per Hubard J.A. at p.513.
[7] R. v. Duncan [1993] B.C.J. No.653 (B.C.C.A.) at para. 6.

Requirements

The test for valid consent is two fold[8].

- **volition.** A proper waiver requires an intentional or voluntary relinquishment of a known right[9]. Consent may be given expressly by words, either orally or in writing, or may be implicit by actions or conduct[10]. In fact, permission to search can effectively be given without particular formality, even in a cursory fashion[11].
- **knowledge**. The person must be aware of the consequences of giving consent.

Volition

Mere compliance, passive acquiescence, or failure to object by themselves do not amount to valid consent[12]. Consent means to actually agree and cooperate[13] and must be consciously, freely, and voluntarily given[14]. For consent to be validly given, a person "must have the ability to prevent the police from conducting a search or seizure by withholding…consent"[15]; the person must have the freedom to prefer one option (no search) over another (search). Consent cannot be the result of police oppression, compulsion, coercion, or other external conduct negating the right to choose. Police representations that they would otherwise apply for a search warrant if consent is not obtained, in proper circumstances, does not necessarily require a finding of coercion[16].

Included under the rubric of voluntariness is an awareness of the right to refuse the search[17]. An awareness of the right to refuse may be implied by the conduct of the person such as their initial hesitation in permitting a search, questioning the police as to why the search is being requested[18], or by a person's awareness that they need not cooperate with the police[19]. Although, the police are under no obligation to formally advise a person of their right to refuse consent, it would be prudent for the police to expressly tell a person of this right since the onus lies with Crown in proving volition[20].

Knowledge

The right to make a valid choice as to whether or not to permit the search requires sufficient available information to make the choice meaningful[21]. The standard of an **informed** constitutional waiver must be met[22]. The person consenting must be aware of the consequences of waiving their s.8 right. The degree of awareness required is dependent on the particular facts of the case and it will not be necessary for the person to have a detailed comprehension of every possible outcome of their consent. However, if the police are planning to use the product of the seizure in a different investigation from the one in which the person was detained, the person should be made aware of that fact[23]. If a person is mentally incompetent, intoxicated, or a language barrier exists, there will be a question of the level of their awareness (similar to the questions raised for the right to counsel waiver). Included under the rubric of knowledge is:

- **an awareness of the nature of conduct to which the person is being asked to consent** (the search), and
- **an awareness of the potential consequences of giving consent.** The person must appreciate in a general way what their position is vis-à-vis the ongoing police investigation[24]. In some cases this may include that any material found may be used against the person. Deceit or trickery by the police of the true reason for the search will invalidate the consent[25].

A court may infer from the facts that it was more likely than not that the person was aware the police were searching for evidence. Thus, where a person is given a *Charter* warning and police caution regarding an investigation of an attempted break and enter, the person knew the officer was looking for evidence that would connect the person with the matter under investigation[26]. Although there is no affirmative duty to advise the person of the consequences, the onus placed

[8] R. v. Kennedy 2000 BCCA 362 at para.23, R. v. Head [1994] B.C.J. No.2522 (B.C.C.A.) at para. 22.
[9] R. v. Blinch (1993) 83 C.C.C. (3d) 158 (B.C.C.A.) at p.169.
[10] R. v. Meyers [1987] 52 Alta.L.R. (2d) 156 (Alta.Q.B.).
[11] R. v. Duncan [1993] B.C.J. No.653 (B.C.C.A.) at para. 6.
[12] R. v. Head [1994] B.C.J. No.2522 (B.C.C.A.) at para. 18.
[13] R. v. Knox (1996) 109 C.C.C. (3d) 481 (S.C.C.) at p.485.
[14] R. v. Meyers [1987] 52 Alta.L.R. (2d) 156 (Alta.Q.B.)..
[15] R. v Stillman [1997] 1 S.C.R. 607 at para.60.
[16] R. v. Haglof 2000 BCCA 604 at para. 42.
[17] R. v. Head [1994] B.C.J. No.2522 (B.C.C.A.) at para.22.
[18] R. v. Wotton (1998) Docket: GSC-16008 (P.E.I.S.C.) at para.10.
[19] R. v. Eakin (2000) Docket:C24289 (Ont.C.A.)
[20] R. v. Blackstock [1997] O.J. No.3597 (Ont.C.A.)
[21] R. v. Borden [1994] 3 S.C.R. 145 (S.C.C.) per Iacobucci J. for the majority.
[22] R. v. Deprez (1994) 95 C.C.C. (3d) 29 (Man.C.A.) at p.36.
[23] R. v. Borden [1994] 3 S.C.R. 145 (S.C.C.) per Iacobucci J. for the majority.
[24] R. v. Wotton (1998) Docket: GSC-16008 (P.E.I.S.C.) at para.11.
[25] R. v. Adams (2001) Docket:C34243 (OntCA)
[26] R. v. Head [1994] B.C.J. No.2522 (B.C.C.A.) at para.31, see also R. v. Wells (2001) Docket:C13744 (Ont.C.A.) at para.43-44..

on the Crown by the waiver requirement once again disappears in large measure if the police advise the individual that anything found may be used as evidence[27].

Withdrawing Consent

Consent may be withdrawn at any time during the search. However, withdrawal of consent may not be used in forming reasonable grounds to justify a search[28]. The police cannot use the fact a person invokes their constitutional protection and draw an adverse inference when they change their mind and revoke permission they did not have to give in the first place. If at the time consent is withdrawn, the officer has sufficient grounds to justify an arrest, an arrest may be effectuated and a search incidental to lawful arrest may be undertaken.

Scope

General Consent

Consent may be of a general nature allowing a complete search of the area, place, person or thing. Where evidence is obtained under "open ended" consent, evidence may be used for any legitimate police purpose unless limits, if any, were placed on the consent[29].

Limited Consent

Consent may be limited in purpose or by location and a search exceeding the limitations will be unreasonable. The search may be "conditional" or limited in scope by the person consenting or by the police. For example, the police may preface their request for consent by informing the person that the object pursued, such as a blood sample for DNA testing, will only be used for comparison to a specific investigation. Similarly, consent given for a specific purpose such as to enter a residence to search for a person does not authorize a search of the remainder of the residence once the person sought has been located[30]. Moreover, consent by an individual for a limited non-police purpose such as the taking of blood by a physician for medical purposes does not grant police officers the right to use the blood for investigative purposes[31]. Consent limited by location may include circumstances such as consent to search the interior of a vehicle but not the trunk.

Third Party Consent

For consent to be valid it can only be given by someone having the authority to grant the consent. A person who has a sole expectation of privacy may consent to an intrusion into that private area. What governs the legitimacy of obtaining consent from a person with a "shared" expectation of privacy? If an individual would not reasonably expect another person to be able to authorize a search, then that person cannot validly consent to the search[32]. Stated positively, if a "suspect" reasonably expects that a third person could authorize a search, the third party could consent to the search. The question becomes whether the consent given by the third party, which led to the invasion of the suspect's privacy is an acceptable substitute for the absence of prior judicial authorization[33]. Examples where third party consent may become a viable search or seizure option for police include co-habitants, spousal[34], parental[35], employee/employer, or registered owner/occupant of vehicle relationships. Although a third party may in some cases validly consent vicariously to a search, private areas not accessible to the third party would remain such.

For example, hotel management could not consent to police entry and search of a hotel room where the room was rented, the registered guests were absent, and a "Do not Disturb" sign had been left on the door. The renter of a hotel suite maintains a reasonable expectation of privacy from uninvited state intrusions with respect to their belongings left inside the room despite their awareness that cleaning staff will enter their rooms daily for cleaning purposes. In particular, objects not left in plain view or stored in areas that do not require daily maintenance remain private. Thus, where police erroneously entered a rented hotel room at the invitation of the hotel manager, rather than obtaining the permission of the occupants, the entry and search constituted a violation of s.8[36].

[27] R. v. Wills (1992) 70 C.C.C. (3d) 529 (Ont.C.A.)
[28] R. v. Brownridge 2000 BCSC 795 at para. 36, R. v. Brownridge 1999 BCCA 27 at para. 16.
[29] R. v. Arp [1998] 3 S.C.R. 339 (S.C.C.)
[30] R. v. Smith (1998) 126 C.C.C. (3d) 62 (Alta.C.A.)
[31] R. v. Pohorestsky [1987] 1 S.C.R. 945 (S.C.C.)
[32] "Search and Seizure Law in Canada", 1993, Hutchison, Carswell Thomson Professional Publishing
[33] R. v. Mercer (1992) 70 C.C.C. (3d) 180 (Ont.C.A.) leave to appeal to S.C.C. refused 74 C.C.C. (3d) vi.
[34] See for example R. v. Van Wyk [1999] O.J. No.3515 (Ont.S.C.J.) at para. 41.
[35] See for example R. v. Rai [1998] B.C.J. No. 2187 (B.C.S.C.), R. v. Wells [1998] O.J. No.3371 (Ont.C.J.)
[36] R. v. Mercer (1992) 70 C.C.C. (3d) 180 (Ont.C.A.) leave to appeal to S.C.C. refused 74 C.C.C. (3d) vi.

Right to Counsel

The right to counsel is triggered on arrest or detention, not on search or seizure[37]. Therefore, informing a person of their right to counsel is dependent on whether in law there is a detention or arrest. In many cases, even where the right to counsel has been denied, "the denial… has no relevance to a determination of the reasonableness of a s.8 search"[38]

Pre-Detention Consent

The right to retain and instruct counsel derives from arrest or detention and not from the fact of being searched[39]. When the police attempt to obtain consent from an individual in the absence of detention or arrest, there is no obligation on the police to provide information respecting the right to counsel.

Consent Following Arrest or Detention

Police may legitimately seek consent from a person who is detained or arrested.. In *R. v. Haglof* 2000 BCCA 604, police obtained valid consent from a person who was under arrest and in custody at the police station. The accused had provided written consent to search his residence in the face of representations that the police would otherwise apply for a search warrant.

If the police detain an individual and seek that person's consent following the detention, the detainee has the right to counsel and the police are obligated to inform the detainee of their right. If the lawfulness of the search is dependent on consent of a detainee or arrestee, the police must provide the person with a reasonable opportunity to exercise their right to counsel before obtaining consent if the person asserts their desire to contact counsel. In the absence of waiver, the consent is valid provided the person took advantage of the opportunity afforded them and thereafter agreed to the search and/or seizure[40]. However, if the police obtain consent and either fail to advise the person of their right to counsel or fail to provide a reasonable opportunity for the person to exercise their right, the s.10(b) *Charter* violation will render the search unreasonable[41].

If the detainee or arrestee does not wish to exercise their right to counsel, consent can be validly obtained. This may occur in circumstances where a person has been arrested and an officer wishes to search an area beyond the scope authorized as incidental to lawful arrest without obtaining a warrant.

Consent v. other Lawful Authority

Where a police officer has lawful authority to conduct a search without consent, such as by warrant or otherwise, it is an unnecessary step to attempt to obtain consent. In *R. v. Brownridge* 2000 BCSC 795, a police officer testified he had reasonable grounds to search a vehicle without consent, yet the officer asked the accused for permission. The Court found the officer's evidence of the existence of reasonable grounds for an arrest inconsistent with his conduct, suggesting the officer was unsure of his authority. The Court drew an adverse conclusion from the conflict between the officer's assertion he could search without consent and the fact he attempted to obtain permission.

Subjective Good Faith

Where the police mistakenly believe they have consent to conduct a search, the otherwise invalid search will not be rendered valid. However, this mistaken belief is an important consideration in determining whether to admit the evidence under s.24(2) of the *Charter*[42]. In assessing the officer's good faith belief, the Court will review the interaction between the person and the police, including the words spoken by the police and the responses given by the person[43]. A finding of good faith may mitigate the *Charter* violation and favour inclusion of evidence.

Note-able Quote

"No man is above the law and no man is below it; nor do we ask any man's permission when requiring him to obey it". Theodore Roosevelt (1904)

[37] R. v. Rube (1992) 10 B.C.A.C. 48 (B.C.C.A.)
[38] R. v. Carpenter (2001) 151 C.C.C. (3d) 205 (B.C.C.A.)
[39] R. v. Debot [1989] 2 S.C.R. 1140
[40] R. v. Deprez (1994) 95 C.C.C. (3d) 29 (Man.C.A.) at p.39.
[41] R. v. Debot [1989] 2 S.C.R. 1140 per Lamer J.
[42] R. v. Leveillee (1984) Docket:CA831359 (B.C.C.A.)
[43] R. v. Tang 2001 BCCA 165.

B.C.'s 2000 CRIME STATS

The Municipal Police case burdens for the year 2000 have recently been published by the Police Services Division of the Public Safety and Regulatory Branch, Ministry of Attorney General[44]. A summary is as follows:

Dept.	Strength [45]	Population[46]	Crimes [47]	Crime Rate[48]	Case Burden[49]
Victoria	178	74,996	16,355	218	**92**
Abbotsford	143	115,195	10,791	94	**75**
Vancouver	1,066	567,351	78,107	138	**73**
New Westminster	111	54,904	8,120	148	**73**
Nelson	17	9,677	1,189	123	**70**
Esquimalt	33	16,400	2,088	127	**63**
Port Moody	30	23,819	1,811	76	**60**
Delta	138	101,440	7,260	72	**53**
Saanich	136	106,814	6,942	65	**51**
Oak Bay	22	17,664	948	54	**43**
Central Saanich	21	15,553	850	55	**40**
West Vancouver	77	44,679	2678	60	**35**
Total	1,972	1,148,492	137,139	119	70

The RCMP municipal detachment with the highest case burden was the Courtenay RCMP with 151 cases per officer while North Saanich RCMP had the lowest at 53 cases per officer. Overall, there were 2,669 municipal RCMP officers policing a population of 2,187,606 with 260,694 *Criminal Code* offences for an average crime rate of 119 offences per 1000 people.

Spousal Assault[50] Incidents

In British Columbia, there were 10,121 spousal assault incidents reported (Municipal and RCMP) in 2000; an increase of 254 from 9,867 in 1999. Of these spousal assault incidents, 7,916 involved male offenders, 1,307 involved female offenders and 898 involved both parties of a spousal or intimate relationship assaulting each other. From the 10,121 incidents, 11,296 *Criminal Code* offences were investigated resulting in 8,916 people charged[51] with 3,610 convictions[52]. Forty nine percent, or 4,944 incidents, were alcohol related. A municipal breakdown follows:

Department	Total Offenders[53]
Abbotsford	250
Central Saanich	1
Delta	113
Esquimalt	25
Nelson	8
New Westminster	211
Oak Bay	7
Port Moody	35
Saanich	57
Vancouver	1,186
Victoria	112
West Vancouver	30

Note-able Quote

"Although there are well-settled restrictions on their treatment of detained persons and certain affirmative obligations set out in the Charter and the Code, the primary function of the police is to investigate crime with a view to solving it and obtaining a conviction[54]". OntCA Justice Finlayson.

OUR ERROR

In last month's issue of "In Service: 10-8", the Nelson Police Department's 2001 Enhanced Counterattack Statistics were incorrectly reported. The statistics reported were for the 2001 Christmas Counterattack Campaign and not for the whole year. The correct numbers for the 2001 Enhanced Counterattack Roadcheck statistics for Nelson are:

Vehicles checked	Roadside BACs	Impaired Charges	215s
23,309	123	5	66

We apologize for any inconvenience or embarrassment this may have caused.

[44] Complete data available at www.pssg.gov.bc.ca/police_services
[45] Based on authorized police strength as of December 31, 2000.
[46] Populations are based on Canada Census data.
[47] Criminal Code offences obtained from Uniform Crime Reporting Survey and do not include traffic offences.
[48] The number of Criminal Code offences per 1000 population excluding tourists, commuters, or "part time" residents such as students.
[49] The number of Criminal Code offences per authorized police strength.
[50] Including marriages, common-law marriages, same-sex relationships, and intimate partners.
[51] An RTCC has been filed and does not necessarily imply the swearing of an information.
[52] Either plead guilty or found guilty.
[53] Detailed data for Esquimalt, Vancouver, and Victoria was not available and was estimated by the Ministry.
[54] R. *v. Bain* (1989), 47 C.C.C. (3d) 250 (Ont. C.A.).

INTENTION TO CARRY OUT THREAT NOT NECESSARY

R. v. Deneault, 2002 BCCA 178

The accused was convicted of knowingly uttering a threat to cause death or bodily harm contrary to s.264.1(1)(a) of the *Criminal Code* which reads as follows:

> Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat to cause death or bodily harm to any person;

Two forestry workers performing road inspections were told by the accused, who was in company of two other native males, that he was taking over and kicking everyone off the land of the Shuswap nation by escorting them out of the Upper Adams Valley and was "willing to shoot and burn to protect his land". The two forestry workers proceeded to leave the area and were followed out by the accused and the two other males for approximately 2 kms.

The accused appealed his conviction arguing that the words spoken did not constitute a threat to be taken seriously nor did he threaten "any person" as the term has been defined in law. The accused contended that the words used were "at best a frustrated, bitter outburst and at worst an idle threat". Furthermore, even though the accused said he was willing to shoot and burn to protect his land, he never stated he would or planned to do so.

In dismissing the appeal, the BCCA noted that the *actus reus* of the offence is the uttering of the threats of death or bodily harm while the *mens rea* is that the words spoken were meant to intimidate or to be taken seriously; there is no need for the Crown to prove the intention to carry out the threat. Since the accused did not testify in this case, the subjective intent of the accused could be inferred by looking objectively at the words used and their context. The Appeal Court stated, at para. 49:

> Given the words used by the appellant and the context in which he used them, along with the evidence of his having followed the forestry workers for some distance after his encounter with them, … there was ample evidence from which the trial judge could conclude that the appellant intended the words he uttered to intimidate and to be taken seriously by the forestry workers and others who came into the Upper Adams Lake Valley.

Even though the threats were not exclusively directed at the forestry workers, it is not necessary under this section that "any person" be restricted to a specific individual target; it is sufficient that the threat be made against an "ascertainable group of citizens". In this case, the threats were directed against non-members of the Shuswap Nation finding themselves in the Upper Adams Lake area, and given the context of the utterance, forestry workers in particular. Here, the ascertainable group of citizens was identifiable as those non-Shuswap members entering the area.

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

QUESTIONING DURING INVESTIGATIVE DETENTION PROPER DESPITE NO s.10(b) WARNING

R. v. Sloan, 2001 ABPC 116

Two police officers were on patrol when they stopped a car with a license plate not matching the vehicle (which was apparently not registered or insured). Suspecting that it may be stolen and wanting to know if she was connected to the vehicle, an officer asked the accused passenger for identification. She orally provided a name and the officer followed this up by asking if she had any identification. The accused opened her purse on her own volition and the officer saw a quantity of mostly unpacked syringes in plain view in the open purse. The officer asked the accused "What are all those needles for" to which she replied she was a heroin addict.

The officer asked her to step from the vehicle to obtain some form of photo identification and to further investigate whether the needles were related to illegal drug activity. The officer asked the accused for photo identification and to empty the contents of the purse onto the hood of the car. When she dumped her purse out, the needles, and a cigarette package, which the accused attempted to conceal, fell out. After the officer looked inside the cigarette package and found a deck of cocaine, he arrested the accused for its possession. Later, the officer warned the accused about obstruction and consequently obtained the accused's true identity. The accused argued that the officer had no right to question a passenger, failed

to provide the accused the s.10(b) *Charter* warning prior to asking what the needles were for, and that the search was unreasonable because there was no warrant or consent.

The *Charter* and Investigative Questioning

If finding the request for identification reasonable in the circumstances, the trial judge stated:

> The licence plate did not match the vehicle. The registered owner was a woman and obviously not the man who was driving. Consequently, this was much more than a traffic stop. It was a criminal investigation relating possibly to a stolen vehicle with two potentially involved parties: the driver and the passenger. As such, the police had the right and obligation to question both the driver and the passenger, with a view to determining their right to be in the vehicle at all. The police were engaged in the lawful execution of their duty.
>
> Clearly, upon stopping the vehicle, the two occupants were detained. It was not an arbitrary detention. It did not infringe s.9 of the *Charter*. The constables had articulable cause to detain them and demand identification from each. They had no obligation to either arrest or advise either of the occupants of their *Charter* rights before demanding identification. At this point , no search had been undertaken. (emphasis added)

Furthermore:

> Defence counsel argues the constable should have confined his questioning to matters relating to ownership of the car, asking the accused a question such as, "Does this vehicle belong to you?" instead of simply asking for identification. With respect, I disagree. As indicated before, this was not simply a traffic stop; it was a criminal investigation. When police are in an investigative stage such as this, surely they have the right to initiate their investigation as they deem fit under all the circumstances. Asking first for identification is reasonable, as the police have a right to first establish with whom they are dealing.
>
> In addition, the police have the power to detain a person in the course of a police investigation where there is a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect the detainee is criminally implicated in the activity under investigation.

The judge found the accused opened her purse on her own without prompting or suggestion by the police. The needles were in plain view and at this time the officer "had articulable cause to suspect the accused was implicated in illegal drug activity and to detain her pending further investigation". As stated by the trial judge, "[w]ith real evidence staring him in the face, his decision to carry on the investigation and further detain the accused, was neither based on intuition or hunch".

The accused also argued that the officer should have ceased questioning and immediately arrested and Chartered the accused upon seeing the needles. The judge found that when an officer "observes unusual evidence leading him to reasonably believe criminal activity is afoot, he may make reasonable inquires aimed at confirming or dispelling his suspicions without either arresting the suspect or reading her *Charter* rights or providing her with the opportunity to consult with counsel". At para. 31, Daniel J. stated:

> Had [the accused] actually been an innocent diabetic, and had she been immediately arrested, without further inquiry, surely defence would have roundly criticized the constable. It would be alleged he had insufficient grounds for the arrest and that he should have asked her for a reasonable explanation for possessing the needles before arresting her. In all investigations police are compelled to ask questions for the legitimate purpose of sorting out facts to determine if arrest is appropriate. To require arrest before all reasonable investigative inquiries are completed would immediately paralyze police forces, quickly fill our jails and clog our courts with lawsuits against the police for unreasonable and unlawful arrest.

The officer was simply providing the accused with an "opportunity to give him a reasonable explanation in what otherwise were extremely suspicious circumstances for her". In this case, the question was "a sound and justifiable inquiry based on real evidence voluntarily displayed in plain view for the [officer] to see". The judge found there had been no s.10(b) *Charter* violation by either the demand for the identification or the question regarding the possession of the needles.

The *Charter* and the Purse Emptying

Having found the initial opening of the purse voluntary, the Court next examined the emptying of the purse's contents. The accused argued that this search was unreasonable and furthermore, the officer should have read the s.10(b) *Charter* rights at this time and allowed an opportunity to consult with counsel prior to commencing the request to empty the purse. The judge found that the search of the purse was lawful because the officer had the right to search for identification. However, at this time the officer had seen the drug

paraphernalia and had reasonable grounds to search for evidence; he should have informed the accused of her right to counsel. In any event, the evidence was admissible under s.24(2) of the *Charter*.

Complete case at www.albertacourts.ca

THROWING PACKAGE OVER PRISON FENCE: TRAFFICKING VERDICT REASONABLE

R. v. Kwok, 2002 BCCA 177

A correctional officer observed a male acting suspiciously outside the perimeter fence surrounding a prison. After observing the man on several occasions approach the fence and then retreat, the officer saw him throw a package over the fence. The officer retrieved the package (which contained heroin), exited the correctional centre, and pursued the man through an adjacent park. While walking along the park trail, the officer apprehended the accused (who matched the description of the male the officer saw at the fence) standing slightly off the trail.

Among other grounds, the accused argued the trial judge's verdict was unreasonable because the evidence could not support a finding of guilt. First, the accused asserted there was no evidence of trafficking or that "he knowingly trafficked to a person in jail". Since the evidence was unclear whether the accused knew the fence surrounded a prison, his actions were equally consistent with simply discarding the package. In finding this submission unacceptable, the BCCA held the nature of the packaging (heroin, a needle, and a rock for projectile weight) was consistent with the drug trade and that the accused intentionally threw it over the fence. This was sufficient to warrant the conviction and it was not necessary to prove the accused" knowingly trafficked to a person in jail".

Second, the accused argued he was not the person who threw the package over the fence but was merely in the park watching birds and enjoying the solitude, despite the officer testifying he observed the accused at the fence, pursued and found the same person, and also identified him in court. The trial judge found the accused's evidence "vague and unsatisfactory" and "inconsistent" with other evidence. The Appeal Court refused to interfere with the trail judge's decision finding "not only was the evidence sufficient, it was overwhelming". The appeal was dismissed.

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

'PRESSURE FILLED', INTENSE, & PERSISTENT QUESTIONING ADMISSIBLE

R. v. J.P.F., 2002 BCSC 106

The accused was arrested by police at the airport following his return from a vacation and advised of his right to counsel. He was transported to the police station where, after speaking to counsel, he was interrogated by two police officers for approximately three hours. At the beginning of the interview, the accused informed the officers that his lawyer told him not to have any contact with them. In spite of this information, the officers persisted in questioning the accused. The questioning was intense and consisted of lengthy monologues directed at the accused with the officers taking turns. Three breaks were taken during the interrogation including a 12-minute cigarette break initiated by the accused and one where the accused wrote an apology to the victim. During the voire dire to determine the admissibility of the accused's statements, Romilly J. described what occurred as follows:

> During the interview, the accused was constantly asked to take the first step to getting help by admitting his crime. [The police] also pointed out that his daughter would have to take the stand in court if he did not own up to the crime. The accused eventually broke down into tears and admitted that he touched his daughter improperly on a few occasions when she was asleep and when he was bathing her. He stated that the writings which were found were only his thoughts and fantasies. The accused eventually wrote two letters of apology: one to his daughter… and the other to her mother…. He asked the police to deliver them for him. On his way to court after the interrogation he thanked the officers for their help.

The accused argued that the persistent questioning violated the common law confessions rule of voluntariness because the police statement that the accused's daughter would be required to testify was an inducement. Furthermore, it was submitted "the police should have desisted from questioning the accused

when he told them that he was advised by his counsel not to talk to them".

Confessions Rule

Under the confessions rule, a statement made to the police will only be admissible if the Crown can prove beyond a reasonable doubt it was made voluntarily (free from oppression or improper inducements). In some cases, persistent police questioning can create an atmosphere of oppression if extracting the statement overcomes the free will of the person to confess. In this case, the Court found that although the questioning was "pressure filled", intense, and persistent, the accused was allowed breaks and the interrogation did not result in an atmosphere of oppression.

Improper inducements, such as hope of advantage or the prospect of lenient treatment in exchange for a confession can also render a statement involuntary. This involves determining whether there was a *quid pro quo* offer. Although, the police implied that his daughter would have to testify if he did not talk, he might not see her again, and he would get psychological help if he confessed. These statements were not *quid pro quo* offers and did not render the statement involuntary.

Quid pro quo (kwid proh kwoh) is a Latin term meaning "something for something".

Continued Questioning after Consulting Counsel

The accused also argued that the police violated his right to counsel by questioning him after he specifically told the officers his lawyer told him not to talk. Once an arrestee expresses a desire to contact counsel, the police are obligated to provide a reasonable opportunity for the communication to occur. Furthermore, the police must refrain from questioning the person until this opportunity is facilitated. However, once the arrestee speaks to counsel, the police are not prohibited from questioning an arrestee after they have retained counsel. Here, the Court found the officers were "entitled to continue to interview the accused even after he told them that his lawyer told him not to speak to them".

The statements were voluntary and not obtained in a manner that violated the accused's *Charter* rights. Thus, the statements were admissible at trial.

Complete case available at www.courts.gov.bc

NEW *CRIMINAL CODE* & *CDSA* AMENDMENTS

There have been several recent amendments to the *Criminal Code* and *Controlled Drugs and Substances Act*. Highlights include:

- The definition of "offence related property" under s.2 of the *Criminal Code* has been changed by removing references to criminal organization offences. The new definition reads:

"offence-related property" means any property, within or outside Canada,
(a) by means or in respect of which an indictable offence under this Act is committed,
(b)that is used in any manner in connection with the commission of an indictable offence under this Act, or
(c)that is intended for use for the purpose of committing an indictable offence under this Act;

- The definition of "offence related property" under s.2 of the *Controlled Drugs and Substances Act* has been changed by removing references to significantly modified real property. The new definition reads:

"offence-related property" means, with the exception of a controlled substance, any property, within or outside Canada,
(a) by means of or in respect of which a designated substance offence is committed,
(b) that is used in any manner in connection with the commission of a designated substance offence, or
(c) that is intended for use for the purpose of committing a designated substance offence;

- Intimidation under s.423 of the *Criminal Code* has been changed from a summary conviction offence to a dual offence now bringing a maximum punishment of 5 years.
- A new intimidation section protecting justice system participants or journalists with a maximum sentence of 14 years has been added:

s.423.1 *Criminal Code*
(1) No person shall, without lawful authority, engage in conduct referred to in subsection (2) with the intent to provoke a state of fear in
(a) a group of persons or the general public in order to impede the administration of criminal justice;
(b) a justice system participant in order to impede him or her in the performance of his or her duties; or
(c) a journalist in order to impede him or her in the

transmission to the public of information in relation to a criminal organization.

Prohibited conduct

(2) The conduct referred to in subsection (1) consists of

(a) using violence against a justice system participant or a journalist or anyone known to either of them or destroying or causing damage to the property of any of those persons;

(b) threatening to engage in conduct described in paragraph (a) in Canada or elsewhere;

(c) persistently or repeatedly following a justice system participant or a journalist or anyone known to either of them, including following that person in a disorderly manner on a highway;

(d) repeatedly communicating with, either directly or indirectly, a justice system participant or a journalist or anyone known to either of them; and

(e) besetting or watching the place where a justice system participant or a journalist or anyone known to either of them resides, works, attends school, carries on business or happens to be.

Punishment

(3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than fourteen years.

- A new part (II.1) addressing terrorist offences has been added. Included in this part is a power of arrest for police officers. Section 83.3(4) of the *Criminal Code* now authorizes a peace officer to arrest, without a warrant, a person they believe will carry out a terrorist activity or suspect a recognizance is necessary to prevent the carrying out of terrorist activity if it is impracticable to first appear before a judge to lay an information and necessary to prevent the terrorist activity. Once arrested, the person must be taken before a provincial court judge.
- A new mischief section specific to religious worship property has been added:

s.430(4.1) *Criminal Code*

Every one who commits mischief in relation to property that is a building, structure or part thereof that is primarily used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

OFFICER HAS A DUTY TO INVESTIGATE SUSPECTED CRIMINAL ACTIVITY

R. v. Robichaud, 2001 NBQB 245

A police officer set up surveillance from an unmarked police car in a parking lot because of an ongoing theft from vehicle problem. After observing several people go to, spend a short time at, and then depart from a parked SUV in the parking lot, the officer became suspicious, briefed a second officer in a marked unit, and asked him to check it out. This second officer observed a vehicle of similar description about to leave the parking lot as he drove by. The officer turned around and as he again approached the parking lot, the driver of the SUV turned around and proceeded back into the lot and parked. The officer checked the vehicle and found the accused driver had a slight odour of alcohol on his breath. The accused submitted to a breath test and was charged with impaired driving and over 80mg%.

At trial, the judge found the stop arbitrary and a violation of s.9 of the *Charter* because the officer lacked an articulable cause to stop the vehicle. The breathalyzer results were subsequently excluded under s.24(2) of the *Charter*. The Crown successfully appealed to the New Brunswick Court of Queen's Bench. Riordin J. found the detention to be justified in the circumstances. At para. 20 he stated:

> With the background information that he had been given…shortly before and in addition with what he observed as [the accused] drove back into the parking lot upon the police vehicle arriving in the immediate vicinity and obviously readily apparent, this officer had reasonable cause to suspect that the driver of the vehicle was possibly involved in illegal activity. The action of the officer to take further action and detain the operator of the vehicle was justified. The detention of [the accused] was not arbitrary and in my view there was an articulable cause for such action and the police officer's conduct was justifiable. He was carrying out his duty to investigate suspected criminal activity.

Note-able Quote

"The wicked man flees though no one pursues". Proverbs 28:1

ACCUSED MUST ASSERT DESIRE TO CONTACT COUNSEL: REMINDER NOT NECESSARY

R. v. Leedahl, 2002 SKCA 5

A police officer stopped the accused after observing his vehicle being operated in an erratic manner. After observing various signs of impairment, the officer arrested the accused for impaired driving and recited the standard right to counsel warning and breathalyzer demand. The accused indicated he understood the *Charter* warning but did not wish to contact a lawyer at that time. The accused subsequently provided breath samples with readings of 160mg% and 150mg%. The accused argued, in part, that although he was asked at the roadside whether he wanted to speak to a lawyer, he expected to be asked again at the police station before providing a sample of his breath. The trial judge stated:

> [The accused] said he expected to be asked again. Well, he never communicated that to the officer. And there's really nothing in the evidence that would indicate that the officer would have expected to have to tell him again.
>
> …an officer is not expected to know about secret doubts or misunderstandings on the part of a suspect. He's entitled to assume, in the absence of evidence to the contrary, that the accused understood what his rights were, especially when he said he did. Also entitled in the absence of some unusual circumstances to assume that the accused will request a call when the first reasonable opportunity presents itself.

Although the accused was convicted at trial of having a blood alcohol level over 80mg%, his conviction was overturned on appeal to the Saskatchewan court of Queen's Bench because the officer's imperfect compliance with s.10(b) of the *Charter*, the officer should have again asked the accused if he wanted to call a lawyer at the police office. On further appeal to the Saskatchewan Court of Appeal, the conviction was restored.

Tallis J.A. for the unanimous Appeal Court found the officer properly advised the accused of his right to counsel and was under no obligation to go further unless the accused asserted a desire to exercise the right. Furthermore, the burden in establishing non-compliance with the *Charter* lies with the accused; the prosecution does not need to prove compliance. In this case there was "no suggestion that [the accused] was incapable of understanding the right to counsel or that he was incapable of acting on his right".

Complete case available at www.lawsociety.sk.ca

PHOTOS OF BODY INCIDENT TO ARREST

R. v. Ilina, 2001 MBQB 317

The accused was arrested and Chartered for the death of her husband after she had been transported to the police station and left in an interview room for just over an hour. She was advised of her right to counsel and cautioned but declined to contact counsel. Over the next 7 hours and 45 minutes she was interviewed three times. She had agreed to provide bodily samples including hair, saliva, blood, and fingernail clippings. She was told that she was not obligated to provide the samples and that they may be used as evidence against her. The accused was also subject to a non-consentual strip search by a female officer to view her body for injuries. Finally, photographs were taken of the accused with a particular focus on her hands.

Although the accused's statements were ruled inadmissible because they had not been proven beyond a reasonable doubt to be voluntary, the consent to provide bodily samples was valid. The police had explained there was no requirement to participate and if provided, they could be used as evidence. In holding the strip search and subsequent photographs to be lawful as an incident to arrest, Monnin J. at para. 85 stated:

> Given the information the police had at the time, it was reasonable to make a further investigation as to whether or not [the accused] had injuries or marks on her body given the violence of the attack and the amount of blood at the premises. It was not an unreasonable step to take in the investigation in order to preserve evidence.
>
> Similarly, the taking of photographs of [the accused's] hands and of her body at the time is a matter which I find falls within the requirement to preserve evidence when done reasonably and in keeping with powers incidental to arrest.

As a result, the evidence from the bodily samples, strip search, and photographs were admissible.

INSERTED OBJECT A WEAPON: OFFENCE MADE OUT

R. v. Lamy, 2002 SCC 25

The victim accepted a ride from a bar offered by the accused. During the ride however, the accused made a stop at his home and invited her in. At his home he sexually assaulted the victim, which included the insertion of a bamboo dildo in the shape of a baseball bat. The victim testified the assault had hurt her and that she was bleeding afterwards. Furthermore, a physician testified to finding extensive recent bruising in her groin area. Although the accused was acquitted of sexual assault causing bodily harm at trial, he was convicted of sexual assault with a weapon which was reduced on appeal to sexual assault *simpliciter* by the Quebec Court of Appeal because the accused had not used the dildo to kill, threaten, or intimidate as the French version of the *Criminal Code* definition of weapon requires.

The Supreme Court of Canada overturned the Court of Appeal's decision and restored the decision of the trial judge. In its reasoning, the Court found the English text of the definition of "weapon" resolves any ambiguity arising from the French text and includes an object "used…in causing…injury". Weapon is defined in s.2 of the *Code* as follows:

> "weapon" means any thing used, designed to be used or intended for use
> (a) in causing death or injury to any person, or
> (b) for the purpose of threatening or intimidating any person
> and, without restricting the generality of the foregoing, includes a firearm.

"Injury" as is used in the definition of "weapon" is not synonymous with the term "bodily harm" as defined in s.2 as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". In other words, injury for the purpose of determining whether an object is a weapon does not need to amount to the severity of "bodily harm". Even though the injuries of the victim in this case were not sufficient to amount to "bodily harm", an accused who is acquitted of sexual assault causing bodily harm can nonetheless be convicted of sexual assault with a weapon. Arbour J., for the unanimous Supreme Court wrote:

> Without providing an exhaustive definition of "injury" or a catalogue of distinctions between "injury" and "bodily harm", it is sufficient to say here that there was evidence of injury. The complainant testified that the assault was hurting her, and the doctor who examined the complainant testified to finding extensive recent bruising in her groin area. She bled sufficiently that traces of blood were left on the [accused's] sofa. The [accused], who is now admittedly guilty of sexual assault, cannot exonerate himself from having caused the injury by claiming that the bleeding may have been triggered by a pre-existing medical condition of the victim. In the same way, it is not open to him to claim, in the circumstances of this case, that the injuries to the complainant may not be attributable to the insertion of the object in her vagina against her will, but may have resulted from the part of the assault in which no object was used. In my view, a proper application of the criminal causation rules allowed the trial judge to conclude that the complainant was injured by the sexual assault committed on her by the [accused], and that the use of the object was sufficiently linked to the injuries to allow the conclusion that the object used in committing the assault was a weapon as defined in s. 2. This reasoning applies equally to physical and psychological injuries.

Complete case available at www.scc-csc.gc.ca.

FAILURE TO BRING SUSPECT FORTHWITH TO COURT W/I 24 HOURS NOT ARBITRARY: NO *CHARTER* BREACH

R. v. Tate, 2002 BCCA 189

The accused appealed his conviction for the first-degree murder of his wife. Among other grounds, the accused argued that he was arbitrarily detained contrary to the *Charter* because the police failed to bring him before a justice of the peace in a timely manner as required by s.503 of the *Criminal Code* and his statements to police should be excluded. The accused was arrested at his residence at 11:30 am and not taken before the court until 26 ½ hours later (2:00 pm the following day). During the intervening period the following activities occurred:

- After his arrest, the accused was transported to the hospital because he had taken a quantity of sleeping pills. At 11:50 am while enroute to the hospital, the accused acknowledged he put a "pickaxe" to his wife's head;

- He spent approximately 7 hours in the hospital (from 12:00 pm-7:00 pm) where he admitted to being ashamed of what he had done;
- He spent 13 hours in police cells (from 7:00 pm-9:00 am);
- Between 9:20 am and 10:15 am the accused was interviewed. This was recorded on videotape.
- At 11:20 am the accused was taken to court. However, the officer suggested, and the accused agreed to, doing a "re-enactment". This was done between 11:20 am and 12:00 pm.
- The accused arrived at the courthouse at 12:15 pm but remained in custody until his court appearance at 2:00 pm. During this time, the police spoke to Crown Counsel and swore the information.

In admitting all the statements made to the police, the trial judge found that although the police failed to comply with s.503(1)(a) of the *Code*, the accused was neither arbitrarily detained nor suffered any breaches of his s.7, 9, or 11 *Charter* rights. The failure of the police to deliver the accused earlier to court "was the result of a combination of factors including a shortage of personnel to handle what is, for this small police force [the Central Saanich Police Department], a major investigation".

On appeal by the accused to the BCCA, Hall J.A. for the unanimous court held the trial judge did not err in his conclusion. Furthermore, the appeal court noted:

> …there was no causal connection between the failure to take the [accused] to court earlier on the 25th and his willingness to give the statements he did on that date. The circumstances of the taking of all the statements are fully disclosed in the evidence and there was nothing unreasonable, oppressive or improper in the conduct of the police on either January 24 or 25, 2000, in their dealings with the [accused]. I would not accede to the argument advanced by the [accused] concerning the conduct of the police after his arrest.

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

Note-able Quote

"*There is no recognized principle in Canadian law that the end justifies the means*[55]". BCProv.Crt. Judge Alexander.

[55] R. v.Luu & Chan 2002 BCPC 0067.

INTENT SURROUNDING ARREST LINKED TO THAT OF ACCUSED, NOT THE OFFICER

R. v. Jackson,
(2002) Docket:C32921,C28624 (OntCA)

A uniformed police officer attempted to stop the accused under Ontario's *Highway Traffic Act* for riding a bicycle double on the sidewalk. The accused did not comply with the officer's request and began to jog away. As the officer pursued, the accused turned and fired a shot in the officer's direction from a .357 Magnum revolver while there were five other people in the area including two children. The accused stopped running and fired a second shot while the officer took cover behind a parked car. The accused fled to a nearby apartment building and hid the revolver, which was later recovered. The accused was convicted by a jury of several weapons offences including discharging a firearm with intent to endanger life and intent to prevent an arrest. Section 244 of the *Criminal Code* reads:

> s. 244 *Criminal Code*
> Every person who, with intent
> (a) to wound, maim or disfigure any person,
> (b) to endanger the life of any person, or
> (c) to prevent the arrest or detention of any person
> discharges a firearm at any person, whether or not that person is the person mentioned in paragraph (a), (b) or (c) is guilty of an indictable offence…

The accused appealed these convictions as well as the respective concurrent sentences of 7 and 5 years, excluding the 14 months spent in pre-trial custody.

Among several arguments, the accused submitted that the element of arrest in s.244(c) relates to the *actus reus* of the offence and not the *mens rea*. Although the accused testified he discharged the revolver to avoid arrest, the police officer testified he had no intention to arrest the accused. Irrespective of the accused's intent, the accused argued that the offence had not been made out because the officer neither had the intention to arrest nor began to effect one. The Ontario Court of Appeal rejected this ground of appeal and found the element of arrest in s.244 is "linked" to the intent, or *mens rea*, of the accused and there is "no valid reason to require proof of an actual arrest,

whether in progress or intended, as part of the *actus reus* of this offence". In other words, what was in the mind of the accused concerning arrest is relevant and not necessarily the intent of the police.

On his sentence appeal, the accused contended the trial judge erred in giving the police officer an opportunity to address the Court without complying with the victim impact statement procedures found in s.722 of the *Criminal Code*. By complaining of the rules, regulations, and bureaucratic red tape tying the hands of the police, and that it was his opinion that the accused set the officer up to shoot him, the officer's statement "exceeded the limits" of a proper victim impact statement. These comments went beyond the statements of "the harm done to, or loss suffered by, the victim" permissible under the victim impact provisions. Because of this error, the Appeal Court was open to review the sentence imposed.

After considering the grade 12, 20 year old accused's previous record (one prior conviction of assault) and letters submitted by his teachers on the one hand, and the serious threat to public safety of firearms possession and the use of a firearm against a police officer on the other, the Court reduced the total sentence to 4 years and 8 months.

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

JIBC's ANNUAL BUY A BOOK CAMPAIGN

The Justice Institute is honoured to recognize William Deverell, award winning crime writer, lawyer, and former journalist as the first Honourary Campaign Chair of the Justice Institute's Annual **Buy a Book Campaign** taking place throughout the month of April. Deverell's most recent novel, *The Laughing Falcon*, was published in September 2001.

The **Buy A Book Campaign** is an initiative by the fundraising arm of the Justice Institute, the JI Foundation, in support of the JI Library.

The JI Library serves 40,000 users around the province including students and professionals who work in the areas of municipal policing, firefighting, emergency medicine, corrections and community justice, social services, courts, emergency management, and conflict resolution.

"The campaign enables us to maintain our diverse collection and provide the information our clients need," says Institute Librarian April Haddad.

Financial contributions to the library translate into an ability to purchase the most current and relevant information for professionals working in the fields of public safety, social services and conflict resolution - the people who keep BC's communities safe.

The Justice Institute of BC is a dynamic, post-secondary learning organization with a unique provincial mandate that encompasses education and training for all aspects of public safety that lead to safer communities. Locally and globally, the JI model brings together police, fire, paramedic, courts, corrections, emergency management, traffic education, conflict resolution, and social services. Each year, the JI's distinctive educational co-op model attracts more than 20,000 students with 27% of the curriculum delivered via distance learning and referred to as the "Virtual" JI.

For further information or to make a donation contact:

Francine Gaudet or Karen Wanders
JI Foundation
Justice Institute of B.C.
(604) 528-5582 or 528-5874

INMATE SUES FOR LOST SLEEP: MOTION TO DISMISS REJECTED

Wild v. Correctional Services of Canada, 2002 FCT 219

A Federal Court judge dismissed an application by the defendant Correctional Services of Canada (Mission Medium Institution) seeking an order striking the plaintiff's claim. The defendant argued that there was no reasonable cause of action and the plaintiff's suit was frivolous or vexatious. The plaintiff is suing the

Correctional Services of Canada for awakening him unnecessarily during regular inmate counts causing him to lose 509 full nights of sleep, 312 of which were when the plaintiff was in REM sleep. Furthermore, he contends he was not treated humanely, his dignity was undermined, and his current or future health was jeopardized. The accused seeks damages for emotional stress and physical and neurological damage. Hugessen J. dismissed the defendant's motion finding there is "absolutely nothing" to support the claim that the action is frivolous or vexatious. The lawsuit will proceed.

Complete case available at http://decisions.fct-cf.gc.ca

ATTEMPT MURDER OF POLICE OFFICER CONVICTION UPHELD

R. v. McCallum, 2002 BCCA 198

The accused (driver) and another male (passenger) drove to a bank in Victoria. The passenger entered the bank dressed in a RCMP uniform, demanded money while armed with a shot gun, and left the bank and entered into a vehicle driven by the accused. The suspect vehicle sped away but was observed by police (one officer in a police car and another on a motorcycle) who began to pursue it. The vehicle stopped at one point and a shot was fired in the direction of the pursuing officers. The vehicle took off again with police in pursuit and a second shot was subsequently fired from the moving vehicle.

The motorcycle officer continued the pursuit during which he was shot at a further five times. As this officer came around a blind corner, he found the vehicle stopped, the passenger door open, and the passenger facing him with a gun at his shoulder pointed directly at the officer. The officer took an evasive maneuver to avoid gunfire. The vehicle fled again and officer was able to continue the chase and later locate the vehicle stopped in a driveway. The passenger emerged from the vehicle and fired his weapon in the direction of a police officer who arrived at the scene. The accused and the passenger fled on foot but were later apprehended.

The accused, who was the driver of the get away vehicle, appealed his attempted murder conviction. Section 21(2) of the *Criminal Code* creates criminal culpability for collateral offences committed where a person has a common intention with another person to commit a primary offence. Since the offence was attempted murder, the Crown must prove that the accused had knowledge that the passenger would do something with the intent to kill in carrying out the common purpose (robbery). The accused argued that the passenger never attempted to shoot the motorcycle officer when he rounded the blind corner and simply pointing a firearm under these circumstances does not lead to a common intention to kill. The submission of the accused was that the passenger aimed the gun at the motorcycle officer to dissuade him from pursuing, not to kill him.

The trial judge held that the intent to kill was formed by the passenger before the motorcycle officer rounded the corner and continued until the evasive action of the officer made it "impractical and unnecessary" to carry out the intention to murder. In defining the robbery as "well-planned" involving a fake RCMP uniform, masks, false licence plates and numerous firearms, the trial judge found both the accused driver and the passenger were assisting each other in carrying out the common purpose of committing the robbery and both were assisting each other in escaping from police. Moreover, the only reason the accused stopped the vehicle on the blind corner was to allow the passenger to exit the vehicle to get a clear shot at the pursuing officer; the previous attempts at eliminating this officer had been unsuccessful. In dismissing the accused's conviction appeal, the unanimous BCCA found the trial judge drew a reasonable inference from the evidence of the accused's knowledge of the passenger's intention to murder and that the accused participated in this attempt.

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

CHARTER TURNS TWENTY

On April 17, 2002 the *Canadian Charter of Rights and Freedoms* celebrates its 20th Anniversary. For the police, the *Charter* is like a living tree, continually growing to find a just and proper balance between the competing interests of individual rights and the needs of law enforcement to effectively protect society.

'INSIGNIFICANT, INACCURATE, & OVERSTATED' OBSERVATIONS FATAL TO SEARCH WARRANT

R. v. Luu & Chan, 2002 BCPC 0067

Several police officers executed a search warrant at a residential premise and found both accused and a 236 marihuana plant grow operation inside. The accused challenged the validity of the search warrant and a voire dire was declared to determine if there was a breach of s.8 of the *Charter*. The information to obtain (ITO) the search warrant stated:

> On the 4th of December, 2000, information was received by the Burnaby RCMP from an anonymous tip that the residence located at 8496 16th Avenue has a marihuana grow operation located in the basement. On January 11th, 2001, the peace officer attended and confirmed that 8496 16th Avenue, Burnaby, British Columbia, did in fact exist. The peace officer made note that the lower windows in the basement were blacked out with no light showing through the blinds; this observation made by the police officer on five previous attendances to this address. The police officer also smelled a strong odour of growing marihuana directly in front of the house at 8496 16th Avenue, Burnaby, British Columbia. The police officer determined that the given location of the house on the corner and, with the given direction of the wind, that the odour of growing marihuana could only be coming from that residence. The police officer has experience with 25 marihuana grow operations. The anonymous tip of the home containing a marihuana grow, the darkened windows in the basement, and the detection of odour of growing marihuana coming from the home, are all consistent with a home that is currently growing marihuana. The police officer verily believes that the information contained herein to be true and correct.

At trial, the officer was called as a witness and provided further testimony as to his observations; much of this information was not included in the ITO. The trial judge found the officer did not disclose a number of material facts, including "physical difficulties in observing the property due to its location and lack of lane access, the existence of another home immediately backing the subject residence, and the consequent potential difficulties in isolating any odour". Furthermore, the officer did not disclose he did not detect any odour of marihuana on four prior attendances at the property. Although a strong odour of marihuana may be sufficient to justify a search warrant, the trial judge found the officer was not in a position to properly isolate the odour to the accused's residence. The officer's conclusion that the odour could only emanate from the accused's residence was unreasonable. The trial judge also found the officer "ill prepared to testify" and made "the impression that he had not even taken the time to glance at his notes before giving evidence". There were inconsistencies in his evidence and the judge found the officer to be unreliable.

After assessing the information and excising several of the observations made by the officer from the ITO, what remained could not properly support the issuance of the search warrant. In excluding the evidence under s.24(2) of the *Charter*, the trial judge stated, at para. 28:

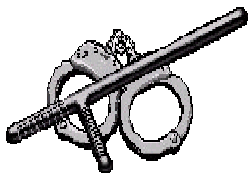
> In considering the seriousness of the breach, I take into account the relatively insignificant, inaccurate and overstated observations of the peace officer in support of the application for the search warrant. The resulting breach was beyond technical or inadvertent. It was a deliberate entry into a personal residence on the spurious grounds. Though I am unable to conclude on the evidence before me that the peace officer acted in bad faith, his actions are consistent with an attempted shortcut to a more through investigation.

And further at para. 30:

> [T]he search was not undertaken on reasonable and probable grounds, but on the barest suspicion initiated by a tip of unknown reliability. Further investigation may have yielded more concrete grounds for the peace officer's suspicions, and hence a proper basis for a warrant. However, the evidence as presented falls short of that threshold.

Complete case available at www.provincialcourt.bc.ca

WE WANT TO MAKE YOUR EXPERIENCE A POLICE ACADEMY SCENARIO



Have you had an experience that you want to share involving a police tactic that went right, or wrong? If so, we are interested in hearing from you.

We want to expose police recruits to your real life experiences so that we can address officer safety issues or to reinforce good, solid police tactical training, before they hit the streets.

So, please e-mail us your experiences to Sgt. Frank Querido fquerido@jibc.bc.ca or Sgt. Tammy Schellenberg at tschellenberg@jibc.bc.ca.

If we use your scenario, during our simulations, we will send you a JIBC Police Academy "***Sharing the Moment***" t-shirt. Be safe out there!!!

IN MEMORIAL

Last month, Canadian police lost two officers in the line of duty. This brings the total number of officers killed this year to five. Our hearts and prayers go out to the family members of our fallen colleagues. Their bravery and courage will not be forgotten and the circumstances surrounding their deaths are a reminder to the dangers police officers face as they protect and serve us all.

On March 29, 2002, 29-year-old British Columbia RCMP **Constable Wael Toufic Audi** lost his life in an automobile accident. He made an abrupt U-turn at about 3 p.m. near Brackendale, BC. A tour bus, unable to slow down, sliced open his unmarked car. Doctors who happened on the scene tried to save Constable Audi, but he died from massive injuries. Constable Audi was the liaison officer for Mamquam Elementary School, and often visited the school to help with sports and an anti-drug program. Constable Audi was a five-year veteran of the RCMP.

On March 12, 2002, 35-year-old Alberta RCMP **Constable Christine Diotte** was struck and killed by a vehicle while she and her partner investigated an accident on the Trans-Canada Highway near Banff, Alberta. After the two constables exited their patrol car an SUV lost control on the icy road and struck both of them, causing fatal injuries to Constable Diotte. Her partner was transported to a local hospital in stable condition. Constable Diotte had been with the agency for eight years and was survived by her husband.

On February 28, 2002, 29-year-old Montreal Police Officer **Constable Benoit L'Ecuyer** was shot and killed following a chase with a stolen car. He died in hospital a few hours after the shooting in the city's north end. Police said the shooting occurred after a brief chase involving a police van and a stolen car. Following a collision between the two vehicles, three suspects got out of the vehicle and a foot chase ensued. The officer, a seven-year police veteran, was shot several times in the chest and was wearing a bullet proof vest. His partner, who was not hit, tried to return the fire. Constable L'Ecuyer is survived by his wife and two children.

On February 18, 2002, 31-year-old Toronto Police Officer **Constable Laura Ellis** and her partner, Constable Ronald Tait, were responding in their scout car to an emergency call when their vehicle collided with another car. The crash occurred on Brimley Road at Huntingwood Drive in Toronto and Constable Ellis was pronounced dead at the scene. Constable Tait received serious, but non life threatening injuries. The driver and lone occupant of the private car was also taken to hospital with non life threatening injuries. Constable Ellis is the first female police officer killed on duty in Toronto. She joined the force in December, 1996 as an officer in training and was appointed constable in June, 1997. She is survived by her husband and one-year-old daughter.

On January 18, 2002, 37-year-old Parks Canada **Warden Michael Wynn** was stationed at the Columbia Icefields warden station in Alberta. Part of his duties included forecasting avalanche conditions. Warden Wynn and two other Jasper wardens, Randy Fingland and Brad Romaniuk, were conducting avalanche risk assessments at the ridge when a massive slide engulfed them. Fingland, also an auxiliary member of the Jasper RCMP, suffered only minor injuries to his leg, while Romaniuk escaped unharmed. Wynn was taken to Banff Mineral Springs hospital, and later went to Foothills Hospital where he succumbed to his injuries. He is survived by his wife and 2-year-old son.

The above information provided with permission by Officer Down Memorial Page available at www.odmp.org/ canada.

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For comments on this newsletter contact
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