POLICE ACADEMY
715 McBride Blvd. New Westminster B.C. V3L 5T4

IN SERVICE:10-8

JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On May 7, 2002, 42 year old Walpole Island Police Constable Paul Neudert died as a result of an on duty traffic collision. Two officers from the Walpole Island police force were heading to the Petrolia OPP office to do administrative work at the time of the incident. The officers, Constable Neudert and Sergeant Lyle Johnson were not on a call or involved in a police chase. The two vehicles, a car and a SUV, collided at an intersection north of Wallaceburg. Both vehicles then slid into a deep ditch. The car came to rest on its roof in 30 cm. of water.

Constable Neudert, who served six years with the Walpole and Hamilton-Wentworth forces, died in the crash. He is survived by his wife and two young children. Constable Neudert is the first Walpole police officer to die on duty and the sixth officer to die on duty this year in Canada.

The above information was provided with the permission of Officer Down Memorial Page: available at www.odmp.org/canada.

INVESTIGATIVE SEARCH REASONABLE: CONVICTIONS UPHELD

R. v. Cooke & Jaworski, 2002 BCCA 305

A police officer, on patrol in Winfield BC, passed a Subway restaurant noticing its lights were out and a van about a 100 metres away, on the same side, pull out of an alleyway and travel along the highway. The officer followed the van a short distance until it turned right off the highway onto Glenmore Rd. At about this time, the officer heard the broadcast of an armed robbery that had recently occurred at the Subway. A male suspect dressed in a grey sweatshirt with a hood and a nylon covering his face, entered the restaurant armed with a small revolver. The suspect produced a small black bag with a zipper into which the Subway employee placed the contents of the cash register; approximately $160 in $5 bills. The suspect then fled from the Subway on foot. The employee turned out the lights and called 911. Before proceeding to a checkpoint 4-6 km away from the Subway, the officer who saw the van made a mental note of it and broadcast its description as a "dark brown beater" with a licence plate containing the letters "BTL".

Another officer proceeded to a checkpoint about a ten-minute drive from the Subway on Glenmore Rd. Within a minute or two the first vehicle, a dark blue older van with licence plate BLL151 arrived. The accused Jaworski was driving and the accused Cooke was in the passenger seat. The officer queried Jarowski on CPIC after obtaining his driver's licence and learned he had some connection with the offence of robbery. After backup arrived, the accused were asked to get out and the van was searched. In plain view on the passenger seat, where Cooke was previously seated, police found a black zippered bag with $5 bills. Police confirmed the amount of money found in the bag corresponded with what was taken from the robbery and the accused were arrested. The police obtained a search warrant for the van and subsequently located a nylon and a revolver behind the wood paneling on the van's ceiling. A search of the area also resulted in a grey hooded sweatshirt, tearaway pants, and a denim jacket being found on Glenmore Rd. between the checkpoint and the restaurant.

The accused Cooke later told police that they were in the area of the Subway smoking a joint when a man leaving the restaurant carrying a black pouch and wearing black pants and a grey hooded jacket under a denim jacket dropped the bag after Cooke called to the man. Cooke picked up the bag and found the money. The accused were both convicted of robbery and Cooke with being masked while committing an indictable offence. They appealed their convictions to the British

Columbia Court of Appeal arguing that the roadside search by the police was unreasonable and it consequently tainted the subsequent issuance of the search warrant.

The police may detain persons for the purpose of police investigation prior to arrest provided they have "sufficient objective evidence that the [persons] were recently involved in a crime ". This has been described as an "articulable cause". However, a subjective belief alone is not enough; the officer's belief must also be based on objectively discernible facts providing reasonable cause to suspect the person might have been involved in the criminal activity under investigation. In this case, the officer knew the Subway had been robbed with a firearm, that a van had been seen leaving the area, and that the accused's van arrived at his location in about the time it would have taken to drive from the restaurant. Furthermore, two of the letters in the licence plate matched the van leaving the area of the Subway, there was almost no other traffic in the semi rural area, the van was the first vehicle to arrive at the checkpoint, and the driver had some past connection with the crime of robbery. Finch, C.J.B.C. for the unanimous British Columbia Court of Appeal stated:

> [T]his combination of objectively discernible facts fully justified the police in detaining the occupants of the van, and conducting a search on the spot. The timing of the events, the description of the van and its direction of travel on Glenmore Road were sufficient to meet the test. The fact that the crime under investigation involved the use of a firearm adds to the justification for the detention and search.

The search was lawful and the evidence was admissible. Moreover, the subsequent issuance of the search warrant was founded on reasonable grounds and the evidence obtained there from was also admissible. The appeal was dismissed.

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

COURT CAUTIONS OVER USE OF 'SHOW-UP'

R. v. Hurley, [2002] N.J. No. 119

The accused was charged with theft and attempt theft after he was identified by two witnesses who saw him enter and search two vehicles that did not belong to him. The identification of the accused by the witnesses occurred after he consented to the police bringing the two witnesses back to the crime scene to identify (or not identify) him while he was seated alone in the rear of the police car. This type of identification is known as a "confrontation" or "show-up". In Court, the two witnesses testified about their observations that day which could at best be described as "uncertain". Although the judge described the witnesses as honest, there were some inconsistencies in their evidence and what they told police the day of the incident.

In describing the identification of the accused as "the equivalent of a multiple choice test in which the answer is underlined or set out in bold", the Court recognized the weaknesses of eyewitness identification. Eyewitness testimony must be weighed and even though a witness may be honest and credible, identification evidence suffers from inherent human-frailty and must be carefully assessed. Furthermore, the police role in ensuring the integrity of the identification process must not be undermined by using improper identification techniques. In weighing eyewitness identification, a Court will assess factors including:

- the opportunity to observe;
- the witness' powers of observation;
- the witness' actual observations;
- the witness' actual recollection;
- the witness' ability to relate recollection; and
- the sincerity of the witnesses testimony

Gorman, J. opined that the "show-up" technique used by the police in this case "should rarely, if ever, be used". It negatively impacted the weight to be given to the witnesses' testimony and the judge was unable to conclude that identification had been proven beyond a reasonable doubt. The accused was acquitted.

ROADSIDE SCREENING SUSPICION v. BREATHALYSER OPINION

R. v. Hodgson 2002 MBQB 111

The accused was stopped by the police for a speeding violation. As the accused was getting his driver's licence, the officer noted a moderate odour of alcohol on his breath, a blushed face, watery eyes, and difficulty in getting his wallet. Having formed the opinion that the

accused had been drinking, but not enough for a breathalyser demand, the officer requested the accused provide a sample of breath into a roadside-screening device. Upon exiting his vehicle, the accused was unsteady on his feet and was swaying. After failing the screening test, the officer formed the opinion that his ability to operate a motor vehicle was impaired. The accused was arrested for impaired driving, advised of his rights, and given the breath demand. The accused agreed to take the test and provided samples of 100mg% and 120mg%. The accused appealed his conviction at trial of over 80mg% arguing, among other grounds, that the judge erred in concluding the officer had reasonable and probable grounds under s.254 of the *Criminal Code* to make the demand.

The grounds necessary for demanding a roadside sample and a breathalyser sample are different. A roadside sample requires a reasonable suspicion of alcohol in a driver's body while a breathalyser demand requires reasonable and probable grounds that within the preceding 3 hours the driver's ability is impaired or that they had or have over 80mg% of alcohol in their blood. Beard J. of the Manitoba Court of Queen's Bench found that the accused's blushed face, watery eyes, moderate alcoholic breath odour, and difficulty in getting his wallet established a reasonable suspicion justifying the roadside demand. Furthermore, without the roadside screening test, the fact the accused was speeding and his unsteadiness and swaying on the way to the police car would support reasonable and probable grounds to make the breathalyser demand. The appeal was dismissed and the conviction was upheld.

PROOF OF FIREARM INFERRED FROM FACTS

R. v. Carlson,
(2002) Docket:C36150 (OntCA)

The accused appealed his convictions including one count of pointing a firearm where he argued, among other grounds, that there was no evidence that the gun used during an armed bank robbery was a firearm within the meaning of s.2 of the *Criminal Code*. In his appeal, the onus was on the accused to establish "that there was no evidence upon which a jury could reasonably conclude the handgun brandished by the [accused]…was a firearm". In dismissing the appeal, Ontario's highest Court found that the brandishing, waving, and pointing of the gun during the course of the robbery while screaming that it was a "hold-up" and demanding money, along with witness descriptions of a "small", "black" gun with a 6-8 inch muzzle and the accused's access to guns as reported by his accomplice and common-law spouse, was sufficient to support a finding that the hand gun was by definition a "firearm". The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

REASONABLE GROUNDS: AN HONEST BELIEF IN SERIOUS POSSIBILITY BASED ON CREDIBLE EVIDENCE

Gregory v. Canada 2002 CFT 420

The plaintiff brought an action against the government of Canada alleging that her *Charter* rights were violated when she was unreasonably searched by Canada Customs at an international airport and denied an opportunity to contact counsel when she was detained and arrested. The plaintiff, a Canadian citizen, arrived at Pearson International airport after returning from a 3 week stay in Jamaica where she attended her aunt's funeral on a ticket purchased by her boyfriend a week prior to her departure. She produced her airline ticket and declaration form after being questioned by Customs officers regarding her trip; she declared bottles of alcohol. After leaving primary inspection, the plaintiff was randomly approached by a member of Custom's roving Flexible Response Team (FRT). He asked the plaintiff questions concerning her trip; length of absence, the purchase of her ticket, and amount of luggage. The officer noted that the plaintiff's Custom referral card had been coded for excess alcohol.

After picking up her luggage, the plaintiff arrived at the secondary inspection area where the FRT member met her. The officer emptied her purse onto a desk and examined a duffle bag containing liquor. The officer noted one of the bottles had a separation in the liquid or a foreign object inside the bottle, which was visible through the opaque glass in the bottle neck. This appeared familiar to the officer in his experiences in finding liquid cocaine in rum bottles. The

officer opened the bottle and saw what he believed to be liquid cocaine. The plaintiff was arrested after the officer concluded he had reasonable grounds based on the following factors:

- the plaintiff arrived from a drug source country;
- her bag had been checked in late;
- her flight was a high risk drug flight;
- she was traveling alone;
- he believed (although erroneously) that her ticket had been purchased the day before she left Jamaica; and
- she appeared to be carrying contraband drugs.

The plaintiff was handcuffed to prevent injury to the plaintiff, the officer, and anyone else in the area and to eliminate any risk of flight. The plaintiff was also advised of her right to remain silent and of the right to a lawyer. The plaintiff protested her innocence and repeatedly told the officer to check her receipt that she purchased the bottle from a duty free shop, but was ignored. The plaintiff was escorted to an isolated, controlled room and the handcuffs were removed. The contents of the bottle were examined and a drug test was negative. The plaintiff was released after receiving an apology for the inconvenience. As a result of her ordeal, the plaintiff was shaken, had difficulty sleeping, and was left traumatized.

Was the Search Unreasonable?

The Federal Court Judge found that "airline passengers impliedly consent to be interrogated and searched when [they] go through customs". There was no evidence to suggest that the plaintiff was improperly singled out for inspection because of the presence of significant drug courier indicators. The Court stated that, "from an objective point of view, [the plaintiff] fit the profile of a drug smuggler, albeit unwittingly".

Was the Plaintiff Denied her Right to Counsel?

The plaintiff was properly told that she had the right to remain silent and of her right to a lawyer. The judge was satisfied that she was properly informed, understood her rights, and declined to exercise them.

Did the Officer Have Sufficient Cause?

A peace officer may arrest a person upon reasonable grounds of an offence being committed. Here, the officer had reasonable grounds that the plaintiff was smuggling cocaine. His "honest belief in a serious possibility, based on credible evidence, that a criminal offence [had] been committed" went beyond mere suspicion and was sufficient to justify the arrest.

Was Handcuffing Justified?

To justify the use of restraints, a peace officer must establish a reasonable basis for doing so. In testifying that he was attempting to eliminate any possibility of escape or injury, the officer "was reasonable in concluding that the handcuffs were required". Even though the possibility of escape is difficult to gauge, the Court refused to second-guess the officer. Furthermore, "the interests of enforcement officers in ensuring their personal safety and that of the detained person and the public must be taken into account". However, the Court did not adopt the use of handcuffs in all circumstances:

> My decision <u>should not</u> be interpreted as condoning a blanket policy of handcuffing suspected persons. The public expects enforcement officers to set high standards of truthfulness and honour; while demonstrating a devotion to duty. They also expect that the officers will be responsible and accountable in their use of the powers provided by law. The unvarying use of handcuffs on all persons arrested without regard for the seriousness of the offence, a reasonable apprehension of violence, risk of escape, or the condition of the arrested person is improper. (emphasis added)

The plaintiff's action was dismissed.

TESTIMONY USING INADMISSIBLE TRANSCRIPT ALLOWED

R. v. Fliss, 2002 SCC 16

Police entered into an elaborate undercover operation to befriend the accused, who had become a suspect in the death of a woman found murdered. After inserting themselves into the accused's life, undercover police officers posing as members of the criminal element and acting on an authorization to intercept, surreptitiously recorded a murder confession the accused made while he met the officers in a hotel room. Following the recording, a transcript was prepared and reviewed by one of the officers the following day. After proofreading the transcript, the officer made corrections from his own personal recollections of what was said as well as

listening to the tape. This corrected copy was sent back to be retyped. At trial, the judge found the authorization to intercept should not have been issued and the tape recording and transcripts violated s.8 of the *Charter* and were consequently inadmissible as a remedy under s.24(2). However, because the officer had participated in the conversation and the corrections were made on the basis of fresh memory at the time, the judge ruled that the officer could refer to the corrected transcripts (or "notes") to refresh his memory at trial. In his testimony, the officer essentially read the excluded transcript word for word. The accused appealed the admissibility of the officer's evidence arguing it was so inextricably entwined with the excluded evidence that the officer's testimony itself should not be allowed. After the accused's appeal was dismissed by the British Columbia Court of Appeal (2:1), he launched a further appeal to the Supreme Court of Canada. Although the Supreme Court of Canada unanimously dismissed his appeal, the judges did so for different reasons.

The Majority Reasoning

Binnie J., writing for the majority (4:3), held that the court "was entitled to hear from the undercover officer about his conversation" because the officer had a present recollection of the "gist" of all its important elements. In deciding whether the officer's use of the transcript to refresh his memory was permissible, Binnie J. wrote:

> There is also no doubt that the officer was entitled to refresh his memory by any means that would rekindle his recollection, whether or not the stimulus itself constituted admissible evidence. This is because it is his recollection, not the stimulus, that becomes evidence. The stimulus may be hearsay, it may itself be largely inaccurate, it may be nothing more than the sight of someone who had been present or hearing some music that had played in the background. If the recollection here had been stimulated by hearing a tape of his conversation with the accused, even if the tape was made without valid authorization, the officer's recollection -- not the tape -- would be admissible.

However, in this case the officer could not independently recall at trial all of the conversation from present memory nor did he at the time he proofread the transcript the day following the recording. Since the officer only had a <u>partial</u>, although substantial, recollection of the conversation, he was not entitled to recite the <u>entire</u> transcript. It was not because the transcript was inadmissible that precluded its use as a memory aid, but that it failed to stimulate the officer's recollection. Furthermore, the officer's testimony failed to meet all the criteria of the "past recollection recorded" doctrine. The doctrine, commonly used by police to refresh their memory from notes made during or shortly after an event, requires the following:

1. the recollection must be reliably recorded;
2. the recollection must be sufficiently fresh and vivid at the time to be probably accurate;
3. the officer must be able to assert while giving testimony that the recorded recollection represented their knowledge at the time; and
4. the original record of the recollection itself must be used, if procurable.

Here, the 3rd requirement was not met. The officer testified that he could only recall <u>parts</u> of the conversation at the time he made the corrections to the tape. By allowing the officer to read into evidence those parts of the transcript he did not remember when he made the corrections violated the accused's rights. It was not the officer's recollection, but the excluded tape and transcript that provided the sole basis for the parts he could not remember:

> [A] significant portion of the detail that was recited by the officer into the record cannot be considered to be his recollection (either refreshed, revived or recorded) but the corrected transcript of the ... conversation that ... was obtained in breach of s. 8 of the Charter.

Having found the accused's s.8 rights violated by reading in the transcript, the majority nonetheless admitted the evidence under s.24(2) of the *Charter* after assessing the following factors:

- the evidence was non-conscriptive;
- the accused was not detained nor compelled to confess -- the statement was freely volunteered;
- the surreptitious recording did not cause or contribute to the statement;
- the officer did not hear anything the accused did not intend him to hear;
- the police would have heard what the accused had to say with or without a recording device;
- the officer recalled all the most significant elements of what was said;
- the police acted in good faith – they obtained prior judicial authorization even though it was subsequently ruled invalid;
- the act of volunteering the statements indicated a low expectation of privacy; and

- murder is the most serious of crimes – this murder was brutal and senseless.

The Minority Reasoning

Arbour J., although coming to the same conclusion in dismissing the appeal and admitting the evidence, found it unnecessary to reconsider s. 24(2) of the *Charter*—the trial judge had properly addressed the s.8 breach. Although the recording and transcript of the conversation were the products of an unreasonable search and seizure and thus inadmissible, the conversation itself was not and the officer was only entitled to refresh his memory from the excluded transcript if he testified that the transcript constituted his past recollection recorded (which was not the case for all of the parts of the transcript). However, even though the Court erred in permitting the officer to read verbatim into evidence the contents of the transcript, the error was trivial because no substantial wrong or miscarriage of justice occurred.

A Supreme Warning—closing the back door

It would appear on its face that the police could deliberately circumvent the authorization process by simply recording a conversation, check the transcript, and then rely on the transcript as notes to later be read in at trial even though the tape itself is inadmissible. However, both the majority and minority cautioned against such procedure. Binnie J. cautioned that in another case, "the s. 24(2) hurdle may not be so readily surmounted" while Arbour J. forewarned that in a different scenario, any evidence given in any form about the content of the conversation may well be excluded.

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

WHEN DOES FIREARM "USE" END AND "STORAGE" BEGIN?

R. v. Carlos, 2002 SCC 35

Police conducted a search of the accused's residence with a warrant obtained in connection with an application for a firearms prohibition under s.111 of the *Criminal Code* (resulting from threatening comments allegedly made to government officials). As a consequence of the search, police found a loaded Ruger .357 Magnum revolver without a trigger lock wrapped in a rag and placed in a plastic bag behind a stereo cabinet on the upper floor in the living room. Police also located two other loaded revolvers, again without trigger locks, locked in a gun safe situated on the lower floor of the home. The accused was subsequently charged with careless storage of the .357 Magnum and two counts of storage in contravention of the regulations for the other handguns.

At trial[1], the accused testified that he had taken the guns out to clean, inspect and admire and had loaded all three guns to check them for corrosion. He took the .357 upstairs to his office to check the documentation against the serial number. The arrival of the police was unexpected, caught him by surprise, and he panicked when his wife told him the police were coming to the door. He only had enough time to put the two guns that were downstairs in the safe without unloading them and the .357 he took from his office and hid it behind the stereo cabinet. To obtain convictions on all three counts, the Crown would need to prove the following:

- the revolvers were firearms;
- the revolvers were restricted or prohibited;
- the revolvers were loaded; and
- the revolvers were stored (for the .357, "careless" storage also had to be established)

In recognizing that the terms "store" and "storage" are not defined in the legislation, the trial judge accepted the meaning of "store" as "to reserve, put away, or set aside for future use". In failing to find that the firearms were "stored", the judge reasoned that the accused had planned to unload all of the guns and place them in the safe had the police not arrived unexpectedly as they did. The placing of the gun behind the stereo was described as a "very ill-planned hiding spot" and all the charges were dismissed. In short, the placing of the guns was simply interrupted "use" and did not amount to "storage".

The Crown's appeal to the Yukon Court of Appeal[2] was dismissed (2:1). Proudfoot J., writing for the majority, agreed with the trial judge that the accused would not have placed the firearms where they were found but for the unexpected arrival of the police. Since guns are entitled to be handled within the limits of the law, the accused's actions in putting them aside when the police

[1] See 2000 YTTC 519
[2] See 2001 YKCA 6

arrived did not amount to "storage" but was a continuation of the handling. Even though the majority described some of his actions as "unnecessary, dangerous, and incredibility stupid", the accused did not "store" the weapons. However, the Court noted, had the accused been charged with careless "handling", a conviction would have likely followed.

Ryan J., in dissent, found the guns had been stored when they were put aside and there was no immediate or present use being made of them. In her view, hiding the firearms was the same as storing them since the accused had "clearly stopped using" them when he put them away before answering the door to the police. Whatever "use" he was making of the guns had ended, and storage, although temporary, had begun.

The Crown again appealed, this time to the Supreme Court of Canada. In a unanimous judgment, the Supreme Court set aside the acquittals and entered convictions on all three counts. Even though there may be "circumstances where a short interruption in the use or handling of firearms would still constitute handling rather than storage", the accused "took steps to put away and hide his weapons such that the proper characterization of his actions was that he stored them, albeit temporarily, rather than continue his use and handling of the firearms in plain view of the police". There is no need to establish long term or permanent storage, and the temporary hiding of the guns was sufficient in this case. The matter was remitted back to the trial judge for sentencing.

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

LOGICAL INFERENCES FROM FACTS PROVE POSSESSION

R. v. Zimmerscheld, 2002 BCCA 158

The accused rented a four passenger Cessna airplane in Pemberton and flew it to Squamish where he picked up a passenger. After leaving Squamish, the plane experienced mechanical problems and crashed beside a highway and both men were transported to the hospital. Police, along with other emergency personnel, responded to the crash and found a large duffel bag taking up the entire back seat. This bag was not in the plane when it was rented and contained $125,000 in marihuana and rocks to weigh it down. Also found inside the cockpit was a loaded handgun, a navigational map, and a GPS unit with a "drop" site programmed into it. This site, also circled on the map, was an unpopulated rural area near Mount Baker in Washington State close to a road. When interviewed a week after the crash, the accused denied any knowledge of the drugs on the airplane. At trial the accused was convicted of possession of marihuana for the purpose of trafficking while the passenger, who was also charged, was acquitted. The accused appealed his conviction to BC's top court arguing, among other grounds, that the trial judge erred in finding the accused in possession of the marihuana.

Joint possession under s.4(3)(b) of the *Criminal Code* states:

> …where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

Under this section, knowledge and consent are essential, as well as "the coexistence of some measure of control".

Control

At trial, the accused argued that because he was not the owner of the plane, "a finding of exclusive control of the contents of the plane [could] not be made". The trial judge found that the accused, as pilot, had control over the plane and decided who or what cargo would fly in the plane. The bag was not in the plane when it was rented, was visible from the cockpit, and because of its size and location it could not be successfully argued that some other person left the bag on the plane unbeknownst to the accused. The British Columbia Court of Appeal (BCCA) found the conclusion of the trial judge, that the accused had the requisite control, well supported by the evidence.

Knowledge

The Crown also was required to prove that the accused had knowledge of the contents of the duffle bag. This can be established by drawing on inferences that the accused knew what was in the bag or that he was willfully blind as to its contents. In this case, the trial judge concluded that the accused was piloting the plane to drop the duffle bag at the location marked on the map and entered into the GPS unit. The accused's

statement denying knowledge was made nine days after the crash, with the knowledge the police were investigating, after he spoke to a lawyer, and was not under oath. Even if the accused was not the person who brought the bag onto the aircraft, the trial judge found that he knew the plan was to drop the bag out of the plane and by not making enquiries as to its contents, he was willfully blind which constitutes the necessary knowledge. Again, the BCCA found the inferences drawn by the trial judge were logical and the appeal was dismissed.

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

ARREST IN DWELLING JUSTIFIED: EVIDENCE IN PLAIN VIEW

R. v. J.K., 2002 BCPC 0160

A police officer attended a home to speak to a person about a driving complaint. The door of the home was open and loud music was coming from the home. The officer twice yelled out the name of the person he wished to speak to through the open door. As he knocked or was about to knock, he observed the accused, seated at a table with another youth, with a bag of marihuana in his hand. On the table was a rolling paper and it was apparent to the officer that the accused was rolling a marihuana cigarette. The officer entered and advised the occupants of the home that they were under investigation for possession of marihuana, the accused was arrested and advised of his *Charter* rights. The bag of marihuana weighing 7.5 grams was seized. The accused argued that the evidence of the marihuana should be excluded as evidence because the police violated his rights when they seized the marihuana contrary to s.8 of the *Charter*.

The Approach to the House

The officer attended the residence not for the purpose of conducting a drug search or looking for things to be used as evidence of a crime, but for the legitimate purpose unrelated to the seizure of the marihuana. The officer wanted to communicate with the occupant about a driving complaint and was legitimately at the door under the implied invitation to knock doctrine[3]. The officer did not exceed the implied license at the time he saw the marihuana, which was in plain view through the open door. The officer had reasonable grounds to believe the bag in the accused's hand was marihuana; there was a rolling paper on the table, the substance was green and leafy, and the type of bag was the type commonly used for marihuana according to the officer.

The Arrest

Since possession of marihuana less than 30 grams is a summary conviction offence, the officer could not rely on the *Criminal Code* exigent circumstances provisions justifying warrantless entry to effect an arrest because the offence was not indictable[4]. However, the officer was justified under s.495 in arresting the accused because "he found the accused committing a criminal offence and he needed to take action to secure the marihuana and prevent the continuation of the offence".

The Seizure

The plain view doctrine permits a warrantless seizure when the following criteria are met:

1. the object is in plain view of the police who have a right to be in the position to have the view (the marihuana was in view from the open doorway where the officer had a right to be through implied invitation to knock);

2. the discovery of the incriminating evidence is inadvertent (the officer did not go to the door to look for marihuana); and

3. it must be immediately apparent the object is evidence of a crime (the officer had reasonable grounds to believe the object was marihuana – "any worldy person would have recognized the accused was in the process of rolling a joint")

Even though there is a high degree afforded persons within a dwelling and a general rule that prohibits warrantless entry to effect arrests therein, Smith J. held that the privacy interest in this case was outweighed by societal's interest "in ensuring adequate police protection where [the officer] saw an offence under the plain view doctrine".

[3] See Volume 1 Issue 1 of this publication for a discussion on "Implied Licence"
[4] See s.529.3(1) of the Criminal Code.

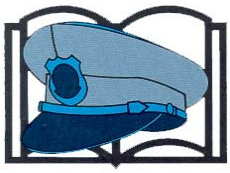
Manner of the Search

Prior to entering to make an arrest in a private dwelling, the common law requires that the police should minimize invasiveness by giving notice of presence, authority, and purpose unless they are saving someone, preventing the destruction of evidence, or if in hot pursuit. In this case, the officer knocked or was about to knock on an open door. He needed to act quickly and did tell the occupants they were under investigation. The occupants recognized him as a police officer and the fact he told them he was investigating marihuana possession reaffirmed this. Thus, the requirements of the common law were satisfied.

The Court concluded that the accused's Charter right protected under s.8 was not breached and the evidence of the marihuana was admissible.

Complete case available at www.provincialcourt.bc.ca

"IN SERVICE: 10-8" CELEBRATES ONE YEAR



The "*In Service: 10-8*" newsletter has celebrated one year of publication in serving operational police officers across British Columbia. In recognition of this anniversary, we would like to share some of our readers' comments about the publication:

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"I wanted to take a moment to commend you for producing such an important educational tool for operational police officers. Your topics are very current and…informative without being overly legalistic. Keep up the good work!!" **Police Constable, British Columbia**

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"Just read Vol 1 Issue 3 re Reasonable Grounds. An excellent overview. This is a refreshing and much needed perspective on an important issue….Hopefully, information such as this will…boost confidence and contribute to better decision making. Keep up the good work!" **Police Inspector, British Columbia**

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"Have read all of the Newsletters which you have prepared and I must congratulate on the product produced. All have been excellent reference material which has obviously been well researched" **Police Chief, British Columbia**

"Just finished reading the first issue. Great job…short, to the point and pertinent" **Police Sergeant, British Columbia**

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"Excellent publication and thanks for putting it on-line so everyone can get a copy. The case law you quote is not only applicable to British Columbia police officers, but also to the rest of us across the Country" **Police Sergeant, Manitoba**

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"*I have been reading some of your newsletters and have found them quite interesting, easy to read and relevant"* **Police Corporal, RCMP**

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"I read a couple of your newsletters. Excellent reading! I have…yet to see any publication similar to this to keep the street officers informed of changes/up-dates" **Police Sergeant, Ontario**

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"I just received a copy of the In-Service: 10-8 News Letter. Indeed a gold mine of information! We have been trying to figure out a way to provide concise case law updates to our front line people and this looks like a wonderful solution" **Police Corporal, New Brunswick**

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"I have enjoyed tremendously the case law updates you have been posting on the JIBC website. We do not have that kind of support here…so I have been relying on the 10-8 to get the best info" **Police Constable, Saskatchewan**

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"I've circulated the last few issues around our office and all of us have found it to be very informative. Kudos to you! It is a great tool for us to keep informed of the latest case law issues etc." **Federal Game Officer, Environment Canada**

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"Thank you for the Newsletter "In Service". We all appreciate the case law" **Crown Prosecutor, British Columbia**

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We are pleased by the positive response and feedback we have received thus far and look forward to serving you in the future!!!

Note-able Quote

"Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. Where they take this latter course, the Charter violation is plainly more serious than it would be otherwise, not less[5]*".* SCC Justice Sopinka

[5] R. v. Kokesch [1990] 3 S.C.R. 3

CONDITIONAL SENTENCE UNFIT FOR 'HORRIFIC' CRIME

R. v. Persaud,
(2002) Docket:C37620 (OntCA)

The Crown appealed the conditional sentence given to the accused after he was convicted of criminal negligence causing death when, while under the influence of alcohol, he sped along a major thoroughfare at a high rate of speed, striking the victim with sufficient force to severe his legs and impale him on the windshield. The accused then fled the scene leaving the victim to bleed to death. Furthermore, after arriving home and composing himself, the accused did not seek any assistance for the victim. Despite the accused's "unblemished background" and prior "good character", the Ontario Court of Appeal substituted a sentence of 20 months imprisonment. The crime was "horrific" and the accused's behaviour was "callous, irresponsible and cowardly" thereby elevating the degree of moral blameworthiness and justifying a sentence that accurately reflected the gravity and seriousness of the crime while also recognizing the sentencing principles of denunciation and general deterrence.

Complete case available at www.ontariocourts.on.ca

ANONYMOUS TIP INSUFFICIENT TO PROVIDE REASONABLE GROUNDS

R. v. Carlson,
2002 ABQB 459, 2002 ABQB 464

A drug unit Staff Sergeant received an anonymous tip through the communications centre that the sale of cocaine was taking place outside a hotel from an older blue Chrysler bearing a specific licence number with four occupants including a named female and a 38 year old female driver with short brown hair. The hotel was located across the street from police headquarters and was known as a location where drug dealing was commonplace. The Staff Sergeant went to a window in the drug office and could clearly see an older blue Chrysler parked outside the hotel with three people entering it. A female with dark short hair entered the driver's side door, a second female entered the front passenger door, and a male entered the rear passenger door.

The Staff Sergeant advised three other officers of the tip and asked them to check it out. The officers exited the police building, immediately approached the vehicle, and advised the occupants they were detained under the *Controlled Drugs and Substances Act* in order to search the vehicle. The accused, who was seated in the driver's seat, had short brown hair but appeared "decades older than 38". No one in the vehicle had the name of the person as provided by the anonymous tipster. The two female occupants were observed leaning towards each other with the accused holding $390 cash in her hand. As a result of a search, the police found drug related evidence including cocaine in the accused's purse, $600 between the two front seats, and more drugs and paraphernalia in the trunk. The occupants were all arrested and informed of their rights under the *Charter*.

Section 11(7) of the *Controlled Drugs and Substances Act* would allow the police to search without a warrant if they had a "reasonable belief that the accused was in possession of drug contraband" and exigent circumstances existed. In assessing whether the requisite belief existed, the totality of the circumstances must be considered including whether the tip was compelling, whether the source was credible, and whether the tip was corroborated by the police before deciding to search.

Was the tip compelling?

Although the police had knowledge of drug trafficking in the area, there was no evidence that the occupants of the vehicle had related records or that any of them were reputed to be drug users or traffickers. The tip that the sale of cocaine was occurring from the car was a mere conclusory statement and "no details concerning the purported possession and trafficking were provided". Furthermore, the named person provided by the tipster was not in the vehicle.

Was the source credible?

The anonymous telephone tipster was not known to the police and therefore could not meet any standard of reliability.

Was the tip corroborated?

The police, prior to searching the vehicle, obtained no additional information, no surveillance was undertaken, nor did the police even look through the windows of the car before they decided to search. In short, the police intended on searching the car before they arrived at it.

In this case, the tip was not compelling, credible, nor corroborated. Even though the police were faced with exigent circumstances because the car could be driven away at any moment, they still did not have the necessary reasonable grounds to justify the search.

Complete case available at www.alberatcourts.ab.ca

PROTECTIVE SEARCH UNREASONABLE, BUT EVIDENCE ADMITTED

R. v. Clements, 2002 ABQB 443

Two police officers observed a vehicle being driven from which a small white object was thrown from the passenger side, followed shortly by a similar object thrown from the driver's side. The vehicle was stopped with the intention of charging the occupant with a by-law infraction for littering. One officer approached the driver's side of the vehicle while his partner approached the passenger side. The accused driver was agitated, nervous, and his eyes were bloodshot and glassy. The officer suspected he may be impaired by alcohol or some other stimulant but was not close enough to detect a liquor odour. The officer asked the accused if he had consumed any alcohol and whether he had any in the vehicle. Spontaneously, the accused exited his vehicle and said, "Go ahead and search the car". The accused, whose movements were rapid and jerky, spoke quickly, and routinely shifted his weight, giving the officer the impression he was very agitated and nervous. As a result of his behaviour and the fact the accused continued to focus attention to searching the vehicle, the officer suspected that the accused may be concealing something on his person.

The officer noted a bulge in the accused's left spandex pants which raised a concern he was concealing a weapon. However, in response to being asked whether he had any weapons, the accused responded in the negative. Further, when asked what was in his pocket, the accused's behaviour markedly changed from rapid-fire speaking to silence while appearing increasingly tense. As a result of the behaviour and noticeable bulge, the officer was concerned with his safety and informed the accused he would be searched. The police found a package with six pieces of crack cocaine. The accused was arrested.

Because the search was conducted without a warrant, the search was prima facie unreasonable and the onus shifted to the police/Crown to demonstrate on a balance of probabilities that it was nonetheless reasonable. In this case, the accused was simply detained at a traffic stop to issue a by-law ticket and therefore the search powers attendant to a lawful arrest did not apply. However, the common law allows the police to search persons who are lawfully detained for investigations and where a reasonable apprehension of danger exists to warrant a safety search. This involves both a subject and objective enquiry.

Johnstone J. of Alberta's Court of Queen's Bench found the objective standard had not been met. Even though the accused displayed nervousness and agitation, there was no evidence that the conduct, objectively viewed, was sufficient to arouse the officer's concern for his safety. As a consequence, the search was unreasonable. However, the evidence was admitted because its admission would not bring the administration of justice into disrepute. The officer acted "in good faith on his subjective belief that there was immediate necessity to protect his safety and that of his partner".

Complete case available at www.albertacourts.ab.ca.

TRAFFICKING COMPLETE ON OFFER TO SELL: INTENTION TO COMPLETE TRANSACTION NOT REQUIRED

R. v. Bell, 2002 ABCA 107

During a conversation with the accused about the purchase of sex for money, the accused quoted a price for drugs after an undercover officer inquired about purchasing cocaine. The officer left but later returned and reiterated his desire to purchase the cocaine. The

accused informed the officer that it would cost $50 for the drugs and $20 for delivery. The officer left to make change for a $100 bill. Upon returning, the officer gave the accused $50 with the understanding that she would receive $20 upon delivery of the cocaine. The accused walked away but never returned. The accused was convicted of trafficking and appealed to the Alberta Court of Appeal arguing that the Crown failed to prove beyond a reasonable doubt that she had the necessary *mens rea*; an intention to actually traffic. Since the *actus reus* of the offence is an offer to sell, the *mens rea* only requires an intention to offer to sell, not proof of intent to actually sell. Thus, an offer to sell is complete once the offer is made and does not require proof the accused intended on completing the sale and delivery. The appeal was dismissed and the conviction upheld.

Complete case available at www.albertacourts.ab.ca.

NO PRIVACY INTEREST IN SEARCH OF 3rd PARTY

R. v. Parchment, 2002 BCCA 252

The accused, in company a 14-year-old female youth, packaged cocaine and heroin at a residence where he stored his bulk drugs. After the packaging was complete, the accused asked the youth to hold the drugs for him. The two left the residence in a vehicle driven by the accused, which was subsequently stopped by the police as a suspected impaired driver after the vehicle failed to stop at an intersection. After directing the youth to step from the vehicle, the officer detected an odour of marihuana and placed her under arrest. After asking her if she had anything on her person the police should be concerned about, the youth produced a baggie containing 17.2 grams of cocaine and 3.8 grams of heroin from the front of her pants. She told the police they were the accused's drugs and that she was holding them for him. She also produced a small quantity of cocaine from her bra which she informed police she received in exchange for helping the accused package the drugs. The accused was convicted of possession of a controlled substance for the purpose of trafficking.

The accused appealed his conviction arguing that he had a reasonable expectation of privacy in relation to his drugs found in the front pants of the youth. In dismissing this suggestion, Braidwood, J.A. for the unanimous British Columbia Court of Appeal stated:

> [The accused] did not have a reasonable expectation of privacy in these circumstances. We are dealing here with narcotics hidden in the front of the pants worn by a 14-year-old minor female. I agree with Crown counsel's suggestion that to hold otherwise would offend not only the law, but also common sense and basic human dignity. Objectively speaking, the appellant had absolutely no rational reason to expect any privacy in these circumstances.

The accused also argued that the search of the youth was not properly conducted as an incident to her lawful arrest. In rejecting this argument, the Court found the accused had no standing to challenge the search of the youth. The appeal was dismissed.

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

CLIMAX NOT NECESSARY TO PROVE ACT OF PROSTITUTION

R. v. Ni, Li, & Jin, (2002) Docket:C33765 (OntCA)

The Ontario Court of Appeal ordered a new trial after the Crown appealed the acquittals of the accused on charges of keeping a common bawdy house and being inmates thereof. A plainclothes police officer attended a massage parlor where one of the accused offered to perform or attempt to perform acts of masturbation upon him. Police attended on several occasions over a period of several days and the offers of masturbation continued. The Appeal Court found the trial judge erred in directing a verdict of acquittal because there was sufficient evidence that a trier of fact could find the masturbation was "part and parcel" of the body rub, and that there was frequent and habitual use of the premises. Masturbation for payment for the sexual gratification of the customers can amount to acts of prostitution. The Court also rejected the accused's assertion that there must be proof of actual climax before the conduct can properly be characterized as acts as prostitution.

Complete case available at www.ontariocourts.on.ca

POLICE ACADEMY OFFERS ON-LINE COURSE IN 'WORKPLACE STRESS, BURNOUT & TRAUMA'

The consequences of workplace stress are a serious problem in law enforcement. Workers are subjected to both systemic stresses (i.e., job stress, burnout, discrimination and sexual harassment) and traumatic stresses (i.e., primary and secondary traumatic stresses), which jointly increase the risk for negative effects on individuals and organizations. The Police Academy at the Justice Institute of British Columbia now offers two, eight-week online courses designed especially for law enforcement staff needing access to flexible training on this important issue.

The Road Back to Wellness: Stress, Burnout & Trauma in Law Enforcement (for frontline staff), and The Managers Guide to Stress, Burnout & Trauma in Law Enforcement are each based on Dr. Patricia Fisher's (Clinical & Consulting Psychologist) popular workbook-based programs. The online study guides provide automated assessment scoring and a trained online facilitator to accompany the course text.

These courses are designed for everyone who currently works in a law enforcement capacity. Course participants will:

- gain an understanding and awareness of the background issues of stress and trauma;
- obtain a detailed evaluation of their personal levels of risk, self-care, and symptoms using the 19 auto-scoring online self-tests; and
- develop a personal wellness plan using the comprehensive set of tools and strategies provided

Participants will be able to evaluate their personal levels of risk, self-care, and symptoms as well as identify tools and strategies to develop and maintain effective personal wellness plans.

Course Dates

- **The Road Back to Wellness: Stress, Burnout & Trauma in Law Enforcement** (course POL791) October 28, 2002 to December 20, 2002. (guided self-paced online course)
- **The Managers Guide to Stress, Burnout & Trauma in Law Enforcement** (course POL792) October 28, 2002 to December 20, 2002 (guided self-paced online course)

Registration

- Register by October 20, 2002
- Tuition fee: $485 CDN each course
- Register by telephone (604) 528-5590
- Visa or Mastercard accepted

For more information, please e-mail mlalonde@jibc.bc.ca or check our website at www.jibc.bc.ca

ACCUSED AWARDED COSTS FOR FAILURE OF CROWN TO DISCLOSE WITNESS INTERVIEW NOTES

R. v. Logan,
(2002) Docket:C354976 (OntCA)

An assistant Crown Counsel took notes during an interview of a witness on the prosecution of a manslaughter retrial. Without an adequate explanation, six months later and two weeks after the trial had begun and nearly all the Crown evidence had been adduced, disclosure of the interview notes was made. A trial judge held that the non-disclosure of the notes had prejudiced the accused's ability to make full answer and defence because the notes of the interview and the earlier statement of the witness were significantly different. The trial judge ordered a stay of proceedings along with the costs of the application for the stay and for the motion for costs. The Crown appealed the trial judge's order, arguing that the inadvertent non-disclosure of the notes was not made in "circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution". In dismissing the appeal, the Ontario Court of Appeal held the notes should have been automatically disclosed and without an adequate explanation, the measured remedy of awarding costs for failing to disclose the notes was reasonable.

Complete case available at www.ontariocourts.on.ca

IN-HOME ARREST LAWFUL: POLICE PRESENCE JUSTIFIED WHILE EXECUTING WARRANT

Townsend v. Sault Ste. Marie Police Service et al,
(2002) Docket:C36850 (OntCA)

The plaintiff brought an action against a police service and some of its officers, which was summarily dismissed by a court. The plaintiff appealed the dismissal of the action to the Ontario Court of Appeal arguing, in part, that the judge failed to properly address his claims of false arrest and false imprisonment. The plaintiff argued that the police did not have reasonable grounds to make a proper arrest and further, that the police were trespassing at the time they made the in-home arrest. In rejecting both of these claims, Ontario's high court found there existed lawful grounds for the arrest. Furthermore, because the police were lawfully present in the dwelling by virtue of a search warrant, they were not trespassing at the time they made the arrest. Thus, the arrest was lawful. The plaintiff's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

OPINION EVIDENCE BASED ON INADMISSIBLE HEARSAY IMPROPER

R. v. Maurice,
(2002) Docket:C34938 (OntCA)

The accused appealed his conviction for possession of drugs arguing, in part, that the Crown improperly lead inadmissible opinion evidence from a police intelligence officer based on hearsay. At trial, the intelligence officer testified that the "[accused's] car was briefly seen at a house occupied by persons suspected, based on informer information, of being drug traffickers and associated with a motorcycle gang suspected of controlling drug trafficking in the…area". The Ontario Court of Appeal found this evidence nothing less than an attempt to establish guilt by association and infer knowledge. Under the circumstances, this evidence was highly prejudicial and should not have been allowed.

Furthermore, the trial judge failed to fully answer the jury's questions about the element of control in proving possession offences. Because the Crown was relying on constructive possession, they were required to prove control as an element of the offence. Although the Appeal Court refused to enter an acquittal, the appeal Court ordered a new trial. There was evidence upon which a properly instructed jury could still convict because the drugs were in plain view in a large plastic package on the back seat of the accused's car.

Complete case available at www.ontariocourts.on.ca

OVEREMPHASIS ON DETERRENCE: CUSTODY SUBSTITUTED BY CONDITIONAL SENTENCE

R. v. Whyte, 20002 BCCA 293

The accused, a 35-year-old first time offender, received a sentence of 12 months imprisonment resulting from a conviction of possession of marihuana for the purpose of trafficking after police found several hundred marihuana plants in his home. He successfully appealed his term of custody, which was substituted by the British Columbia Court of Appeal with a conditional sentence of two years less a day. The underlying principles of sentencing recognize that the incarceration of first time offenders for non-violent crimes should be avoided, if possible. In this case, the trial judge failed to give enough weight to this principle. He properly considered the importance of deterrence but "overlooked" the deterrent effect of conditional sentences containing "very severe restrictions on liberty", which should be sufficient to deter others considering growing marihuana.

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

Note-able Quote

"Remember not only to say the right thing in the right place, but far more difficult still, to leave unsaid the wrong thing at the tempting moment". Benjamin Franklin

NO STANDING TO CHALLENGE WARRANT AFTER DROPPING KEYS

R. v. Luong, 2002 BCPC 0135

Police, investigating a theft from auto and a stolen van, attended a home after witnesses told them that a male was seen leaving the house and enter the stolen van, which was later recovered unoccupied by police. Upon arrival at the house, the officers could see the lights to the main floor were on, but it appeared vacant. On the second floor, they could see a person seated on a couch near a sliding window who appeared to be watching television. Police knocked but received no response. One of the officers attended to the rear of the residence and saw a parked vehicle registered to the accused. The officer knocked at the rear of the residence but also received no reply. After returning to the front, the officer noted that the person seated on the couch was no longer there.

The officer returned to the rear of the house where an elderly female at a neighbouring house pointed down the laneway. The officer noted that the rear gate was now unlatched and slightly open. The officer entered the lane way and observed a lone male walking in the lane. The officer shone his flashlight and the male turned and went out of view. The officer jogged up the lane, turned the corner, and found the accused running. The male stopped running, but continued walking after the officer again shone his flashlight. The officer jogged up to the male and asked him to stop. The officer believed the accused was the same person seen in the window. The two then walked back to the residence.

While outside of the home, the officer observed the accused drop a set of keys from his hand. When asked, the accused denied ownership of the keys and that they would not open the doors to the house. A second officer tried the keys to the home and upon unlocking the rear door, it opened and a strong smell of marihuana was detected. The door was then closed and the accused was arrested for growing marihuana. Police subsequently obtained a search warrant at the residence which the accused sought to challenge during a voire dire.

To successfully challenge the search warrant, the accused would first need to establish a reasonable expectation of privacy in the home. Maughan J. inferred that the accused knew the police were investigating the house because he dropped the keys after having both walked and ran from the premises which signified a desire to avoid detection. In dropping the keys, the accused "intended to relinquish any right to them and to the locks which they opened". Further, "he relinquished his own access to the premises and relinquished his control over the access of others to the premises". Documents located by the police demonstrated that the accused did not live at the house and the circumstances of his presence tended to establish that he had no propriety interest in the home, but at best may have been an invitee. The only evidence linking the accused to the home was that the officer's believed he was the person watching television and who would not respond to knocking, left out the back only to be stopped by the police, had keys that opened a lock, and was the owner of a vehicle parked in the back but not registered to the house.

Although the accused may be a party to the offence of producing marihuana by watering the plants or setting up equipment, he had little or no expectation of privacy in the house. Having failed to establish a reasonable expectation of privacy in the residence, the accused had no standing to challenge the search warrant.

Complete case available at www.provincialcourt.bc.ca

OIC MUST MAKE REASONABLE ENQUIRY BEFORE CONTINUING DETENTION

R. v. Simmons, 2002 BCPC 0144

An experienced police officer attended a minor motor vehicle accident where the accused was found in the driver's seat of one of the vehicles. The officer demanded the accused provide breath samples after forming the opinion that the accused had committed the offences of impaired driving and driving while over 80mg%. The accused was transported to the police station where he provided samples of 210 mg% and 200mg% respectively. The officer was of the opinion that the accused could be released if he took a taxi home and if someone was there to receive him. He described the

accused as a seasoned drinker who could hold his liquor. Despite the investigating officer's intention to release the accused, the officer in charge (OIC), who was aware of the readings but never saw or was in the same room as the accused, aborted any plan for release. The accused's request to speak to the supervisor for an explanation of why he was not being released was refused. The accused was subsequently released 6 hours after the investigator concluded he should have been.

The accused argued that his *Charter* rights under s.7 and s.9 were violated because he was arbitrarily detained and that a judicial stay of proceedings would be an appropriate remedy. Section 498 of the *Criminal Code*, although not a formal bail hearing, does require some enquiry by the OIC – however brief and informal -- when deciding whether to release a person from custody or continue their detention. In this case, at least looking at, talking to, or giving him an opportunity to be heard would be reasonable to ensure the most basic level of procedural fairness. Gove J. found the continued detention in this case was arbitrary and ordered a judicial stay of proceedings.

Complete case available at www.provincialcourt.bc.ca

CAPABILITY & OPPORTUNITY TO MOVE VEHICLE AMOUNTS TO CARE & CONTROL

R. v. Laurie, 2002 ABPC 68

A police officer responding to a complaint found the accused talking on a cell phone behind the wheel of his pickup parked off the roadway in among some trees. The engine was running, the radio was playing loudly, and the vehicle was drivable. An empty can of beer was found outside the driver's door. The accused subsequently provided breath samples of 140mg%. The accused testified that someone he knew, but could only describe in vague terms, drove his vehicle while he was the passenger. During the drive he took out a beer from one of two flats he had purchased earlier and started to drink it. He could remember nothing more until his cell phone awakened him. He sat up and slid across into the driver's seat and was only on the phone for about a minute before being interrupted by the police. He further testified he had not driven the vehicle nor had any intention to do so.

In finding the accused guilty, the trial judge held that the accused was in care and control regardless of his intentions. The vehicle was running, capable of being driven, and the accused was awake in the driver's seat. Care and control can include circumstances where an accused could perform acts involving the vehicle, its fittings, or equipment, which may unintentionally set it in motion. Horrocks J. stated, "a person familiar with the vehicle may well perform the minor actions required to set the car in motion reflexively or accidentally". In this case, the evidence of him being behind the wheel and throwing the beer can out the window clearly indicated he had taken control. The accused was "awake and had both the capability and opportunity to move the vehicle". Regardless of the presumption found in s.258 of the *Criminal Code*, *de facto* (actual) care and control had been proven.

Complete case available at www.albertacourts.ab.ca

AUTHORIZED POLICE REVIEW OF 3RD PARTY RECORD DOES NOT REDUCE PRIVACY EXPECTATION

R. v W.G.G.,
(2002) Docket:C35398 (OntCA)

The accused appealed his conviction on two counts of indecent assault against his two step-daughters arguing, among other grounds, that the trial judge erred when he dismissed the accused's application to review the records of one of the complainants held by a third party, the Children's Aid Society. In part, the accused argued that the complainant's expectation of privacy in the record's had been reduced because she signed an authorization allowing the police to review them. The Ontario Court of Appeal held "the fact that the police reviewed the records with the complainant's authorization had no bearing on her expectation of privacy as it related to the [accused]". Both the accused's conviction and sentence appeal were dismissed.

Complete case available at www.ontariocourts.on.ca

OBLITERATED DATE & TIME ON FAX WARRANT UNREASONABLE

R. v. Steeves, 2002 BCSC 551

The accused, who was charged with possession of marihuana for the purpose of trafficking after police executed a search warrant on his residence, sought to have the evidence excluded on the basis the warrant was defective and invalid. After obtaining the necessary reasonable grounds justifying a search, the police prepared an information to obtain a search warrant by telecommunication pursuant to s. 487.1 of the *Criminal Code*, consisting of a printed form and an appendix setting out the grounds, because there was no Justice of the Peace personally available. The documents were faxed to the judicial centre in Vancouver and a warrant to search was subsequently provided by fax. Police attended the accused's residence and as a result of the search located 30-40 marihuana plants and a quantity of marihuana drying on a patio screen door. A copy of the search warrant was left on the kitchen table of the residence.

The accused argued, among other grounds, that the month, date, and time, located near the Justice of the Peace's signature on the fax copy of the warrant was obliterated by a black marking and was not readable. The warrant forwarded by the Justice of the Peace to the court registry had the same black marking, but the month, date, and time were not obliterated. The officer testified that he noted the blacked out space on the warrant at the time but was more concerned about the time of and place he was permitted to search.

Section 487.1(8) of the *Criminal Code* requires that the police cause a "true copy" of the warrant be left at the premises searched. Since the month, date, and time were not readable and therefore not contained in the copy left at the accused's residence, the warrant was not a facsimile (or exact copy) and the mandatory requirements of the *Code* were not met. As such, British Columbia Supreme Court Justice Chamberlist found a breach of the accused's s.8 *Charter* right to be secure against unreasonable search or seizure. However, in addressing the s.24(2) analysis the Court admitted the evidence of the marihuana. The violation was not serious, the officer did not act in bad faith, and the administration of justice would not be brought into disrepute.

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

THREATS MUST BE MADE WITH INTENT TO BE TAKEN SERIOUSLY

R. v. Hiscox, 2002 BCCA 312

The accused was arrested and taken to a hospital by the police under s.28 of the *Mental Health Act* for a psychiatric assessment after he had called a crisis hotline suggesting he had a gun and was going to shoot himself. During the assessment, the accused was asked by the attending physician to express his thoughts. The accused said he was very angry with his former girlfriend for breaking up with him and at her friends for encouraging the breakup. He said he recently bought a gun and he was intending on getting revenge on his former girlfriend and her friends. Furthermore, he stated he was considering slashing his former girlfriend's throat or forcing her off the road. The physician took the remarks very seriously and felt "somewhat afraid". Since the physician could find no basis for detaining the accused under the *Mental Health Act*, he called the police with his concerns. The accused was charged with uttering threats under s.264.1(1)(a) of the *Criminal Code* and was convicted at trial. The accused appealed to the British Columbia Court of Appeal arguing that the trial judge misdirected himself to the *mens rea* element of the offence.

The *actus reus* of s.264.1 is the uttering of threats of death or serious bodily harm while *the mens rea* component is that they were meant to intimidate or to be taken seriously; it is not necessary to prove the intent to carry out the threat. The trial judge found the words spoken amounted to a threat and that the accused intended on carrying it out. In this case, the appeal Court agreed that the accused uttered words that constituted words of threats. However, it was unclear from the evidence of the physician whether the words were spoken with the intent to be taken seriously or simply as an expression of thoughts without any intent that they be taken as a threat. Since the judge misapplied the law in framing the question as whether the accused intended on carrying

out the threat instead of whether the words spoken were intended to be taken seriously or to intimidate, the conviction was set aside and a new trial was ordered.

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

NO NEED TO CHARTER DRIVER DURING TRAFFIC INVESTIGATION

R. v. Stellitano, 2002 SKQB 199

Police observed the accused lose control of his vehicle as he fishtailed around a curve. After regaining control and proceeding through the intersection where the officers were stopped, he was pulled over by the police. The accused told the officer that he had just had a fight with his girlfriend and was angry. Unsatisfied with the explanation, the officer advised him he was being taken to the police car while they investigated him for speeding and possible dangerous driving. The accused was placed in the rear of the police car and was questioned about the consumption of alcohol before any *Charter* rights were provided. The accused acknowledged he had been previously drinking which caused the officer to form a reasonable suspicion the accused had alcohol in his body and he demanded a roadside screening test. The accused failed and a demand for breath samples was made. It was at this time the accused was informed of his right to counsel. The accused was convicted of driving over 80mg%.

The accused appealed his conviction to the Saskatchewan Court of Queen's Bench arguing that he was entitled to be informed of his right to counsel at the moment the officer advised him he was being investigated for a possible dangerous driving charge and failure to do so was a breach of his s.10(b) *Charter* right to be informed without delay. Since the question which formed the basis for the officer's suspicion that the accused had alcohol in his body preceded any warning, its admission into the trial would be unfair. The Crown contended that the detention was lawful under *Saskatchewan's Highway Traffic Act* (s.40(8)) and no warning or right to counsel is required before questioning about alcohol consumption. Crown suggested that no obligation arises to advise of the right to counsel when demanding a roadside screening test at the reasonable suspicion stage. The right to counsel only arises when a decision is made to demand breathalyzer samples.

Krueger J. found the questioning of the driver about alcohol consumption, for the purpose of achieving safety on the highways, without informing him of his right to counsel was a reasonable limit under s.1 of the *Charter*. At para 11, the Court stated:

> The officer had not embarked upon a new or different investigation that required him to inform the appellant of his Charter right to counsel. If the questions asked had led the officer to believe on reasonable grounds that a dangerous driving offence had been committed, he would have been obliged to then comply with ss. 10(a) and (b) of the Charter. That did not occur. Instead the officer obtained reasonable grounds to believe that a drinking and driving offence had been committed. Once he had reasonable grounds for that belief, he was entitled to make a demand for samples of breath to be analysed on an approved machine and was obliged to advise the appellant of his Charter right to counsel. I see no distinction between a dangerous driving investigation and an impaired driving investigation. Nor does an investigation of one offence prevent gathering evidence on the other. Rights to counsel arise when a decision is made to pursue a charge.

The appeal was dismissed and the conviction upheld.

Complete case available at www.lawsociety.sk.ca

MISTAKE OF LAW NO DEFENCE TO POLICE ENTRY

Hudson v. Brantford Police Services Board, (2001) Docket:C34963 (OntCA)

Two police officers attended the apartment of the plaintiff and his mother to arrest him for a hit and run involving a parked vehicle that occurred a short time earlier. The plaintiff's mother answered the door in response to the officer's knocking and the officers entered, without consent, and went to the plaintiff's bedroom where he was awaken. There was no arrest warrant or authorization to enter, no hot pursuit, or no exigent circumstances under s.529.3 of the *Criminal Code* permitting warrantless entry. A scuffle ensued and the plaintiff was subsequently handcuffed and removed from the bedroom. While being escorted from the apartment, the plaintiff spat at one of the arresting

officers and, at the police station, spat at a Staff Sergeant. He was charged with hit and run, resisting arrest x 2, and assaulting a police officer in the execution of their duty (spitting) x 2. He subsequently plead guilty to the two assault charges and the other charges were withdrawn. The plaintiff brought an action against the Police Services Board suing for unlawful arrest and detention.

At trial, the Court found the entry into the apartment to be unlawful. Although the officers had sufficient reasonable grounds to make the arrest, they did not comply with the requirements of s.495(2) of the *Criminal Code*. Further, even though the officers were in the lawful execution of their duty at the time they were spit upon while transporting the plaintiff to the police station, his guilty plea did not bar the civil action for the unlawful warrantless entry and arrest, which was a separate event. However, the trial judge found the common law and s.25 of the *Criminal Code* protected the officers, who she described as acting in good faith, and dismissed the claim.

The plaintiff appealed to a Divisional Court which allowed the appeal and remitted the matter back to the trial judge to determine damages. The Divisional Court judge found that the trial judge had erred in her finding of good faith because at least one of the officers had training on the warrantless entry amendments to the *Code* before the arrest. It did not matter whether the officers had sufficient reasonable grounds to justify the arrest; it was the unauthorized entry that made the arrest unlawful.

The Police Services Board then appealed to the Ontario Court of Appeal arguing that the Divisional Court judge erred in setting aside the trial judge's finding that the officers acted reasonably and in good faith. The Board argued that the police were justified under s.25 of the *Criminal Code*, or alternatively, under the common law for their actions. In *R. v. Feeney* (1997) 115 C.C.C. (3d) 129, the Supreme Court of Canada held that prior authorization to enter is generally required to make an arrest in a dwelling house absent exceptional circumstances such as hot pursuit. In response, parliament enacted provisions in the *Criminal Code* that allow the police to obtain an entry warrant or authorization to enter. Since the police did not have consent, authorization to enter, or exigent circumstances, they committed a trespass when they entered the apartment which rendered the arrest unlawful.

Application of s.25(1) *Criminal Code*

Section 25(1) of the *Criminal Code* states:

> Every one who is required or authorized by law to do anything in the administration or enforcement of the law…(b) as a peace officer…is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Rosenberg J.A., for the unanimous Ontario Court of Appeal, summarized the application of this section as follows:

> [Section 25(1)] provides that a peace officer who is authorized by law to do something in the enforcement of the law is justified in doing what he or she is authorized to do if the officer "acts on reasonable grounds". In effect, s.25(1) protects the officer from civil liability for reasonable mistakes of fact and justifies the use of force. It does not protect against reasonable mistakes of law, such as mistake as to the authority to commit a trespass to effect an arrest. (emphasis added)

If the officers had reasonably believed they had consent to enter the apartment even if in fact they did not, s.25(1) would have provided a defence. However, they did not have permission and no lawful right to enter to make the arrest. Even though they had ample reasonable grounds to justify the arrest and were acting in good faith, they did not have authorization to commit a trespass. Section 25(1) is not so broad as to protect a police officer who generally acts reasonably and in good faith. A defence found in this section "must be related to the specific conduct involved and the legality of the action the officer claims is "authorized by law" within the meaning of s.25(1)".

Application of s.25(2) *Criminal Code*

Section 25(2) of the *Criminal Code* states:

> Where a person is required or authorized by law to execute a process or carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

This section absolves a police officer from civil liability if they act in good faith and reasonably believe that their actions are justified by law in executing a process which is later found to be defective. In this case, the law concerning the warrantless arrest of persons had been outlined by the Supreme Court of Canada and new

Criminal Code provisions had been enacted. If the officers were mistakenly acting on the basis of pre-*Feeney* law, s.25(2) offered no defence. It would not have been a defect in the law, but a mistake of law, that formed the basis for the officer's actions.

Application of the Common Law

The Board further argued that the police were authorized under common law to enter the apartment because they satisfied the *Waterfield* test (common law ancillary power doctrine) by acting in the course of their duty when they entered the apartment and their conduct did not involve an unjustifiable use of police powers in the circumstances. The Court ruled that the police were not entitled to claim any common law power based upon *Waterfield* by ignoring the dictates of the Supreme Court of Canada, which had defined the rules of entry, simply because the police "are generally acting in the course of their duties to keep the peace and apprehend perpetrators".

The actions of the police were not protected under s.25 of the *Code* nor at common law and the appeal by the Police Services Board was dismissed.

Complete case available at www.ontariocourts.on.ca

OFFICER's DUTY TO INFORM, NOT PROVIDE ADVICE

R. v. Jutras,
(2001) 160 C.C.C. (3d) 113 (SaskCA)

A police officer stopped the accused after he had driven into a ditch and back onto the road. After forming an opinion, the officer demanded the accused provide samples of his breath. This was followed by the officer informing the accused of his right to retain and instruct counsel and that he could call a lawyer from the police station. The accused, who was calm and cooperative, acknowledged understanding and quietly accompanied the officer. At the station, the accused declined the offer of the use of a telephone and was asked to take a seat while awaiting the arrival of the BTA operator. The accused became increasingly upset and uncooperative and was acting strangely. As the first test was about to be administered, the accused asked the BTA operator, "What can a lawyer do for me? What can a family member do for me?". The operator referred him to the investigating officer who subsequently permitted the accused to contact his father. After speaking to his father to seek his advice about whether he should call a lawyer, the accused submitted to the breath tests as his father suggested and blew 150mg% and 140mg%.

At trial, the Court found the police had violated the accused's right to counsel because he suffered from Attention Deficit Hyper Activity Disorder and the officer "failed to inform the accused at a time when he was capable of understanding and appreciating his right to counsel and what he should do as a result of that right". Nevertheless, the trial judge admitted the results of the tests under s.24(2) of the *Charter* and convicted the accused. The accused appealed to the Saskatchewan Court of Queen's Bench where Dovell J. agreed that the accused's rights had been violated, but ordered a new trial because the trial judge failed to properly apply the provisions of s.24(2) in admitting the evidence. On further appeal by Crown, the Saskatchewan Court of Appeal stated, at para. 20:

> [The officer] properly informed [the accused] of his right to counsel immediately upon demanding samples of his breath and then effectively afforded him an opportunity to exercise that right once at the police station. He did this at a time when [the accused] was capable of understanding – and indeed understood – that it was open to him to take the advice of a lawyer before complying with the demand. As a result, [the accused] was aware of his predicament, appreciated his constitutional right to consult counsel, and knew the means were at hand by which he could exercise that right. Indeed, he expressly declined the opportunity to call a lawyer, this at a time when there was no suggestion whatever that he did not fully appreciate the situation.

Moreover, the officer's duty was to inform the accused of his rights, not to provide advice of what he should or should not do. When the accused became agitated and confused, his confusion was confined to what he should do (call a lawyer or not) and not what he could do (call a lawyer if he wanted). Having found no breach of the accused's s.10 *Charter* rights, the unanimous Appeal Court restored the conviction.

Complete case available at www.lawsociety.sk.ca

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