POLICE ACADEMY
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JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

INTENTION TO DRIVE NOT NECESSARY FOR CARE & CONTROL

R. v. Don Vann, 2002 SKQB 89

In the middle of winter a police officer observed the accused walking from a bar, where he had been drinking all day, and go between a car and truck. The officer heard a vehicle start, noticed exhaust fumes, and pulled in behind to find the accused, wearing only a short sleeved t-shirt, in the driver's seat without his seatbelt on. The vehicle was running, the engine revving, the lights were off, but the heater was on. The accused testified that he had made arrangements with another person to drive him home and had entered his vehicle to wait for the ride and had started the vehicle only to stay warm; he had no intention to drive. The accused nonetheless was convicted of care and control of a motor vehicle with a blood alcohol level in excess of 80mg%. The accused appealed his conviction to the Saskatchewan Court of Queen's Bench arguing, among other grounds, that the judge failed to properly consider his intent.

In proving care and control, the Crown can rely either on the presumption found in s.258(1)(a) of the *Criminal Code* or by proving actual care and control. In the former, the intent of the accused is important in rebutting the presumption but for the latter, it is irrelevant whether the person had the intent to drive[1]. In this case, McIntyre J. noted that the accused had not been convicted on the basis of the presumption but upon Crown having proven actual care and control which has been defined by the Supreme Court of Canada in *R. v. Toews* [1985] 2 S.C.R. 119 as including "acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous". In this case, the Court held, at para. 16:

> The [accused] had been behind the wheel for 20 seconds. The engine had been started, the heater was on and the [accused] was revving the engine. He clearly performed acts involving the use of the car, its fittings or equipment, whereby the vehicle may unintentionally be set in motion. All it required was to put the vehicle in reverse.

It was not necessary to determine whether the accused had the intent to drive or simply to keep warm. Care and control had been satisfied and the appeal was dismissed.

Complete case available at www.lawsociety.sk.ca

SEARCH OF GLOVE BOX FOLLOWING IMPAIRED ARREST REASONABLE

R. v. Neigum, 2002 SKPC 26

After responding to a call reporting a suspected impaired driver, a police officer found the accused alone, seat belted in, and sleeping in the driver's seat of a truck parked slanted on the shoulder of a road with its engine running. The officer arrested the accused for care and control while impaired, read him his right to counsel, and told him he could call a lawyer at the police station. While waiting for back up and a tow truck, the officer searched the accused's vehicle and found a pop bottle containing an alcoholic beverage under the seat. The officer also opened the glove box looking for alcohol and found a plastic bag in plain view while detecting an odour of marihuana. Inside the bag, the officer found a zip lock bag containing marihuana.

At the police station, the officer asked the accused whether he would like to call a lawyer; he responded "No. I'll call later". The officer then showed the accused the marihuana he had found and stated, "You're charged with impaired driving and there is this

[1] The Court noted that there are some circumstances where an intent not to drive or abandoning the intent to drive may be relevant to actual care and control (citing R. v. Sherbrook (1998) 164 Sask. R. 183 (Q.B.)) but did not apply to the case at bar.

other thing too that you have to know I found in the truck". While in the breathalyser room the officer told the accused that if he changed his mind about the lawyer he would have an opportunity to talk to one. At this time the accused asked about the marihuana and the officer responded that as soon as the tests were done they would talk about it. Following the tests, the officer interviewed the accused about the marihuana without any further mention of contacting a lawyer. The accused suggested that his s.10(b) *Charter* right to counsel was violated and the warrantless search of the glove box breached his s.8 *Charter* right.

s. 10 (b) *Charter*

While the accused failed to establish a violation of his right to counsel respecting the impaired charge (he was advised or reminded of his right 3 times - at the scene, on arrival at the office, and in the breathalyser room), his waiver respecting the marihuana charge was "not so clear":

> [The accused's] response to [the officer], when invited to let them know should he change his mind about contacting a lawyer, should have alerted [the officer] that the accused may wish to speak to a lawyer before being questioned with respect to the marihuana charge. The accused asked about the marihuana in response to and in the context of [the officer's] mention of phoning a lawyer. [The officer's] response to [the accused] implied that he need not be concerned about that charge just then, that they would first finish dealing with the matter at hand, being the breath tests.

Meekma J. concluded "there was no clear waiver by the accused of his right to counsel prior to being questioned with respect to the drug charge". His right to counsel was thus violated.

s. 8 *Charter*

With respect to the warrantless search and the finding of the marihuana, the Court held "the search of the glove compartment…for alcohol was reasonable and justified incidental to [the accused's] arrest for care and control of a motor vehicle while impaired by alcohol".

As a result, the evidence concerning both the breath samples and drug exhibits was admissible while the statements regarding the marihuana were excluded.

Complete case available at www.lawsociety.sk.ca

REQUEST FOR VIDEO LINK OF OFFICER'S TESTIMINOY DISMISSED

R. v. Raj, 2002 BCSC 193

The Crown made an application that the principal police witness on a drug case be allowed to testify via video link. The RCMP officer was transferred from British Columbia to a 3-person island detachment off the coast of New Brunswick. The Crown submitted that the officer's absence in the remote detachment would leave the island under policed and would involve overtime pay and approximately $4000 in travel expenses. The accused argued that the most significant matter at trial was the search of the vehicle, which uncovered the 3 kilograms of marihuana at a traffic roadblock, and the credibility and reliability of the officer's evidence was at issue. In this vein, the video link made it difficult to observe the body language and facial expressions of the witness officer. In dismissing the Crown's application, the Supreme Court of British Columbia concluded "there is a reasonable likelihood that taking [the] evidence by video link would impede or impact negatively on the ability of the defence counsel to cross-examine the [officer]" and "may well compromise the accused's right to make full answer and defence".

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

IMPAIRED REASONABLE GROUNDS: LACK OF WITNESS IDENTIFICATION NOT RELEVANT

R. v. Mesenchuck, 2002 BCSC 448

A police officer responded to a non-injury motor vehicle accident at a rural intersection. A witness to the accident told the officer that the male driver was walking down the road. The officer, who could see a lone person about 300 yards away, went after and came within about 100 yards when the person looked over his shoulder and jumped into tall grass. The officer called out – threatening to bring a police dog – and about 10 minutes later the accused was located. The officer detected a strong smell of "beer

or alcohol" on the accused's breath, noted slurred speech, and observed that the accused was unsteady on his feet. After forming his opinion the accused was impaired, the officer arrested and transported him to the police office. The accused was presented to a qualified breathalyzer technician but failed to provide samples. Although the accused was acquitted of care and control while impaired because none of the witnesses were able to identify him at trial as the driver, he was nonetheless convicted of failing to provide a breath sample.

The accused appealed his conviction to the Supreme Court of British Columbia arguing, among other grounds, that the officer did not possess adequate reasonable and probable grounds to demand breath samples. The accused suggested that because the witnesses failed to identify the accused as the driver of the vehicle in question, the officer's demand was improper. In assessing whether a proper demand was made by the police officer, the Court must direct itself to the belief of the officer at the time of the demand and not on the inability of witnesses to identify the accused. Reasonable and probable grounds to demand a breath sample requires a subjective belief (the officer's mind) based on objective criteria. In this case, the objective criteria grounding the officer's belief that the accused was the driver was summarized as follows:

- "[a witness] pointed out a male walking approximately three hundred yards down the road from the intersection. He was the only person walking on the road;
- "[the officer] traveled approximately two hundred yards down the road when he saw the man look over his shoulder and dive into the underbrush of the ditch area;
- "[the officer] searched this area for approximately ten minutes and then found [the accused] lying down at the bottom of an approximately five foot deep ditch in about three inches of water;
- "when helping [the accused] from the ditch, [the officer] observed him to be wet, unsteady on his feet, slurring his speech and exhibiting a strong smell of alcohol.

In dismissing the accused's appeal, McKinnon J. found the "totality of the evidence relating to [the officer's] involvement" allowed the trial judge to reasonably conclude the officer had the requisite grounds to make the demand.

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

WARRANTLESS IN-HOME ARRESTS: LOOKING FORWARD FROM FEENEY

Sgt. Mike Novakowski

The legal authority to arrest a person does not by itself justify an entry into a dwelling house to effect the arrest. There is a recognized distinction between the police power to arrest and the police power to enter to carry out the arrest and they are analytically distinct. The former deals with the power to make the arrest while the latter deals with the power to enter to carry it out. Since the decision in *R. v. Feeney* [1997] 2 S.C.R. 13, entry to effect an arrest in a dwelling house is generally prohibited unless the police are in fresh pursuit or in cases of exigent circumstances. To comport with *Charter* values, entry is permissible when the interests of law enforcement outweigh the privacy interest of the individual in the home. This article will examine some of the recent cases from provincial appellate courts concerning arrests in private residences.

In *R. v. Duong and Tran* 2002 BCCA 43, the most recent of these cases, police officers canvassed a neighbourhood for possible witnesses after responding to a home invasion. One of the officers approached the front door of a residence and knocked. As a male opened the door, the officer felt a rush of warm, humid air carrying the odour of both burning and growing marihuana. As the officer questioned the male about the home invasion he observed a female standing inside the house. The officer described the male at the door as "fidgety", rocking on his heels, looking over his shoulder, avoiding eye contact, and attempting to pull the door closed behind him. The officer called for backup and after a second officer arrived, the male and female were arrested inside the residence for growing marihuana. The officers then checked the residence to satisfy themselves there were no other persons present. While inside, police made several observations including a padlocked basement door, fans humming in the basement, and a locked rear basement

door. A search warrant was obtained and executed resulting in the seizure of a commercial marihuana grow operation from the basement and other evidence linking the arrested occupants to the premises. Following conviction at trial, the accused appealed arguing the police violated their right under the *Charter* to be secure against unreasonable search or seizure and that the evidence should be excluded because the arrest, entry, and walk through following the arrest were unlawful.

Section 529.1 of the *Criminal Code*, Parliament's response to the Feeney decision, allows the police to enter a residence without a warrant to arrest in exigent circumstances if the police have the power to arrest under s.495 and reasonable grounds to believe the person is within the residence. Exigent circumstances are defined in the *Code* as including circumstances where the officer believes on reasonable grounds that entry is necessary to prevent the imminent loss or destruction of evidence relating to an indictable offence. In this case, the officer had both reasonable grounds to arrest and reasonable grounds the person was present. Likewise, the standard for assessing the existence of exigent circumstances is reasonable grounds. In other words, the officer must believe exigent circumstances exist and that belief must be supported objectively. The trial judge concluded exigent circumstances existed after accepting the officer's testimony that:

- if he left to get a warrant the accused could escape and he would subsequently be unable to identify him;
- the accused and anyone else inside could destroy evidence;
- because of an officer shortage that evening he would have difficulty obtaining additional officers to watch the house; and
- he was dealing with an 'active' crime rather than one that could be dealt with later.

The accused argued that a commercial marihuana grow operation could not be dismantled and destroyed in the hour it would have taken the officer to obtain the warrant, unlike a quantity of cocaine which could easily be destroyed. Although the British Columbia Court of Appeal agreed that the operation could not be completely destroyed, other evidence linking the accused to the operation, such as documents and fingerprints on equipment, could be made unavailable had the accused been left inside the home for that hour. The Court refused to interfere with the trial judge's conclusion that exigent circumstances existed.

The Court also examined whether the entry of the premises and the initial search were lawful as an incident to arrest at common law. For a search to be incident to arrest, the following threefold test must be satisfied:

1. the arrest must be lawful
2. the search must be for a valid investigatory objective
3. the search must be conducted in a reasonable manner

Because the arrest was lawful, the officer's "entry of the premises without a warrant to ensure its security and to preserve evidence was a lawful incident of that arrest and was not carried out in an unreasonable manner". The entry and search were therefore lawful at common law as well as under statute.

In *R. v. Grothiem*, 2001 SKCA 116, a police officer was investigating a complaint that a vehicle had struck a tree. The officer responded and found a damaged evergreen, a trail of fluid, and a long black skid mark leading to a nearby driveway where a truck with extensive front-end damage was parked. The officer knocked on the door of the house to ask about the accident when someone yelled, "come in". The officer entered and found three men with whom he was familiar; one of them was injured. The accused entered the room, was unsteady on his feet, and appeared intoxicated. When he was about to explain what happened the officer asked who was driving the vehicle. The accused stated he had been driving and accidentally ran into the tree while turning into the driveway. The officer concluded the accused was impaired and placed his hand on the accused's arm and suggested the two step outside or go to the police car to discuss the matter. The accused brushed the officer's hand aside and braced himself against the door jam. The officer grabbed the accused and pulled him through the doorway, hastily advising him he was under arrest. At the station, the accused subsequently provided breath samples over the legal limit.

At trial, the judge found both the presence of the officer in the home and the arrest lawful. On appeal, the Saskatchewan Court of Queen's Bench opined that although the officer had been lawfully in the accused's home, the arrest was inappropriate because an in-home arrest absent exigent circumstances is a grave matter.

Because the officer "should have left the premises and attempted to obtain an arrest warrant", the arrest was unjustified and the results of the breath tests were excluded and the conviction was set aside. On further appeal, the Saskatchewan Court of Appeal found the officer was lawfully present in the home at the time of arrest. He was invited in and had not been told to leave. Since the officer had reasonable grounds, the arrest for impaired driving causing bodily harm was lawful. The conviction was restored.

In *R. v. Castro, Stinchcombe, & Ferretti*, 2001 BCCA 507, police intercepted telephone calls between the three accused suggesting they were organizing a drug deal at a hotel. Police set up surveillance on the hotel and observed two men who appeared to be keeping watch outside two rooms (unit 309 and 310) registered to the accused Stinchcombe. At 11:30 pm the accused Castro and Ferretti, carrying a brown bag, arrived and entered room 309. About one hour later, Castro and Ferretti left the room without the brown bag and were arrested. Neither drugs nor large amounts of money were found on them. At 2:40 am another man, identified as Mostell, left the hotel room and was followed by police, but they subsequently lost surveillance of his vehicle. It was not known whether he left with any drugs or money. Although they did not have a warrant, police decided to enter the two hotel rooms and arrest the occupants fearing they may have been alerted by Mostell of the police presence and were either destroying the evidence or barricading themselves in the rooms. In room 309 police found two people and Stinchcombe asleep in room 310. Police obtained a search warrant and under the mattress in room 310 police found a kilogram of cocaine in a duct-taped package. Stinchcombe was arrested and the other two men provided evidence implicating the three accused.

Although the British Columbia Court of Appeal ordered a new trial on a disclosure issue, the Court rejected Stinchcombe's ground of appeal that the drugs seized in the search of the two adjoining hotel rooms should be excluded because the initial entry to the rooms was made without warrant. The Court found "the entry was necessary to preserve evidence in exigent circumstances and that the police action did not exceed the requirements of the situation as no search occurred until a warrant was issued. The drugs were found as a result of a search authorized by a warrant. There was a real risk that Mostell, who eluded the police, could have tipped off those in the rooms"

In *R. v. Hofung* (2001) Docket:C31904 (OntCA), an undercover police officer purchased heroin several times from a suspect. During a culminating drug deal ending the 4-month undercover drug investigation, police arrested one suspect in a car outside an apartment and a second suspect in the lobby of the same apartment building after he had exited a unit believed to be the source of the drugs. The officers also believed that a quantity of drugs remained inside this unit along with the person who supplied the drugs to the two arrested suspects. Police forced entry into the apartment without a warrant and arrested the accused. After several firearms were observed in a bedroom cabinet, police secured the apartment and obtained a search warrant to seize the weapons. Police subsequently located two loaded handguns under a couch in the living room. In assuming without deciding that the warrantless police entry and search of the apartment was a s.8 *Charter* breach, the Ontario Court of Appeal admitted the evidence because the police had "well-founded" concerns "about weapons inside the apartment" in light of the unfolding events that day.

In *R. v. Adams* (2001) Docket:C34243 (OntCA), police attended a rooming house and purportedly obtained the consent of the superintendent of the building to enter a shared laundry room where the accused was ultimately arrested. A subsequent search of the accused resulted in the discovery of a controlled drug that led to the charges before the Court. The accused challenged the entry of the police into the laundry room to make the arrest. If the entry to arrest was unlawful, the resultant search incidental to the arrest would be unreasonable as the arrest formed the foundation for the search. The Ontario Court of Appeal reasoned that the general prohibition against warrantless entry into a dwelling to affect an arrest is not restricted to a suspect's dwelling and applies equally to the dwelling of a third party. Furthermore, because the police tricked the superintendent by stating their purpose in entering was to investigate a noise complaint when their real purpose was to arrest the accused, consent was not properly informed. Thus, the entry and search were unreasonable and the evidence was excluded.

In *R. v. Schulz* 2001 BCCA 601, police attended the accused's residence to communicate information to him at the request of an outside agency. After knocking, a voice from within the premises stated "come-in" and the officer opened the door and observed the accused seated at the table. The accused immediately got up

and closed the door behind the officer. The officer detected the odour of burning marihuana from within the residence, advised the accused of this, and that the residence would be searched as a result. The officer arrested the accused for possession of a controlled substance and the officer called for back-up. The back-up officer entered the residence to "ensure that no other persons were present in the premises and to preserve any evidence". A warrant was subsequently obtained and incriminating evidence located which formed the basis for a conviction. The accused appealed arguing, among other grounds, the arrest was unlawful because there were insufficient grounds upon which to base the arrest, the incidental search was thus unreasonable, and the evidence should have been excluded. The Court found the officer had sufficient grounds to arrest and that the initial search of the residence was incidental thereto. The appeal was dismissed.

In *Townsend v. Sault Ste. Marie Police Service* (2002) Docket:C36850 (OntCA), the plaintiff appealed the dismissal of his lawsuit in which he claimed in part, that the police were trespassing at the time they arrested him in his dwelling. In dismissing the plaintiff's appeal, the Ontario top court found the police had authorization to enter the home under a search warrant and the arrest was lawful.

In *R. v. Haglof* 2000 BCCA 604, police attended a property damage hit and run accident where the driver had fled the scene. After obtaining address information on the registered owner of a plate number provided by a witness, police attended the owner's residence 15 minutes after the accident. Police also received information from a neighbour that she observed the accused's vehicle race down the lane and disappear out of sight. The police officer noted the accused's residence was located at a dead end and there was nowhere else for the vehicle to go other than the garage. Upon knocking at the door police observed the movement of window blinds from someone peeking out. After 25 minutes on scene (a total of 40 minutes after the offence) police entered the residence through a rear sliding door. The accused was located in the residence and arrested for hit and run under the provincial *Motor Vehicle Act*. During a sweep of the residence to ensure no one else was present, injured or hiding, and to secure the home, police located a marihuana operation in the basement. The Court found the chain of events sufficiently proximate amounting to fresh pursuit, thus the entry lawful. The evidence obtained following police entry was untainted and could properly support a search warrant the police subsequently applied for and were granted.

More About Fresh Pursuit

A person cannot defeat a lawful arrest that has been set in motion by seeking refuge in a private premise. In the words of C.J. Lamer in *R. v. Macooh* [1993] 2 S.C.R. 802 (S.C.C.):

> [I]t would be unacceptable for police officers who were about to make a completely lawful arrest to be prevented from doing so merely because the offender had taken refuge in his home or that of a third party.

Hot or fresh pursuit has been defined as a continuous pursuit, conducted with reasonable diligence, so that the commission of the offence, pursuit, and capture may be considered as forming part of a single transaction. Fresh pursuit does not require continuous and uninterrupted visual contact with the fleeing suspect. For example, a suspect rounding a corner and briefly lost from sight will not defeat this doctrine. Likewise, police may pursue a person fleeing into a dwelling even if the police do not observe the person enter. Similarly, a pursuit that ends almost as soon as it begins will still amount to hot pursuit, such as a person fleeing from a driveway into a home.

It is not necessary that the offence be a criminal offence for which the person is being pursued. Where the police have the power to arrest for a provincial offence, entry into a dwelling is also justified[2]. Undoubtedly, fresh pursuit occurs when the police are lawfully in a position to effect an arrest and the suspect takes flight from the officer's presence; evasion is contemporaneous with the arrest attempt. Although the police need not witness the initial crime, they do require the necessary power of arrest prior to flight.

Cases will also arise where the officer arrives on the scene of an offence and the suspect has already fled prior to police arrival. While at the scene the police engage in further investigation that provide information causing police to "shadow", or "track", the suspect to a dwelling. In such a case the police neither observed the offence nor the suspect's entry into the dwelling, nor was an arrest yet attempted or set in motion. The test

[2] R. v. Macooh [1993] 2 S.C.R. 802 (S.C.C.)

is whether the events linking the offence to the capture are sufficiently proximate to be considered as forming part of a single transaction[3]; there must be "real continuity between the commission of the offence and the pursuit undertaken by police"[4]. There is no fixed formula for when a fresh pursuit becomes stale and each circumstance will need to be taken in context and turn on the facts of the individual case. For instance, entry following the application of a police tracking dog shortly after the commission of an offence may amount to fresh pursuit.

Summary

In short, the following principles can be extracted from the above cases:

- the legality or illegality of police entry is determined at the moment of entry (eg. entry based on exigent circumstances) and does not change from the result (eg. evidence was not being destroyed);
- non-consentual entry into a dwelling house to arrest is generally prohibited unless law enforcement's interest outweighs the individual's right to privacy;
- compelling law enforcement interest favouring warrantless entry includes fresh pursuit and exigent circumstances;
- exigent circumstances are to be considered from the perspective of the officer based on reasonable grounds (subjective/objective analysis);
- entries can be justified under both statute (Parliament's response to Feeney) or at common law incident to arrest. In either case the police must face exigencies of the moment. Where the exigencies involve preservation of evidence the standard is reasonable grounds. Where exigencies involve safety concerns the standard is lower, but must amount to a reasonable suspicion[5].
- the belief evidence will be destroyed does not require that all the evidence is at risk. Simply because the evidence could not be lost in its entirety without immediate police action does not necessarily establish the absence of exigent circumstances; and
- an arrest following consent to enter is lawful provided the consent was properly informed.

[3] R. v. Hagloff 2000 BCCA 604
[4] R. v. Macooh [1993] 2 S.C.R. 802 (S.C.C.)
[5] See s.529.3(2) Criminal Code.

CLASS 86 GRADUATES

The Police Academy is pleased to announce the successful graduation of recruit Class 86 as qualified municipal constables on May 3, 2002.

ABBOTSFORD
Cst. Bjorn Grimsmo
Cst. Jody Thomas

DELTA
Cst. Derek Defrane
Cst. Brent Morson
Cst. Michael White

NEW WESTMINSTER
Cst. Patrick Dyck

SAANICH
Cst. Brent Kelleher
Cst. Andrew Stuart
Cst. Robert Warren

VICTORIA
Cst. Joan Elliott

VANCOUVER
Cst. Anja Bergler
Cst. Kyle Davies
Cst. Besnick Dobrecki
Cst. Gregory Fodor
Cst. Jennifer Giese
Cst. Stephen Haras
Cst. Nancy Jolin
Cst. Bryan McKeddie
Cst. Douglas Woollacott

WEST VANCOUVER
Cst. Bruno Accili
Cst. Michael Bruce
Cst. Jarrett Chow
Cst. Ian Hynes
Cst. Jodi Ramsay

Congratulations to Cst. Robert Warren (Saanich), 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. Stephen Haras (Vancouver) received the Abbotsford Police Association Oliver Thomson Trophy for outstanding physical fitness. Cst. Patrick Dyck (New Westminster) was the recipient of the Vancouver Police Union Excellence in Academics award for best academic test results in all disciplines. Cst. Robert Warren (Saanich) 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. Jody Thomas (Abbotsford) was the recipient of the Abbotsford Police Recruit Marksmanship award for highest qualification score during Block 3 training (48/50). Although not formally recognized at the graduation ceremony, Cst. Brent Morson (Delta) received the award for the fastest Police Officer's Physical Abilities Test.

TWO YEAR SENTENCE FOR PROBATION VIOLATION NOT UNFIT

R. v. Swanson, 2002 BCCA 243

An accused who received a sentence of two years less a day for breaching his probation has had his sentence appeal dismissed by the British Columbia Court of Appeal. The accused was convicted of one count of breach of probation when he attended his 85-year-old mother's home without the permission of his probation officer. Police were called and found the accused hiding in the bathroom with the lights off. This was the accused's thirteenth conviction for breaching a court order in just over a year, which began when police laid a s. 810 *Criminal Code* information (peace bond) against the accused forbidding him from returning to his mother's home. In dismissing the accused's argument that his sentence was "unfit", Ryan J.A. for a unanimous Court stated:

> I do not see any point in placing [the accused] on further probation orders which he has every intention to breach. Every opportunity has been extended to [him], every resource available has been tapped in an attempt to help him. Nothing has worked in the past, nothing but a change in attitude will help him in the future.

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

HOME-MADE 'MORNING STAR' A PROHIBITED WEAPON

R. v. Sampson,
[2002] O.J. No. 1339 (Ont.C.J.)

A police officer, directing traffic in an area being evacuated due to an anthrax scare, stopped the accused who was driving a taxi cab and searched his car after he would not move it on the officer's request. In an open briefcase on the front seat, the officer observed what he believed was a home-made "morning star". The officer described the object as a small ball, with nuts and bolts welded to it, attached to a tubular piece of metal by a chain.

Section 91(2) of the *Criminal Code* prohibits the possession of a prohibited weapon, including "the device commonly known as a "Morning Star" and any similar device consisting of a ball of metal or other heavy material, studded with spikes and connected to a handle by a length of chain, rope or other flexible material". In this case, the accused argued that because the object seized by police did not have "spikes", if fell outside the definition and the defence was therefore entitled to a directed verdict of acquittal. The Crown argued that it was open to the Court to find that the sides and edges of the nuts and bolts were spikes. In holding that each nut "has vertices which are pointed", the Court concluded that this satisfied the requirement of "studded with spikes" and that the object seized properly fell within the definition of the "Morning Star" prohibited weapon.

ENTRY FOLLOWING 9-1-1 CALL LAWFUL: LAWSUIT DISMISSED

Skinty v. Bell,
(2002) A.J. No. 454 (Alta.Q.B.)

Following a dispute with his basement tenant, the intoxicated plaintiff made numerous calls to the police complaint line, but would hang up after he was asked questions that digressed from the point he was trying to make. Being annoyed by the questions he was asked and his lack of progress with police, the accused called 9-1-1, said nothing, and left the receiver off the hook. Constables Bell and Korek responded to the call and arrived 3-minutes after a second 9-1-1 call was received from the residence. Again nothing was said. Cst. Bell approached the front door while Cst. Korek went toward the side of the house. The events that transpired were summarized by the Court of Queen's Bench justice as follows:

> When the Plaintiff opened the door he simply told Bell to "fuck off". Bell asked him if anyone else had called 911 and the response was, once again, "fuck off'. Neither officer had experienced this before so Bell used his left arm and simply pushed the Plaintiff aside and walked into the house followed by Korek. He noted another male [the Plaintiff's 85 year old intoxicated uncle - Tvidochib] in the kitchen area and went directly there. Korek did not touch the Plaintiff who remained at the front door. Korek asked him to stay where he was and again Korek was told, "fuck off". The Plaintiff started walking about the living room area which was immediately adjacent to the front

door and on approaching Korek, Korek put his hand up and told the Plaintiff to stay where he was. They touched but that is all. Korek then moved more toward the kitchen and hallway and positioned himself where he had a better view of the main floor area. At this time the Plaintiff was walking around the living room area muttering to himself. Korek could not understand his behaviour, noting that the Plaintiff was becoming more and more agitated. Bell, in the meantime, had gone into the kitchen area where he noted liquor and beer bottles on the table and concluded that Tvidochib was intoxicated. He was mumbling and gave no answers to the questions posed.

Bell then searched the bedroom and bathroom areas to see if there was any problem there and finding none, returned to the kitchen. At that point he tried to again speak to Tvidochib and while doing so noted that the Plaintiff was moving toward Korek in an aggressive fashion which I understood to mean that he had his hands clenched as fists. Bell was not sure that Korek noticed him coming so Bell moved quickly and by use of his hand against the Plaintiff's chest, pushed him backward. The Plaintiff fell on his seat and probably hit his head on the floor. We have no evidence as to what the floor covering was. Korek said that he noted the Plaintiff out of the corner of his eye coming toward him but that Bell intervened and pushed the Plaintiff. As Bell put it, the Plaintiff was ranting and using profane language throughout these events.

The Plaintiff got up within about ten seconds and circled through the dining room area into the kitchen. This meant that he did not pass by Korek. By this point, Bell was in the kitchen, had picked up the telephone, and was about to put it to his ear when the Plaintiff, swearing, came at him, knocked the phone out of his hand and bumped him chest to chest. Bell pushed him away, possibly using his foot or his knee to do so. The Plaintiff again came at Bell with his fists raised, at which point Bell told the Plaintiff he was under arrest for obstruction and tried to put him in a headlock so as to control him. In doing so, his arm slipped and the buttons on his coat cut the bridge of the Plaintiff's nose. The Plaintiff has a very thick neck and it is not surprising that this occurred. Bell advised the Plaintiff that he was under arrest for obstruction and assault. At this point, Korek moved in and managed to apply handcuffs to the right wrist of the Plaintiff who resisted having them put on the left wrist. Korek is a relatively small person and no match for the Plaintiff. The Plaintiff continued uttering profanities. In any event, about this point in time, Winkworth [the plaintiff's basement tenant] who had heard a bump on the floor above him, came up from the basement and into the kitchen area. He noted what was transpiring and asked the police to let the Plaintiff go, advising that he would look after him. The police did so, after being satisfied that Winkworth was sober and capable of attending to the Plaintiff. ... [T]he handcuffs were taken off and the Plaintiff was released from arrest.

The plaintiff brought an action against the police claiming damages for headaches, a cut nose, a cut left hand, a sore ankle, bruised chest, and an injured shoulder which he asserted resulted from unlawful police trespass, assault, and wrongful imprisonment.

Trespass by Police

In finding that the officers "had no choice but to enter the residence to investigate a potential emergency", including searching the home after receiving unsatisfactory responses from the occupants, Murray J. stated:

> When a 911 call is made and there is no response, the police have every right to assume that the caller or indeed someone in the home is in distress and requires immediate assistance. Their duty to protect life is engaged and until they could ascertain who had made the call and why, they have the right to intrude upon the privacy of the person residing on the premises, as long as in doing so they act reasonably. When one considers the totality of the circumstances their entering the Plaintiff's premises and behaving as I have found they did, which included attempting to keep the Plaintiff under control while they made their investigation, was necessary and their actions reasonable. They would have been remiss had they acted otherwise.

Assault by Police

The Court examined the assault allegations as two separate incidents; the pushing of the plaintiff where he fell back into a seated position and likely hit his head and the headlock incident in the kitchen. With respect to the push, the Court concluded that Cst. Bell acted on reasonable grounds that the plaintiff was advancing on Cst. Korek and only as much force as was necessary was used to prevent the plaintiff from committing an offence against Cst. Korek, which would likely have caused "immediate and possibly serious injury". In the kitchen, the circumstances of bumping Cst. Bell, knocking the phone from his hand, and coming back at the officer after the plaintiff had been pushed away amounted to obstruction, as well as an assault, which justified an arrest. Consequently, Cst. Bell was justified in using as much force as was necessary for that purpose:

> One must not lose sight of the fact that this was an emergent situation and it is very difficult to measure with nicety the amount of force which a police officer

> uses in such a situation. In my view, given the overall circumstances of this case and in particular the behaviour, condition, and size of the Plaintiff, the actions of both Bell and Korek were reasonable. It is also important to note that as soon as Winkworth arrived on the scene and the police officers were satisfied he was sober and could deal with the situation, they immediately removed the handcuffs from the Plaintiff and released him from arrest. Before leaving, Bell quite calmly attempted to obtain a commitment from the Plaintiff that he would not abuse the 911 facility, and left. The evidence does not support the contention that the police officers sought to harm the Plaintiff. What happened was a result of his own misbehaviour.

Wrongful Imprisonment by Police

For the same reasons, the allegation that the plaintiff was unlawfully confined and falsely arrested was "untenable".

The Court dismissed the plaintiff's claim.

CERTIFICATE OF ANALYSIS IS EVIDENCE OF IMPAIRMENT

R. v. Eliuk, 2002 ABCA 85

The accused was the driver of a motor vehicle involved in an accident in which the other driver was killed and two passengers were seriously injured. The accused was convicted by a jury of one count of impaired driving causing death and two counts of impaired driving causing bodily harm. The accused appealed, in part, that the statements he made to police were inadmissible because he did not have an operating mind, the officer lacked reasonable grounds, and the accused's right to counsel was breached. Furthermore, it was suggested the certificate of analysis should be excluded.

Statements to Police

The accused had told the officer that he was the driver at the time of the accident and that he had consumed two beers. Although a witness testified the accused was "shaken up", the judge nonetheless found the statements represented an operating mind. Another witness had stated the accused appeared lucid and the accused told the officer at the scene he was fine.

Reasonable Grounds

The accused argued that the officer lacked reasonable grounds for making the breathalyser demand. The Court rejected this ground of appeal finding the officer's grounds based partly on what he had been told by another officer (odour of alcohol, swaying slightly, and that there had been a serious accident) met the required standard.

Right to Counsel

The accused was placed in a telephone room with the door remaining open and was provided a list of Legal Aid lawyers where he proceeded to make 40 calls over a span of 45 minutes without successfully speaking to counsel. The accused provided a sample of breath after he was told it was time to blow, and continued to make further calls between breath samples. The accused suggested his rights were violated because the door to the telephone room was left open and he was denied a reasonable opportunity when he was told it was time to blow while he was trying to call a lawyer. In rejecting both these arguments, the Appeal Court upheld the trial judge's conclusion that the accused's rights were not violated. The accused was not aware that the door was open and never did succeed in speaking to a lawyer. Furthermore, the accused did not give any "indication that he had not contacted counsel nor that he required more time". The certificate of analyses was admissible and it, by itself was strong evidence of impairment. At para. 9, the unanimous Alberta Court of Appeal stated:

> [I]t is clear that a breathalyser reading can itself be relied upon as evidence of impairment. Both experts testified that impairment occurs in all persons at blood-alcohol levels in excess of 100 milligrams…

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ca

THREATENING CONVICTION DOES NOT BREACH FREEDOM OF EXPRESSION

R. v.Taylor, 2002 BCSC 455

The accused, who was involved in a bitter property and child custody dispute with the mother of his child, called and left a telephone message on the answering machine of a Real Estate Board. In

the message, the accused used phrases such as "Now you can deal with this the easy way or the hard way, but nobody will ever be safe selling my property without my authority" and "So what you want to do is put a note not be sold or even shown. That would be inviting combat into their lives from the Airborne Brotherhood Security Forces of the Church of Freedom and Children First". At trial, the Court found the messages created an "eerie and ominous tone" and were consistent with someone wanting to be taken seriously. The accused was convicted of uttering threats contrary to s.264.1(1)(a) of the *Criminal Code* but appealed to the Supreme Court of British Columbia arguing his *Charter* right to freedom of expression had been violated because the message was an "expression of his religious beliefs" and a statement of what he called the "terms of engagement".

The *actus reus* of threatening is the uttering of the threat while the *mens rea* is that the words uttered be taken seriously; there is no need for any further action beyond the threat itself. The trial judge had properly considered the elements of the offence and the freedom of expression guaranteed in the *Charter* "cannot apply so broadly as to protect the "right" to make statements that threaten others, contrary to the provisions of the *Criminal Code*". The accused's appeal was dismissed.

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

OFFICER'S OPINION NEED NOT BE FORMED 'AS SOON AS PRACTICABLE': IMPAIRED CONVICTION UPHELD

R. v. Colbourne, 2002 BCSC 416

A police officer pulled the accused over after observing a vehicle make a wide turn and stop about 100 feet from an intersection. The accused had blood-shot, watery eyes and an odour of liquor on his breath. Following the accused's failure of sobriety tests, the officer demanded the accused submit to a roadside screening device which he also failed. As a result, the officer formed the opinion the accused was impaired, *Chartered* and warned him, and after about 12 minutes in which the accused asked questions of the officer, the breathalyzer demand was made. Following arrangements to tow the accused's car to his hotel, the accused was transported to the police detachment where he contacted a lawyer and subsequently provided two breath samples of 120mg%.

The accused appealed his conviction of driving while over 80mg% arguing, in part, that the officer's demand to provide breath samples was not made "as soon as practicable". The law requires that the Crown must "provide some evidentiary basis to establish that the demand was made as soon as practicable once the officer had formulated his opinion", but it "does not say when the opinion must be formed". Even though the officer agreed at trial that he had enough indicia of impairment to form his opinion before the sobriety tests were performed, it is not the opinion that must be formed as soon as practicable, but the demand that must be made as soon as practicable after the opinion is formed. Here, it was the officer's "practice to continue investigating…by doing sobriety tests and then making the demand". Taylor J. for the Supreme Court of British Columbia wrote:

> Such opinion must be made on "reasonable and probable grounds". To do so, there must be some investigation that provides that basis. To say that an officer had too much evidence or should have formed it at some earlier moment would, in my view, be an inappropriate retrospective assessment. A police officer should not, in my view, be criticized for the thoroughness of his investigation even though he may have had the basis to form such an opinion at an earlier stage of the investigation absent oblique motives for not forming the opinion earlier.
>
> The officer testified that before demanding a roadside screening device, it was his practice in investigating such offences to conduct three standardized field sobriety tests despite having observed the manner of driving and symptoms such as the blood-shot, watery eyes and smell of liquor on the driver's breath.
>
> It was after these tests that he said he formed his opinion to make the road side screening device demand at 23:04 and then formed his opinion to demand that samples of the appellant's breath be given at 23:10 once that road side screening had occurred. There is no suggestion in the evidence nor is it alleged the officer had some reason to carry out these sobriety tests other than as a part of his investigation.

And further:

> To have required the police officer, even though at 22:55 he may have had reasonable and probable grounds, to cease his inquiries or investigation and form his opinion at

> that point as opposed to 23:10 when he had additional information would emasculate investigations.
>
> The starting point for the consideration of "as soon as practicable" is the forming of the opinion.

In this case, the passage of time was clearly explained and the demand was made as soon as practicable. The appeal was dismissed and the conviction upheld.

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

RIGHT TO COUNSEL 'CLEAR, CORRECT, & INFORMATIVE': APPEAL DISMISSED

R. v. Wallace, 2002 NSCA 52

Police officers, acting on a tip from a citizen that a vehicle was being driven erratically by a possible impaired driver, stopped the accused who exhibited the usual signs of impairment. The officer read the accused the breath demand followed by his right to counsel. The accused acknowledged understanding and indicated he wanted to call a lawyer. The accused was transported to the police detachment and while entering the building told the officer he was not going to take the breathalyzer test. The officer guided the accused into a room with a desk, chair, telephone, and two posted notices; one with names and numbers of private practice lawyers and the other with both after hour duty counsel and business hour Legal Aid offices. The officer asked the accused to take a seat and placed a telephone book on the desk. The accused, who was standing in the doorway but had not yet entered the room, told the officer he had changed his mind about talking to a lawyer and simply wanted to go home. The accused again told the officer he was not going to blow in the breathalyzer. After the officer explained the consequences of a refusal, the accused reiterated he was not going to comply with the demand. An appearance notice was issued and the accused was released into the care of a friend to take him home.

The accused was convicted at trial of both impaired driving and refusing to provide a breath sample. He appealed to the Nova Scotia Court of Appeal arguing, among other grounds, that his right to counsel under s.10(b) of the *Charter* had been violated because the police failed to properly inform him of the right to "free" counsel and how to access such legal services. Further, the accused testified he had taken more than the amount of medication he was prescribed to calm his nerves and half a can of beer. He suggested he did not understand anything the officer told him other than the demand for breath samples and did not know what "duty counsel" meant. He also asserted he did not call a lawyer because he would be charged for a long distance telephone call and had limited means, and no money. Finally, from his experience of being in police custody on prior occasions, he believed the police were obligated to contact a lawyer on his behalf.

In rejecting the appeal, Saunders J.A. for the unanimous appeal Court found that what the officer told the accused at the time of the stop was "clear, correct, and informative".

> [The officer] clearly informed [the accused] of both his right to retain and instruct counsel without delay and advised him as to the available means of accessing immediate legal advice without charge. All this was properly explained to the [accused] when first detained by the police at the scene. Further, when asked if he understood, he indicated he did. Finally, when asked if he wished to call a lawyer, he said that he did.

And further:

> In our view, the [accused] clearly and unequivocally waived his right to counsel when he explicitly informed the police on more than one occasion that he had changed his mind, would refuse to take the breathalyzer test and simply wanted to go home.

The Court characterized the accused's testimony that he was worried he could not afford the call as "hardly convincing"; he never communicated this concern to the police. In summary, the Court stated:

> The evidence fully supports the conclusion that the [accused] was properly informed of his right to counsel, and that he was given every opportunity to access counsel, that he understood his rights and how to exercise those rights on the afternoon in question, then changed his mind and waived his rights, choosing not to avail himself of that opportunity.

The appeal was dismissed and the accused's conviction upheld.

IDENTIFICATION NOT PROVEN: *ACCUSED ACQUITTED OF IMPAIRED DRIVING*

R. v. Jobson, 2002 BCPC 0129

The accused was charged with care and control while impaired and over 80mg% as a result of a police roadblock. After his apprehension on the street and transport to the police detachment, a police officer took the accused to an interview room for the purpose of letting him make a telephone call. The accused could not recall the name of his lawyer so the officer called Legal Aid (to whom the accused spoke). The accused then remembered his lawyer's name, called his office, but received no response. The accused subsequently provided a sample of his breath.

At trial, the accused argued that his s.10(b) *Charter* right to counsel was violated because he was denied counsel of his choice. In holding that the accused's right was not violated, Hogan J. stated:

> There's some case law that the police should be vigilant in assuring that the accused has his right to call counsel of his choice and that automatically phoning Legal Aid isn't enough to satisfy the *Charter* requirement. However, in this case the accused both spoke to Legal Aid and he did get to call counsel of his choice. It was his lawyer's absence from his office at midnight that left the accused without his counsel of choice. Having a lawyer who's not available is not having a lawyer. Well that's pretty obvious, but that's not the fault of the police or the *Charter*. The accused had opportunity to call and the police have extended him quite an effort to try and get him to counsel of his choice. So I honestly can't see how a lack of his lawyer's availability somehow escalates into a *Charter* problem for him. Perhaps he should consider suing his former lawyer for non-availability at midnight. (emphasis added)

The accused further argued that Crown was unable to prove the identification of the accused as the impaired driver because the officers were unable to identify him in court. The Crown argued that the driver produced a (non-picture) driver's licence at the scene, was taken to the police station, issued a promise to appear, and that the accused appeared in response to that notice, plead not guilty, and now stands on trial. This circumstantial evidence, the Crown suggested, proved identity.

In acquitting the accused, the judge noted that the driver's licence did not have a photograph of its holder nor did the police ask the driver to confirm any of the details of the licence to ensure that was in fact whom they were dealing with. Without a picture on the licence or any confirmation of the licence details at the scene, the mere attendance in court in response to the promise to appear was insufficient to establish identity beyond a reasonable doubt.

Complete case available at www.provincialcourt.bc.ca

ACCURATE PREDICTIONS OF INFORMANT SUPPORTS REASONABLE GROUNDS

R. v. Kwong, 2002 BCPC 0132

A police officer received confidential information from a source who had personally dealt with two heroin and cocaine dealers, one a 5'6", stocky Hispanic looking male in his mid 20's named "Carlos or Chris" and the other a 20 year old Chinese male named "Mike", that they would drive a gold coloured Mazda protégé or a blue green Nissan Ultima in which they would sell drugs at a local McDonald's restaurant. The drugs were concealed in the Mazda's driver's side door armrest or under the Nissan's console near the gearshift. The source also provided the names of purchasers including Terry Edwards (a known heroin addict). The source told the officer that they would attend Terry Edward's residence everyday between 12:15 pm and 1:00 pm. The officer did not have licence plate numbers for the vehicles nor did he take any steps to corroborate the information.

The officer, along with other police members, set up surveillance in marked police vehicles surrounding the area of Terry Edwards' residence. At 12:39 pm, the officer observed a person leave Edwards' residence and run up the street. After the officer made a u-turn, he saw a late model brown gold or mustard colour Mazda Protégé with a driver and the male he saw running as the passenger. Although the officer did not see any movement inside the vehicle consistent with a drug transaction, the two appeared shocked to see the officer as evidenced by their facial expressions and body language. The driver was an Asian male in his early 20's.

The accused was stopped by the officer, using area break and enters as a ruse, and produced a valid picture British Columbia driver's licence. The accused told the officer that he was visiting a friend named Terry and offered to call him on the phone. Terry Edwards subsequently attended and advised the officer that the accused and his passenger were visiting him. At this time the accused was arrested for trafficking in drugs, provided his *Charter* right to counsel, cautioned regarding statements, and searched incidental to arrest. Police found the following items:

- a large amount of money on the accused;
- a cellular telephone in plain view in the vehicle;
- a glasses case containing cocaine, another cellular telephone, and some money in the glove box;
- a "score sheet" on the floor by the driver's seat;
- a "score sheet" in the pocket of the driver's door; and
- cocaine and heroin wrapped in plastic baggies underneath the pocket of the driver's door.

The accused argued that the search was unlawful because the officer lacked reasonable grounds to make the arrest. It was suggested there was no evidence concerning the reliability of the informant and officer acted "precipitously". There was no detailed description of the Asian male, no licence plate was provided, no drug transaction was observed, and the only matching circumstances was the presence of a similar vehicle with an Asian male all of which could be "innocent coincidence". Moreover, the accused asserted he was in a lawfully parked and fully licensed vehicle and apart from the tip there was no basis for the detention and arrest.

The test for determining whether reasonable grounds exists is whether the officer had the requisite personal belief supported by objective evidence. When reasonable grounds finds a basis in an informants tip, the reliability of the information must be assessed by examining the totality of the circumstances with particular attention to:

- whether the source was **credible**;
- whether the information was **compelling**; and
- whether the police were able to **corroborate** any part of the information.

In this case there was no evidence of the credibility of the informant or any attempt to corroborate the information prior to the surveillance. However, many of the officer's observations during the surveillance were accurately predicted by the source. The officer observed a similar vehicle described by the informant driven by an Asian male in his 20's attend a street near a known drug user (Terry Edwards) as disclosed by the source during the time frame predicted. The officer then saw a person leave the known drug user's house and enter the vehicle driven by the Asian male. The two occupants appeared shocked at the sight of the officer and were in possession of a cellular telephone, which is known to be used by drug dealers. After the accused was detained, the known drug user attended the scene after being summoned by the cellular telephone call made by the passenger. In finding the officer had the necessary reasonable grounds to arrest, Bruce J. stated:

> Viewing the circumstances in their entirety, it appears to me that the sequence of events actually observed by [the officer] conformed sufficiently to the anticipated pattern predicted by the tip to remove any possibility of innocent coincidence…. Further, the strength found in the compelling nature of the tip, as well as the amount of detail confirmed by the constable's observations prior to arrest, overcome the weakness in the evidence concerning the general credibility of the source and the lack of corroborative investigation. While it would have been preferable if the officers had conducted more surveillance prior to making a decision to arrest, the fact that they failed to do so does not render the arrest unlawful…
>
> Considering the evidence as a whole, I am satisfied beyond a reasonable doubt that [the officer] had reasonable and probable grounds to arrest the accused and search him and his vehicle incidental to arrest. In my view, a reasonable person placed in the position of the officer would have come to the same conclusion; that is, there was a reasonable probability that the accused was in possession of illegal drugs for the purpose of trafficking. (references omitted)

The evidence was admissible.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

"[P]olice work, can be and often is quite onerous. The hostility that the police face frequently in carrying out their duties is unpleasant even to the most thick-skinned among them. The constant possibility of danger and violence erupting in their work does little to provide a tension-free job environment. The sheer human ugliness that they are called upon to deal with in the course of one year on the force surpasses significantly the amount tolerated in the whole life span of most individuals[6]". Rose Yunka, PhD.

[6] (1977). Police Field Training: The Analysis of a Socialization Process. Washington University.

SAFETY ALERT

A New York police officer reportedly located this rectal plug containing the following pictured items.

UNLAWFUL ENTRY TO ARREST: RESIST CHARGE STAYED

R. v. Borden, 2002 NSPC 3

Police, acting on an arrest warrant, attended a mobile home where the accused was believed to be living. The police spoke to the accused's common law spouse who denied that the accused was in the trailer. After hearing footsteps within the trailer, police entered and arrested the accused. During the arrest, the accused resisted and threatened the officers. In addition to the outstanding breach of probation charge, the accused was charged with resisting arrest and uttering threats.

The accused made an application seeking relief under s.24 of the *Charter* to have the all the charges stayed including the original breach of probation. Campbell J. found that the police "knew or should have known" that the accused had a "limited expectation of privacy" while resident in the trailer which was sufficient to require a warrant to enter to effect the arrest. There were no exigent circumstances such as flight or the destruction of evidence which might otherwise justify a warrantless entry. Since the arrest was unlawful, the resist charge was stayed. However, the breach of probation and threatening charge remained since there was neither any evidence related to those charges that was obtained as a result of the *Charter* breach or any connection between the breach and the charges.

REASONABLE BELIEF ESTABLISHED DESPITE USE OF UNCALIBRATED DEVICE

R. v. Linford, 2002 ABPC 47

After stopping the accused for speeding, an officer made a formal demand for a breath sample into a roadside screening device. The accused provided a sample that resulted in a "fail" reading. At this time, the officer formed the opinion that the accused's ability to operate a motor vehicle was impaired by alcohol, arrested him, and read him his *Charter* rights. The accused acknowledged understanding and indicated he wished to contact a lawyer. The officer then cautioned the accused and read the breath demand. When asked if he understood, the accused replied "100%".

The accused was transported to the police station where he was placed in a phone room. He placed a call to a friend, presumably to obtain the number of a lawyer, and then made a second call that went unanswered. He then refused to make any more phone calls. The officer re-explained the right to counsel and read a waiver. The accused acknowledged understanding of the waiver and after being asked if he wished to contact any lawyer he replied "no". When asked, "Are you sure?", he replied "Yah". The accused was escorted from the phone room, and after doing some push ups, provided samples of his breath.

The accused argued that the certificate of analysis was inadmissible because the officer used an uncalibrated roadside screening device to form his reasonable grounds and his s.10(b) rights were violated because the waiver advice he was given was deficient.

The Roadside Screening Device

The police policy required that all roadside screening devices be calibrated every two weeks; if not they were removed from use. Each device was affixed with a sticker, which would have the calibration expiry date. On this occasion, there was no sticker attached to

indicate the date of expiry, nor did the officer check the calibration log. The officer assumed that the persons responsible for calibrating the devices did so. At the trial, it was revealed that the device used by the officer was beyond the two-week calibration period. However, Patterson J. found that although the police policy required two week tests on the devices, there was no corresponding duty on the officer to ensure the check had taken place. The officer's belief that the device was calibrated was, along with the "fail" reading, sufficient to provide reasonable and probable grounds for the breath demand.

The s.10(b) Waiver

When an arrestee originally expresses a desire to contact counsel and has been reasonably diligent in exercising it but changes their mind, the police must inform the person of:

- their the right to a reasonable opportunity to contact a lawyer, and
- the police obligation in "holding off" from questioning or other evidence gathering (including breath samples) until the opportunity is provided.

In this case, the information read to the accused was deficient in that it failed to provide the advice that the police must "hold off" their investigation until he was provided a reasonable opportunity. However, this additional advice requirement is triggered only when the person asserts their right to counsel and has been reasonably diligent in exercising it. Here, the accused made two phone calls; one to a friend and the second went unanswered. The phone room contained lists of duty counsel and other lawyers posted on the walls and had he made a minimal effort to call, he would have likely received free, immediate advice. Having failed to establish that he was being reasonably diligent, the "holding off" component of the warning was not required. The accused failed to prove that his s.10(b) right had been violated and the certificate of analysis was admissible.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

"Citizens who are engaged in the policing profession are the guardians of life and property. While the public expects that ordinary citizens will run from circumstances of extreme danger, it is the heroic duty of a police officer to run toward that danger and resolve it. Police work often occurs in highly volatile circumstances that are not always viewed by the public. Because police are granted discretion in the exercise of their extraordinary powers, there is a recognized need for public accountability. That accountability should not, however, amount to simply second-guessing[7]". B.C.'s Deputy Police Complaint Commissioner Barb Murphy

IN or OUT? MAKING THE CALL ON A s.8/24(2) *CHARTER* ANALYSIS

Sgt. Mike Novakowski

Section 24(2) of the *Charter*, although sometimes referred to as the "exclusionary rule", does not require exclusion in all cases. This provision provides a remedy for the exclusion of evidence obtained through an infringement of a *Charter* right provided the requirements of the section are met:

> s.24(2) *Charter*
> Where...a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Although all relevant, probative evidence is prima facie admissible at trial, s.24(2) provides an aggrieved person with a mechanism to exclude evidence resulting from a *Charter* violation.

In a s.8 *Charter* claim for relief under s. 24(2), the person who is seeking exclusion of evidence must satisfy the court on the balance of probabilities that their personal right to be secure against unreasonable search or seizure was violated. There is no obligation on the Crown to establish that the search and seizure did not violate s.8[8]. Although this onus is on the person seeking exclusion, they need not necessarily give evidence. In some cases a breach will be readily established on the

[7] Testimony at the Special Committee To Review The Police Complaint Process, Wednesday, April 17, 2002

[8] R. v. Hammil (1984) 14 C.C.C. (3d) 338 (B.C.C.A.) leave to appeal to S.C.C. dismissed [1987] 1 S.C.R. 265 (S.C.C.), also R. v. Feldman (1994) 91 C.C.C. (3d) 256 (B.C.C.A.) per Hinkson J.A. leave to appeal to S.C.C. dismissed 93 C.C.C. (3d) 575 (S.C.C.)

basis of evidence led by the Crown[9]. To establish that the evidence should be excluded as a result of a *Charter* violation under s.8 , the applicant must prove:

- **their personal s.8 right was violated**. A third party may not bring an application for exclusion by claiming prejudice through the use of evidence gathered as a consequence of a search or seizure directed at another person. In proving their personal right was violated, a person must demonstrate the following three elements:
  - **the search and/or seizure was conducted by a government agent (the police).** The *Charter* controls state action, not the behaviour of persons in the private sphere[10]. However, private persons may be converted into actors of the state when they take an active role by performing a function at the direction of the police.
  - **the person had a reasonable expectation of privacy.** The accused must show that their reasonable expectation of privacy was breached by the state conduct[11].
  - **the search was unreasonable.** Simply demonstrating that a warrantless search or seizure occurred satisfies this requirement. The police will then be required to rebut this presumption. Alternatively, the accused may choose to challenge the law, the manner of the search, or that police failed to comply with the substantive or procedural requirements of the authorizing law.
- **the evidence was obtained in a manner that violated their personal *Charter* right.** It must be shown that the evidence in issue was obtained through a causal or temporal connection with the right violated. If the violation caused the obtaining of the evidence, the evidence will have been obtained in a manner that infringed or denied a *Charter* right. Alternatively, if there is a sufficient temporal nexus or link[12] between the violation and the evidence (the *Charter* breach is an integral part of a single transaction) or if the *Charter* violation was an integral component in a series of investigative tactics which lead to the securing of the evidence[13], the evidence will have been obtained in a manner that infringed or denied a *Charter* right.
- **the admission of the evidence would bring the administration of justice into disrepute.** In assessing whether the admission of the evidence will bring the administration of justice into disrepute, a 24(2) *Charter* analysis involves three steps:
  - **trial fairness.** A fair trial is a basic tenet of Canada's legal system and any evidence causing an unfair trial would bring the administration of justice into disrepute and warrants exclusion.
  - **the seriousness of the *Charter* violation.** Whether the violation was serious or technical will depend on the nature and circumstances of the *Charter* infringement. For example, when the object of an unreasonable search is a dwelling house, any violation of the *Charter* will be rendered all the more serious[14].
  - **the effect of the admission/exclusion of the evidence on the administration of justice**

In assessing whether evidence will be excluded, courts will proceed on a case-by-case basis in recognizing the fundamental importance of balancing a person's right to privacy and society's interest in effective law enforcement. In determining whether the admission of the evidence would bring the administration of justice into disrepute, a Court will consider the following[15]:

- the kind of evidence obtained;
- the *Charter* right infringed;
- the seriousness of the *Charter* violation ;
- whether the violation was deliberate, willful, flagrant, or was it inadvertent or committed in good faith. Good faith is not confined to objectively reasonable good faith, but may also include the subjective good faith of the officer[16];
- whether the violation occurred in circumstances of urgency or necessity;
- whether other investigative techniques were available;
- whether the evidence would have been discovered in any event;
- whether the offence is serious;
- whether the evidence is essential to substantiate the charge; and
- whether other remedies are available.

[9] R. v. Butler (1995) 104 C.C.C. (3d) 198 (B.C.C.A.) leave to appeal to Supreme Court of Canada refused 105 C.C.C. (3d) vi..
[10] R. v. Fitch (1994) 93 C.C.C. (3d) 185 (B.C.C.A.) at p.189.
[11] R. v. Belnavis (1996) 107 C.C.C. (3d) 195 (Ont.C.A.) at p.207.
[12] R. v. Evans (1994) 93 C.C.C. (3d) 130 (B.C.C.A.) per Rowles at p.166
[13] R. v. Grant (1993) 84 C.C.C. 198 (S.C.C.) at p.198.
[14] R. v. Lamy (1993) 80 C.C.C. (3d) 558 (Man.C.A.) at p.570.
[15] R. v. Collins [1987] 1 S.C.R. 265 (S.C.C.)
[16] R. v. Moran (1987) 36 C.C.C. (3d) 225 (Ont.C.A.) 225 at p.248.

s.24(2) *Charter* Analysis

STEP 1 - TRIAL FAIRNESS

EVIDENCE CLASSIFICATION

The proper focus at this stage is the actions of the police involved in obtaining the evidence, not the form in which the evidence exists.

CONSCRIPTIVE

- An accused, in violation of their *Charter* rights, is compelled to incriminate themselves at the behest of the state by means of:
  - a statement (eg. confession)
  - the use of the body (eg. physical line-up, fingerprints)
  - the production of bodily substances (eg. DNA)

NON-CONSCRIPTIVE

- An accused is not compelled to participate in the creation or discovery of the evidence. Evidence existed independently of the *Charter* breach in a form useable by the state:
  - eg. murder weapon found at the scene of a crime
  - eg. drugs found in a dwelling house

Admission of conscriptive or non discoverable derivative evidence would render the trial unfair which warrants its exclusion.

DERIVATIVE EVIDENCE

"conscriptive real evidence"

- An accused is conscripted against themselves which leads to the discovery of an item of real evidence (eg. an accused's statement is necessary to cause its discovery such as an interrogation leading to the discovery of a murder weapon that would not have been obtained but for the statement)

NON DISCOVERABLE

- Evidence would not have been discovered in the absence of the unlawful conscription of the accused

DISCOVERABLE "BUT FOR" PRINCIPLE

- The conscriptive evidence would have been obtained even if the *Charter* had not been breached

INDEPENDENT SOURCE

- A constitutional alternative means of obtaining the evidence existed & the police would have availed themselves of it (proof by Crown on the balance of probabilities)

INEVITABLE DISCOVERY

- The discovery of the evidence was inevitable (probable)

Admission of non-conscriptive or discoverable derivative evidence would not render the trial unfair.

STEP 2 – SERIOUSNESS OF THE *CHARTER* VIOLATION

On the whole of the circumstances was the violation technical or serious?

Factors Considered Include:

- Did the police have reasonable grounds?
- Did the police act in good faith?
- Did the violation interfere with the bodily integrity or dignity of the accused?
- Was there a reduced expectation of privacy?
- Were the police acting out of urgency?
- Is there a pattern of breaches?

STEP 3 – EFFECT OF EXCLUSION

- Would the admission of the evidence bring the administration of justice into disrepute?
- The admission of the evidence would bring greater harm to the repute of the administration of justice than its exclusion.

Factors Considered Include:

- Is the evidence essential to the prosecution?
- Would the admission "shock the conscience" of the fair minded members of the community?

NO SEARCH, NO SEAT

R. v. Schippanoski,
(2002) Docket:C34488 (OntCA)

The accused, a passenger in a vehicle, appealed his conviction after the police searched him before he was allowed to enter a police car. At trial, the judge found a breach of the accused's s. 8 *Charter* right, but admitted the drug evidence because the breach was not serious since it would have been "foolhardy" to permit a civilian to enter a police car before searching them. The Ontario Court of Appeal set aside the accused's convictions and entered acquittals. Unlike the trial judge, Ontario's top Court found the seriousness of the breach favoured the exclusion of the evidence. The police unlawfully detained the accused outside for some time in freezing weather, did not have reasonable grounds for the search, the search was relatively intrusive, and there was an absence of good faith efforts to comply with the law. Although the objective of the police policy in searching civilians before they entered the police cruiser was reasonable, the officer did not implement the policy lawfully. The officer should have informed the accused that as a condition of entering the police car he would be searched, but had the right to refuse. If he refused, he simply would not be allowed to enter the car.

Complete case available at www.ontariocourts.on.ca

DETENTION UNLAWFUL: EVIDENCE INADMISSIBLE

R. v. Snape,
[2002] O.J. No. 714 (OntSCJ)

From previous experiences, police knew that drug and alcohol related activity took place in a park at night. Three officers, attending the park at dusk to investigate such activity, found a lone vehicle parked at the edge of the parking lot near some trees with its lights out. As the officers arrived, the vehicle began to reverse. Police stopped the vehicle by cutting off its exit and ordering the driver to stop. As a result of the stop, police found evidence which they sought to introduce at the accused's trial. The accused argued that the detention was arbitrary and a breach of s. 9 of the *Charter*. It was suggested that had the stop not been made, the officers would not have developed their reasonable grounds leading to the arrest and the obtaining of evidence relied upon to support the charge.

A detention will not be arbitrary if the officer has an articulable cause to detain and the detention is justified in the circumstances. In this case, Ferguson J. held that the police lacked an articulable cause that the accused was engaged in activity that was criminal:

> First, the location is not one where the police had reason to believe all activity was criminal; for example, as in a crack house. This was a public park where a wide variety of legal activities occurred.
>
> Second, the facts related to the parking of the car and the time of day cannot support a conclusion that this was a situation which is more likely than not associated with illegal activity.
>
> Finally, … the police had no reason to suspect that the accused in particular, or the driver of the vehicle, was involved in criminal activity. There was no significant evidence relating to the occupant of the vehicle other than the place and time of day.

Without articulable cause, the detention was arbitrary and a violation of s. 9 of the *Charter*. The police had the erroneous perception that they had the power to stop anyone who happened to be at a place where the police believed could be the site of ongoing criminal activity. Since the evidence the Crown sought to rely upon would not have been discovered without the *Charter* breach, the judge excluded the evidence as a remedy under s.24(2).

SNAIL MAIL EXTENDS 30-DAY TIME LIMIT BY 10 DAYS: DEEMED CONVICTION SET ASIDE

R. v. Tollstam, 2002 BCSC 556

The accused was deemed convicted at the expiration of 30 days after being issued a speeding ticket. She brought an application for an extension of time to appeal arguing that the 30-day time limit requires the dispute be deposited in the mail within 30 days, not that it be received within 30 days by the authorities. After reviewing the applicable provisions of the *Offence Act*,

Hendersen J. found s. 15 of the *Act* made it clear that the ticket is deemed to be disputed on the day on which it is mailed. Furthermore, in setting aside the deemed conviction, the Supreme Court Judge held that no deemed conviction should be entered on a violation ticket until at least 10 days after the expiry of the 30 day period to account for the delivery of the mail.

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

ADP & REFUSAL CHARGE: DOUBLE JEOPARDY

R. v. Frederickson, 2002 BCPC 0134

A Provincial Court Judge stayed a charge of refusing to provide a breath sample after the accused had his 90-day administrative driving prohibition upheld. The accused had been charged with impaired driving and refusing to provide a breath sample under the *Criminal Code*. At the time, he was served with a 90-day driving prohibition under s.94.1 of the *Motor Vehicle Act* because he failed to comply with the *Criminal Code* breath demand. The accused sought a review of the prohibition, which was upheld by the adjudicator.

The accused successfully argued that if the *Criminal Code* refusal charge were now to proceed, a double jeopardy situation would arise because the accused had already been subject to a quasi-criminal/quasi-judicial hearing (the s.94.1 *MVA* adjudication) and the facts in support of the Crown's prosecution on the refusal are those that resulted in the 90-day prohibition. In staying the *Criminal Code* refusal charge, Saunderson J. stated, at para. 16:

> The essence of what occurred under the *Motor Vehicle Act* is that the Crown succeeded in having the defendant punished by a competent tribunal for failing to comply with a demand under section 254 of the *Criminal Code*. The Crown cannot now be heard to ask for another chance to punish the defendant on the same facts with, I might add, significantly greater penalties than have already been suffered by the defendant. To permit such an attempt would offend a principle fundamental to the common law.

Complete case available at www.provincialcourt.bc.ca

ABBOTSFORD POLICE 10K CHALLENGE/5K FUN RUN

SEPTEMBER 28, 2002

The Abbotsford Police are once again gearing up for the Fraser Valley's premier running event. The 12th annual charity run in support of Special Olympics will be starting at 9:00 am on September 28, 2002 with a warm up by the Apollo Athletic Club between 8:35 and 8:45 am.. Walkers, runners, and strollers are welcome to attend. Last year there were 1200 participants and $30,000 was raised for Special Olympics, which is the largest amount ever in the history of the event! Group incentives are offered and awards will be given to the overall top male and female runners for each race along with medals to the top performers in each age category. Last years best time for the 5K was 17:11 while the top finisher in the 10K crossed the line in a time of 32:27.

Entry fees are $20 for an adult (without a t-shirt), $28 for an adult (with a t-shirt) and $13 for a student (grade 12 and under) which also includes a t-shirt. If you register before July 31, 2002 you save $3. Late fees will apply for entries after September 15th. There are $10,000 in prizes to be won and food and refreshments will be provided at the finish line. All proceeds go to the Special Olympics!!!

All the race details and registration information about the run are available by navigating the Abbotsford Police website at www.abbotsfordpolice.org and clicking on the 2002 Abbotsford Police 10K Challenge link or logging on directly to the run website at www.abbotsfordpolice.org/sports/temp-10krun.html. We hope to see you there!!!

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