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.

ABBOTSFORD POLICE 12th ANNUAL 10K CHALLENGE/5K FUN RUN

SEPTEMBER 28, 2002

THE CHALLENGE ABBOTSFORD POLICE

Proceeds donated to BC Special Olympics.
$10,000 in prizes including:

- Annual Apollo Memberships
- 2 bikes from Wal-Mart
- Boston Pizza School Pizza Parties
- West Jet flight for two
- $1000 in prizes from A&B sound
- $500 in prizes from the Optimist Club
- Fraserway RV rental
- Ramada Inns accommodations
- Woodland's at Sunpeaks get-away
- Big Bar Guest Ranch get-aways

REGISTRATION

1. **Regular: to September 15**
2. **Late: September 16-September 26**
3. **Race Day: September 28, 7am-8am**

$$$ Register Early & Save $$$

INFORMATION

1. **LOG ON**: http://www.abbotsfordpolice.org and print out a registration form
2. **E-MAIL**: kjones@city.abbotsford.bc.ca
3. **TELEPHONE**: 604-859-5225 or 1-800-898 -6111 and ask for Cst. Jones

GROUP INCENTIVES

Log on: http://www.abbotsfordpolice.org to find out more about the group incentives available.

NEW OFFENCE FOR DISARMING A POLICE OFFICER

Effective July 23, 2002, a new *Criminal Code* provision was added creating a dual offence punishable by up to 5 years in prison for persons who attempt to disarm a peace officer. The new s.270.1 reads as follows:

s.270.1 *Criminal Code*
(1) Every one commits an offence who, without the consent of a peace officer, takes or attempts to take a weapon that is in the possession of the peace officer when the peace officer is engaged in the execution of his or her duty.
(2) For the purpose of subsection (1), "weapon" means any thing that is designed to be used to cause injury or death to, or to temporarily incapacitate, a person.
(3) Every one who commits an offence under subsection (1) is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than five years; or
(b an offence punishable on summary conviction and liable to imprisonment for a term of not more than eighteen months.

SASKATCHEWAN'S TOP COURT DIVIDED ON RANDOM DUAL PURPOSE TRAFFIC STOPS

R. v. Ladouceur, 2002 SKCA 73

A Saskatchewan detachment of the RCMP set up a vehicle check stop program at a weigh scale on the Trans Canada Highway code named "Operation Recovery". In addition to highway traffic safety, the police were also conducting these stops to interdict drugs, tobacco, firearms, alcohol, wildlife, and other provincial and criminal offences. Others present at the check stop included Customs and Immigration officials, Highway Transport Patrol, and Saskatchewan Finance Field enforcement officers. As the accused approached the check-point in a station wagon, an officer observed his unrestrained

passenger make some "strange movements" and lean forward with his hands down. A sergeant stopped the vehicle and the accused produced a valid Ontario driver's licence, a photocopy of the vehicle's registration, and a rental agreement for the vehicle designating the passenger as the only authorized driver. Both men were acting nervously and avoiding eye contact. The officer noted a strong smell of air freshener accompanied by a second strange, but unidentifiable odour. The accused was directed into the secondary staging area because he was not listed as the driver on the rental agreement and because the sergeant wanted to make further enquiries on both men and into the masking of the strange odour.

The officer sought further assistance from a constable because he wanted to question the men separately and compare their stories. After asking the accused to exit the vehicle and checking the brakes, the sergeant further questioned him while the constable requested identification from the passenger, who remained seated in the vehicle, because he was not wearing his seatbelt. The passenger acted nervously, avoided eye contact, and his hands were shaking as he passed his driver's licence to the officer. While speaking to the passenger, the constable detected an odour of fresh marihuana and observed an air freshener bottle and a small piece of marihuana plant like material on the console of the car. Also noted were a plant like flake, a package of rolling papers, and a pair of scissors lying on the floor. Police conducted CPIC enquiries of the men and learned that the passenger had a previous conviction for possession of marihuana. After conferring with one another, the officers determined there were reasonable grounds to arrest the men for possession of marihuana. As the constable returned the passenger's identification to him, he detected a strong smell of marihuana and observed a partially burned cigarette in the ashtray. The two were arrested for possession of a controlled substance and advised of their rights. Following the arrests, the police searched the car and found a hockey bag in the hatch area of the vehicle containing 4.55 kgs. of marihuana with an estimated street value of $30,000.

At trial, the charge of possession of a controlled substance for the purpose of trafficking was dismissed after the trial judge excluded the evidence. Since he could find no authority that would allow the police to randomly stop motorists beyond highway safety matters to check for drugs, tobacco, firearms, alcohol, or any other infractions under provincial legislation or the *Criminal Code*, he concluded that the police arbitrarily detained the accused in violation of s.9 of the *Charter*. The Crown appealed the dismissal of the charges to the Saskatchewan Court of Appeal arguing that the trial judge erred.

An Unlawful Stop?

In a 2:1 decision, Saskatchewan's highest court dismissed the Crown's appeal. Justice Jackson examined the law and concluded that the police do have the authority to randomly and arbitrarily stop vehicles at common law as part of an organized check-stop program designed to reduce impaired driving or where provincial legislation permits the random stopping of motorists, whether as part of an organized program or not. Such stops, although arbitrary, are saved by s.1 of the *Charter* as being a reasonable limit demonstrably justified in a free and democratic society to address the pressing and substantial concern of highway safety. He also held that an additional authority under the common law would allow the police, if they have an articulable cause to believe an offence has been committed, to stop the vehicle and make limited enquiries. On the other hand, if the sole purpose of the random traffic stop is checking for possible unknown, non-traffic related crimes, the police cannot rely on motor vehicle legislation. Furthermore, if the police combine the checking for illegal contraband with a random check-stop program for motor vehicle infractions, the arbitrary detention is no longer saved by s.1.

In this case, "Operation Recovery" had been designed for the express purpose of determining whether other crimes, in addition to motor vehicle offences, had been committed. By relying on the check-stop program for reasons of vehicle safety, the police were improperly attempting to acquire grounds for arrest. Justice Jackson concluded that "Operation Recovery was intended to be a comprehensive check for criminal activity that could be investigated by stopping all cars on the Transcanada highway" and "the law does not authorize the police to conduct a random check-stop operation which has one of its purposes an investigation or search for possible illegal contraband". Hence, the detention was arbitrary and the evidence was properly excluded. He further cautioned that ordinary Canadians should not be subjected to intrusive searches, as one might expect at border crossings, on domestic highways under the guise of vehicle safety. Justice Jackson found that the accused's right to be free from

arbitrary detention was breached and could not be cleansed by s.1.

Chief Justice Bayda concurred with Justice Jackson, and found that all check-stops result in an arbitrary detention. He agreed that if the aim is for highway traffic safety (sobriety, licences, ownership, insurance, and mechanical fitness of cars), the *Charter* breach is saved. In contrast, if the stop is for "the general detection of crime or the indiscriminate identification of criminals using the highway", the stop is unlawful. Chief Justice Bayda concluded that these two aims cannot operate together. In short, where one aim (traffic safety) of the random check-stop is lawful, a secondary unlawful purpose (general crime control) would render the entire stop unlawful.

A Lawful Stop?

Justice Tallis disagreed with the majority. He found that the police are entitled to randomly stop motor vehicles for the purpose of enforcing highway and safety related regulations, which includes the enforcement of numerous provincial statutes and *Criminal Code* provisions related to impaired driving. Although these broad purposes result in an arbitrary detention, the random stops are constitutional because they are saved by s.1 of the *Charter*. Justice Tallis reasoned that the purpose of this stop was properly grounded in the police powers of enforcing highway and safety related regulations and was not used "as a mere ruse to embark on an invalid search of the vehicle". Any other powers incidentally exercised to enforce other enactments were exercised in accordance with the law.

While in the course of their duties during this valid stop, the officers were entitled to use "their perceptory senses of sight and smell" to detect criminal wrongdoing. The "police are not expected to turn a blind eye to the commission of other offences" and would be derelict in their duties if they did. Here, the officers conducted themselves within the spirit and primary aim of a highway safety stop--it was not flawed, was lawful from the beginning, and was not used for any improper purpose. The officers' observations accumulated during the random stop provided reasonable grounds for a search. Further, the police had exigent circumstances to undertake the search under s.11 of the *Controlled Drugs and Substances Act* or s.487.11 of the *Criminal Code* because of the mobility of the vehicle. Justice Tallis would have allowed the appeal and directed a new trial with the evidence being admissible.

Complete case available at www.lawsociety.sk.ca

Editor's Note: There have been other provincial appellate decisions addressing similar issues. In *Brown v. Durham Regional Police Force* (1998) 131 C.C.C. (3d) 1 (Ont.C.A.), the police set up a check-stop on a road leading to a motorcycle club's property where the police learned they were planning on holding a weekend party. Anyone believed to be heading to or from the property, anyone driving a Harley Davidson motorcycle, and anyone wearing the insignia of a motorcycle club was stopped. Their driver's licences, ownership papers, and insurance documents were checked on CPIC. Furthermore, their vehicles and equipment were also inspected to ensure compliance with motor vehicle legislation. The stops were videotaped and used to gather police intelligence. The Ontario Court of Appeal, in a unanimous judgment, found that the stops were properly circumscribed within the ambit of highway traffic concerns. The fact that the police were also interested in knowing the identity of those connected to organized crime did not make the stop unlawful. Provided any co-existing police purpose was proper, such as maintaining the public peace, investigating other criminal activity, or intelligence gathering, the stops remained lawful. However, had the collateral purpose been improper or violated the constitutional rights of the detainee, such as stopping someone based on colour or gender, the entire stop would have been rendered unlawful.

In *R. v. Guenette* (1999) 136 C.C.C. (3d) 311 (Que.C.A.), a police officer used the powers under Quebec's *Highway Safety Code* to investigate his suspicions that the accused, who was seated behind the wheel of his parked car in front of a restaurant with his engine running and his lights off, might be about to commit a burglary. When asked to identify himself, the accused provided a false name and was subsequently acquitted at trial of obstructing a police officer in the lawful execution of his duty. The Crown appealed to the Quebec Court of Appeal which, in a 2:1 decision dismissed the appeal. Justices Fish and Nuss held that the officer used a statutory power to stop the vehicle for a reason entirely unrelated to highway traffic purposes. In other words, the officer used the *Highway Safety Code* as a pretext or subterfuge in an attempt to justify the stop. The stop of the accused

was arbitrary and the officer was therefore not in the lawful execution of his duty.

Justice Pigeon, in his minority opinion, held that the *Highway Safety Code* permits the police to randomly stop driver's to check for licences, ownership, insurance, and mechanical fitness. Moreover, the officer was entitled to carry out a "routine enquiry" under the motor vehicle legislation even though he had "vague suspicions that the driver was getting ready or had committed an offence under the *Criminal Code*". He described the officer as wearing two hats when he makes a stop—responsible for both enforcement of highway safety and the *Criminal Code*. In recognizing that the *Highway Safety Code* permits routine stops but the *Criminal Code* does not, as long as the officer limits his intervention with the driver to what is permitted under the *Highway Safety Code* he is entitled to act. The police cannot however, use the provincial traffic legislation to carry out a general investigation or to search a vehicle. Since the officer limited his inquiry to the objectives permitted by the motor vehicle statute, in Justice Pigeon's view he was acting lawfully and the accused should have been convicted.

In *R. v. Simpson* (1993) 79 C.C.C. (3d) 482 (Ont.C.A.), the police stopped the accused after the vehicle in which he was a passenger had driven away from a suspected crack house. The accused was asked to exit the vehicle and a baggie of cocaine was subsequently seized. He was convicted of possession of cocaine for the purpose of trafficking but appealed to the Ontario Court of Appeal. The officer who stopped the accused's vehicle did so for investigative reasons entirely unconnected with reasons related to enforcing driving related laws. Justice Doherty, for a unanimous Court, held that "once…road safety concerns are removed as a basis for the stop, then the powers associated with and predicated upon those particular concerns cannot be relied upon to legitimize the stop". If the stop is unrelated to highway safety, the police cannot use the *Highway Traffic Act* to detain a person for an investigation simply because they are the occupant of a motor vehicle.

Finally, in *R. v. Montour and Longboat* [1995] 2 S.C.R. 416, the Supreme Court of Canada restored a trial judge's decision to exclude evidence that was later overturned by the New Brunswick Court of Appeal. In that case, police officers stopped the accused who were the occupants of a van being driven on a highway. In the back of the van police observed tobacco products and the accused were arrested. A search warrant was subsequently issued, tobacco seized, and the accused charged with *Excise Act* offences. The trial judge concluded that the officer did not stop the van for any traffic reason but to look in the vehicle because he had a hunch there may be contraband tobacco. The trial judge found the stopping of the vehicle to be arbitrary and a breach of s.9 of the *Charter*, which could not be saved by s.1. As a consequence, the evidence was excluded and the accused were acquitted. On appeal to the New Brunswick Court of Appeal, Justices Turnbull and Hoyt held that the New Brunswick *Motor Vehicle Act* only permitted the police to arbitrarily detain motorists for licence and registration checks as well as mechanical fitness and safety inspections. There was no power under the legislation to stop motorists to check for contraband. Justice Angers on the other hand, was not persuaded that any of the accused's rights were violated.

Operational Impact:

The following key points can be relied upon to assist the police in their operational duties:

1. Where the police set up a check-stop program aimed at highway traffic safety such as impaired driving, the detention of a motorist is arbitrary but saved by s.1 of the *Charter*;

2. Where the police have the statutory authority to randomly stop motorists under their provincial motor vehicle legislation (eg. British Columbia and Ontario), the stop is arbitrary but also saved by s.1;

3. If the police do not put their mind to a highway traffic concern when randomly stopping motorists, but instead have an investigative purpose unrelated to traffic safety, the arbitrary detention is not saved by s.1;

4. Where the police have an articulable cause (a lesser but included standard of reasonable grounds) to stop a motorist, the detention is not arbitrary and consequently not a s.9 violation;

5. Where the police arbitrarily stop a vehicle for highway safety and continue to detain the occupants for reasons neither related to the original purpose nor based on an articulable cause

of other unlawful activity, the extension of the detention becomes an unsaved constitutional violation. In other words, once the highway traffic concerns are addressed, without further justification for detaining the person the arbitrary detention is no longer cleansed by s.1.

6. In Saskatchewan at least, a dual or multi purpose traffic stop that has as one of its purposes non traffic related crime control, is unconstitutional. However, in other provinces it appears as long as the officer puts their mind to highway traffic concerns and does not exceed the legitimate scope of the stop (such as searching for contraband or asking questions unrelated to driving offences) other legitimate police purposes beyond highway safety will not render the entire stop unlawful. Conversely, illicit police motives, such as targeting only persons of colour or only female drivers, will transform an otherwise lawful traffic stop into an improper detention regardless of legitimate highway safety concerns factoring into the decision. Finally, using highway safety as a pretext, when it was not considered at all by the officer, will poison the legitimacy of the stop and violate the s.9 rights of the motorist.

The impact of the Ladouceur judgment on the rest of Canada has yet to be determined. One can imagine that it will not be long before this issue goes before the Supreme Court of Canada for final resolution.

FINGERPRINTING AND PHOTOGRAPHING

Sgt. Mike Novakowski

Fingerprinting and photographing may serve a wide variety of purposes in the criminal justice system. Fingerprinting purposes include the following applications[1]:

- Linking the accused to the crime where latent prints are found at the scene or on other physical evidence;
- Determining if the accused has been charged with or convicted of other crimes in order to decide if
  - the accused should be released pending trial, or
  - the accused should be proceeded against by way of summary conviction or indictment;
- Determining if the accused is unlawfully at large;
- Determining if the accused has outstanding charges;
- Assisting in the apprehension of the accused if they should fail to appear;
- Identifying prisoners with suicidal tendencies, sex offenders, career criminals, and persons with a history of escape so they can be segregated or monitored as may be appropriate;
- Assist the crown in determining the punishment it should seek by revealing whether the accused is a first time offender or otherwise; or
- Provide advantages to an innocent accused
  - by establishing that another has in fact committed the crime, or
  - by ensuring the innocent will not be wrongly identified with someone else's criminal history.

Photography, like fingerprinting, serves a very useful purpose in identifying persons responsible for crime. Uses of a photograph include:

- A photographic line-up in which a witness is provided the opportunity of selecting and identifying a suspect;
- Refreshing a person's memory of the appearance of an accused person;
- For release to the public in an effort to
  - apprehend a wanted person
  - notify the public of a dangerous offender;
- Recording distinguishing features which would assist identification such as tattoos, marks, or scars; or
- Providing advantages to the innocent person by eliminating them as a suspect.

Identification of Criminals Act

The *Identification of Criminals Act* (ICA) is a federal statute providing police with the authority to photograph and fingerprint persons as long as the necessary requirements of the *Act* are satisfied. Following a constitutional challenge[2], mandatory fingerprinting under the *Act* of a person charged but not yet convicted has been held not to violate a person's rights under s.7, 8, 9, 10, or 11(d) of the *Charter*. Section 2(1) *ICA* authorizes fingerprinting and photographing of accused persons in narrowly

[1] See R. v. Beare and Higgins, (1988) 55 D.L.R. (4th) 481 (S.C.C.).

[2] See R. v. Beare and Higgins, (1988) 55 D.L.R. (4th) 481 (S.C.C.).

defined circumstances. If properly obtained, the police may then use the photograph taken, such as in a photo line-up, to assist in an investigation[3].

Section 2(1) *ICA* authorizes the non-consensual taking of fingerprints and photographs in the following circumstances:

- any person who is in lawful custody charged with an indictable offence[4],
- any person who is in lawful custody convicted of an indictable offence[5],
- any person who is in lawful custody charged with an offence under the *Official Secrets Act,*
- any person in lawful custody convicted of an offence under the *Official Secrets Act,*
- any person who has been apprehended under the *Extradition Act,* or
- any person alleged to have committed an indictable offence[6] who is required to appear for fingerprinting and photographing by
  - an appearance notice,
  - promise to appear,
  - recognizance, or
  - summons.

"**lawful custody**" means the person's loss of physical liberty must be legally authorized. This custodial detention may result from a valid arrest, or a continued detention under conviction (warrant of committal) or remand. If the custodial detention is not lawful it could not be said the person was in lawful custody.

"**charged**" has been interpreted by the courts to have different meanings. There is no doubt that a person is charged when an information is sworn against the person accusing them of committing a criminal offence[7]. Although this does appear to be the popular view, some courts have adopted a more broad meaning of "charge" for the purposes of the *ICA* to include the interaction between the arresting officer and the arrestee during the "usual and reasonable practices of peace officers when they arrest and book persons suspected of crimes[8]" prior to the swearing of an information. The former approach should be adopted as this appears to be the majority opinion. In circumstances where a person is arrested on an outstanding arrest warrant for an indictable offence and fingerprints and photographs are required, the person could be subject to the *ICA* processes because a criminal warrant issued by the court requires the laying of an information.

"indictable offence" means the nature of the offence committed must be indictable. For the purposes of the *ICA,* the term indictable offence includes dual offences which may be prosecuted summarily regardless of how Crown elects to proceed[9]. Crown election for hybrid offences has an impact procedurally on how the charges will proceed, but does not change the character of the offence from that of an indictable offence. Therefore, there is no authority under the *ICA* to fingerprint and photograph a person charged with a strictly summary conviction offence.

"**convicted of**" means the person must have been subject to a conviction in a court of competent jurisdiction for the offence. For example, this would authorize the fingerprinting and photographing of inmates who are in the lawful custody of a federal institution and serving their sentence of incarceration.

"**alleged to have committed**" means it is not necessary that the person be charged (information sworn) with the offence but only that it is alleged the person has committed the offence.

"**required [to appear]"** means the person was released by the police on an Appearance Notice, Promise to Appear or Recognizance, or by way of Summons issued by a court, and is required to appear at a later time and date fixed by the police or Court for the purposes of fingerprinting and photographing. Upon attendance by the person, the police would be afforded the authorities and protections of the *ICA*.

There is no statutory direction as to the amount of time (hiatus), which must be given to the person between the issuance of the release document and the date and time

[3] R. v. Tam (1995) 100 C.C.C. (3d) 196 (B.C.C.A.) at p. 209.
[4] Does not include offences designated a contravention under the Contraventions Act where the Attorney General has made an election to proceed by information as if a ticket were issued.
[5] See note 4.
[6] See note 4.
[7] R. v Lewis [1996} B.C.J. No.1254 (B.C.S.C.), R. v. G.M.R. [1994] N.S.J. No. 566 (N.S.C.A.), R. v. Berthiaume (1997) 45 C.R.R. (2d) 170 (B.C.S.C.) see also R. v. Connors (1998) 121 C.C.C. (3d) 358 (B.C.C.A.) per Newbury J.A. and Donald J.A.
[8] R. v. Gale (1997) Docket:84579-DC2 (B.C.S.C.), see also R. v. Connors (1998) 121 C.C.C. (3d) 358 (B.C.C.A.) per Cumming J.A.
[9] R. v. Connors (1998) 121 C.C.C. (3d) 358 (B.C.C.A.)

of appearance for the fingerprinting and photographing. Departmental policy regarding this "turn around" time should guide the officer in their decision. It has been suggested that the issuance of an Appearance Notice, Promise to Appear or Recognizance directing a person to attend the police department within five minutes of release to be fingerprinted and photographed may be exercised for the purpose of compelling attendance[10]. However, there is no offence of failing to appear for fingerprinting or photographing following release unless a justice has confirmed the method of release[11].

Use of Force

If the taking of fingerprints and photographs is authorized under the *ICA*, the police may demand and use necessary force[12] in obtaining the fingerprints and photographs from an uncooperative person[13]. If an individual detained in custody exhibits signs that the taking of fingerprints will require the application of physical force, it should be ensured that an information has been laid before a justice. A properly sworn information will address any argument that the person was not "charged" with an indictable offence prior to the fingerprints and photographs being taken. Since the courts appear to be adopting the approach that a person is only "charged" when an information is sworn, an information being laid prior to the application of physical force will remove any ambiguity.

Use of Fingerprints and Photographs

Subsection 2(3) of the *Act* allows the fingerprints and photographs to be published for law enforcement purposes. This could include the use of fingerprints for crime scene comparison or photographs released to the public for information on the whereabouts of wanted persons.

Protection from Liability

Section 3 *ICA* provides the police with protection from liability, both civil and criminal, for anything done in compliance with the *Act*.

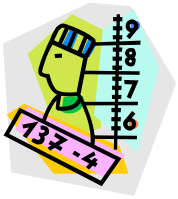
[10] See comments of Donald J.A. in R. v. Connors (1998) 121 C.C.C. (3d) 358 (B.C.C.A.)
[11] See s.145(5) of the Criminal Code
[12] See s.2(2) of the Identification of Criminals Act
[13] See R. v. G.M.R. [1994] N.S.J. No.566 (N.S.C.A.)

Types of Fingerprints/Photographs

Section 2(1) *ICA* provides that persons may be fingerprinted or photographed or subjected to such other measurements, processes, and operations having the object of identifying persons as are approved by the Governor in Council. The Governor in Council has only sanctioned fingerprinting, palmprinting, and photography under the *ICA Regulations*.

Unless the types of prints fall in the category of fingerprints or palmprints, the taking of other bodily prints would not be authorized under the *Act*. For example, the taking of footprints purportedly under the authority of the *Act* was found not to be authorized[14].

Photography is not limited to conventional methods, but includes the use of a video image capture system[15]. The *ICA* does not place a restriction "on the number or kind of photographs which may be taken[16]". Thus photographs are not restricted to the face of the person but may be legitimately taken of other bodily areas, such as tattoos, for the purpose of identification.



Young Offenders

The *ICA* applies to young persons as defined in the *Young Offenders Act* in the same manner as it applies to adults[17].

COMMON LAW

It appears the police may have the common law authority to fingerprint a person. The Supreme Court of Canada in *R. v. Beare* (1988) 55 D.L.R. (4th) 481 (S.C.C.), without definitely deciding the issue, found the common law experience strongly supports the view that custodial fingerprinting is justifiable at common law. LaForest J. for a unanimous court stated:

> It seems to me that a person who is arrested on reasonable and probable grounds that he has committed a serious crime, or a person against whom a case for issuing a summons or warrant, or confirming an appearance notice has been made out, must expect a significant loss of personal privacy. He must expect that incidental to his

[14] See R. v. Nielsen and Stolar (1984) 16 C.C.C. (3d) 39 (Man.C.A.) leave to appeal on Nielsen to S.C.C. refused, Stolar reversed on other grounds (1988) 40 C.C.C. (3d) 1 (S.C.C.)
[15] See Crawford v. William Head Penitentiary [1992] 56 F.T.R. 32 (T.D.).
[16] R. v. Myers [2000] O.J. No.1534 (Ont.S.C.J.)
[17] See s.44 of the Young Offenders Act

> being taken in custody he will be subjected to observation, to physical measurement and the like. Fingerprinting is of that nature.

In *R. v. Feeney* [1997] 2 S.C.R. 13 (S.C.C.) police had taken fingerprints from the accused following what the majority found was an unlawful arrest. As a consequence of the unlawful arrest, it could not be said the taking of the fingerprints were lawful. However, in citing *Beare*, Sopinka J. for the majority held:

> After he was taken to the…detachment, the appellant was fingerprinted. The fingerprints matched prints found on the deceased's refrigerator and on an empty beer can in the deceased's truck. R. v. Beare [1988] 2 S.C.R. 387, held that fingerprinting as an incident to a lawful arrest did not violate the Charter. In the present case, however, the arrest was unlawful and involved a variety of Charter breaches. Compelling the accused to provide fingerprints in the present context was, in my view, a violation of s. 8 of the Charter, involving as it did a search and seizure related to the appellant's body, about which, at least in the absence of a lawful arrest, there is clearly a high expectation of privacy. (emphasis added)

Again citing *Beare*, in *R. v. Dilling* (1993) 84 C.C.C. (3d) 325 (B.C.C.A.) leave to appeal to S.C.C. refused 88 C.C.C. (3d) vi (S.C.C.), Goldie J.A. for the court stated, "a person so arrested [where the detaining officer had doubts as to identification] could be fingerprinted, searched, photographed, items in his possession seized, and notes taken of marks and scars and all this without his consent[18]". In a more recent case, *R. v. Connors (1998) 121 C.C.C. (3d) 358 (B.C.C.A.)*, police arrested an impaired driver and subjected him to the fingerprinting process without first having an information sworn. This fingerprint was then linked to a fingerprint previously found at the scene of a robbery. The Court was divided on whether the common law authorized fingerprinting incidental to lawful arrest. Cumming J.A. found "the power to fingerprint incident to arrest for an indictable offence has its roots in and exists at common law"[19]. Donald J.A. found it "neither necessary nor appropriate to declare on the facts of [the] case a common law power to take fingerprints incidental to lawful arrest". Newbury J.A. found the *ICA* occupied the field[20] in so far as summary conviction offences are concerned and not as augmenting any powers which police officers had at common law. In *R. v. Myers* [2000] O.J. No.1534 (Ont.S.C.J.), the court held that the police had the common law right to photograph the accused incidental to arrest when the photographs were a necessary element in proving identity of the perpetrator of the crime. In this case, photographs were taken of the accused's face and injuries to his upper chest depicting the condition of his body.

PHOTOGRAPHS TAKEN FOR COURT IDENTIFICATION PURPOSES

Photographs such as Polaroid photographs taken of an arrested person for the purpose of preserving evidence of identification has been held, in prescribed circumstances, not to be a violation of the *Charter*. In *R. v. Dilling* (1993) 84 C.C.C. (3d) 325 (B.C.C.A.) leave to appeal to S.C.C. refused 88 C.C.C. (3d) vi (S.C.C.), police detained the driver of a vehicle for a prostitution (summary conviction) related offence following the driver's communication with an undercover police officer. One of the detaining police officers took an unposed Polaroid flash picture of the driver without informing the accused the photograph was about to be taken. The sole purpose of the photograph was to assist the undercover police officer with identifying the driver. The photograph was later shown to the undercover officer shortly after the communication with the suspect. The accused challenged the taking of the photograph as a violation of s.7 (right to privacy and right against self-incrimination), s.8[21] (search and seizure), and s.10[22] (right to counsel) of the *Charter*. In finding no constitutional violations, Goldie J.A. stated:

> The camera recorded what the eye of each police officer could see at the moment it was taken. For the purposes of later identification a still photograph records less than deliberate police scrutiny. Examples of what the camera could not record are demeanour and repetitious or involuntary body movement. A still photograph is no more permanent than a sketch or the officer's notes.

The court found the photograph "was a means of refreshing the recollection of the undercover officer that the person answering the charge in the court-room was the person who communicated with her".

A similar result was found in *R. v. Multani*, 2002 BCSC 68 where a police officer pulled over a van for failing to stop at a yellow light contrary to the *Motor Vehicle Act*

[18] At p.333.
[19] See also R. v. Feeney (1999) Docket CC980028 (B.C.S.C.) per Oppal J. at para. 60.
[20] A position adopted in R. v. Nicholson (1999) Docket X049016 (B.C.S.C.) in which a photograph that was taken of an arrested but not yet charged person and used in a photo lineup was ruled inadmissible.
[21] On this point the court found "in this circumstance, a photograph taken without consent of the person detained, if it is a seizure at all, is a reasonable seizure".
[22] The accused urged the court to find the right to consult counsel and to act upon that advice is rendered meaningless unless an accused is separately warned of the intention to take a photograph and is allowed to consult counsel before that occurs.

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

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

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

In *R. v. Giang* [1994] B.C.J. No. 3154 (B.C.S.C.), the police arrested seven persons involved in a home invasion style robbery. The accused were transported to the police department and placed in a holding cell. Each accused was individually removed from the holding cell, directed to stand against a measuring tape affixed to the wall, and their photograph was taken by use of a Polaroid camera. The accused's names and date of births were then recorded at the bottom of the photographs. One of the officers who took the photographs then made photocopies and distributed the copies to most of the other officers who had participated in the arrest[23]. During the interview of the complainants, the police used the photographs taken of the accused to explain the role of each accused. The accused challenged the admissibility of and any evidence derived from the use of the photographs. The Court found the photographs to be admissible for the following reasons:

- photographs can be used to refresh a witness's memory of a past recollection recorded provided the record was made and verified at the time the witness's memory was fresh;
- the photographs shown to the witness were not shown for the purpose of acquiring evidence of whether the accused was involved in the commission of the offence (ie. photo line-up), but for the purpose of explaining what role the accused played in the commission of the offence; and
- the photographs, like a notebook is used to record observations, are a method of recording the details of the appearance of the accused at the time of their arrests.

In summary, photographs taken by police following arrest only to assist in later identification is not a violation of any *Charter* rights of an accused[24].

It is important to note that neither the *Dilling, Giang* , or *Multani* decision dealt with the application of physical force on the person who was being photographed. Such procedures must be resorted to with caution. Photographs taken for the purpose of evidence at trial, for example showing the appearance of the accused at

[23] Some of the police officers were given colour photocopies to replace the earlier black and white photocopies that they had been given.
[24] See R. v. Fitzsimons [1998] B.C.J. No.3160 (B.C.S.C.).

the time of arrest[25] may also, depending on the circumstances in which they were taken be admissible.

CONSENT

A person may consent to the taking of their fingerprints and/or photographs that may assist the police and which may ultimately provide evidence against them at their trial. For example, it is not uncommon for police to voluntarily request fingerprints from the occupants of a home who have been the victim of a break and enter. When fingerprints are obtained from a crime scene, these unknown prints are compared with the known prints (occupants) as a process of elimination. The remaining unknown prints are then submitted for a computerized search. Likewise, a person of interest or a suspect may provide their fingerprints or photographs voluntarily to the police.

However, there are important rules to consider. For consent to be valid it must be "informed consent". The meaning of informed consent has a two-limb approach[26]. Firstly, the consent must be voluntary, which includes an awareness of the right to refuse. Consent elicited under threat or compulsion cannot be regarded as valid[27]. Secondly, the person consenting to the search must be aware of the consequences of consenting. The police must disclose their anticipated purpose(s)[28] for the use of the fingerprints or photographs at the time the consent was given. However, "if neither the police nor the consenting person limit the use which may be made of the evidence then, as a general rule, no limitation or restriction should be placed on the use of that evidence[29]".

PUBLIC PLACES

The police may make appropriate efforts to obtain photographs of a person without their consent in public places provided no physical compulsion is involved and the methods employed are non-intrusive and without trespass or other improper means[30].

[25] See footnote 24.
[26] See R. v. Head (1994) 52 B.C.A.C. 121 (B.C.C.A.) and R. v. Kennedy 2000 BCCA 362.
[27] See R. v. Nielsen and Stolar (1984) 16 C.C.C. (3d) 39 (Man.C.A.) per Huband J.A. leave to appeal on Nielsen to S.C.C. refused, Stolar reversed on other grounds (1988) 40 C.C.C. (3d) 1 (S.C.C.)
[28] See R. v. Arp [1998] 3 S.C.R. 339 (S.C.C.) at para. 88.
[29] See R. v. Arp [1998] 3 S.C.R. 339 (S.C.C.) at para. 87.
[30] See R. v. Shortreed (1990) 54 C.C.C. (3d) 292 (Ont.C.A.)

FINGERPRINT WARRANT

Section 487.091 of the *Criminal Code* provides statutory authority for the police to obtain bodily prints or impressions, including a fingerprint or handprint, from a person following the issuance of a warrant by a justice. This section requires the justice being satisfied by information on oath that:

- there are reasonable grounds to believe a federal (criminal offence) has been committed;
- there are reasonable grounds to believe information concerning the offence will be obtained by the print or impression; and
- that it is in the best interests of the administration of justice to issue the warrant.

CLASS 87 GRADUATES

The Police Academy is pleased to announce the successful graduation of recruit Class 87 as qualified municipal constables on July 26, 2002.

ABBOTSFORD
Cst. Doug Moore

DELTA
Cst. Clayton Ennis
Cst. Brian Hill
Cst. Paul Hykaway
Cst. Mark McKinnell
Cst. Allan West

NEW WESTMINSTER
Cst. Shawn Machesney
Cst. Mario Mastropieri
Cst. Roger Rempel

WEST VANCOUVER
Cst. Trevor Griffith
Cst. Erin Hogeweide
Cst. Grant Kinney
Cst. Brian Taguiam
Cst. Lisa Wanless

VANCOUVER
Cst. Joel Admana
Cst. Andrea Anderson Cst. Jitender Aujla
Cst. Michael Fealing
Cst. Stephen Fraser
Cst. Terri-Lynn George
Cst. Cameron Hemphill
Cst. Colin Imai
Cst. Richard Jarvis
Cst. Tanya Le Boutillier
Cst. John Pyper
Cst. Giusseppe Raffele
Cst. Holly Stefonovich
Cst. Amber Van Hove
Cst. Ryan Wray

VICTORIA
Cst. Allison Johnson

Congratulations to Cst. Doug Moore (Abbotsford), 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. Doug Moore (Abbotsford) also received the Abbotsford Police Association Oliver Thomson Trophy for outstanding physical fitness. Cst. Cameron Hemphill (Vancouver) received the Vancouver Police Union Excellence in Academics award for best academic test results in all disciplines. Cst. Roger Rempel (New Westminster) 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. Clayton Ennis (Delta) and Cst. Cameron Hemphill (Vancouver) were the recipients of the Abbotsford Police Recruit Marksmanship award for highest qualification score during Block 3 training (49/50). The Honourable Mr. Justice Wallace Oppal of the Supreme Court of British Columbia was the keynote speaker at the ceremony.

ONGOING PRIVACY INTEREST IN FINGERPRINTS

R. v. Dore,
(2002) Docket:C29634 (OntCA)

The accused was arrested and charged with two *Criminal Code* offences and the provincial offence of driving without insurance arising from an incident involving a stolen license validation sticker. As a consequence, the accused was fingerprinted and photographed pursuant to s.2(1) of the *Identification of Criminals Act* on the two *Criminal Code* offences. All three charges were subsequently withdrawn and the accused pled guilty to two provincial offences (driving without insurance and use of unauthorized validation sticker) on a new information. The fingerprints arising from the withdrawn charges were not destroyed and were retained in a police databank.

Several months later, a 17-year-old female victim reported she had been sexually assaulted in the stairwell of her apartment building. Police located three fingerprints on the railing where the victim said the assault occurred, which were matched to the accused's prints through AFIS (Automated Fingerprint Identification System). At trial, the accused was convicted of sexual assault with a weapon, assault with a weapon, forcible confinement, and uttering a death threat. The accused appealed his conviction to the Ontario Court of Appeal arguing, in part, that the retention of his fingerprints by the police following the withdrawal of the criminal charges violated his s.8 *Charter* right to be secure against unreasonable search and seizure and that the evidence of the fingerprint match was inadmissible under s.24(2).

Section 8 of the *Charter* protects a person's reasonable expectation of privacy and their right to be left alone by the state. In assessing whether the continued retention in the fingerprints following the withdrawing of charges was unconstitutional, two approaches were analyzed. First, if the prints were lawfully taken, did the person have a continuing privacy interest in the prints beyond the initial seizure? And second, did the retention of the prints become unconstitutional when the precondition for their taking (charge) was no longer present (as a result of an acquittal, withdrawal of charges, permanent stay of proceedings)?

The accused argued that he retained a privacy interest in the information contained in his fingerprints and, once the charge had been disposed of in his favour, he regained the same privacy interest as a person who had never been charged. On the other hand, the Crown submitted that once the prints had been lawfully taken, the accused no longer had a reasonable expectation of privacy or, at the most, a very minimal expectation. The Ontario Court of Appeal noted two aspects surrounding a "seizure" of fingerprints:

1. **physical**: "the actual physical act of taking the impression of the fingers, including the physical and psychological indignity involved in the process"; and

2. **informational**: "the acquisition by the state of the informational component of the fingerprint, its unique characteristics and identifying relationship to the particular individual".

When fingerprints are lawfully taken, retention and use of the informational component continues as long as the charge remains outstanding or a conviction has been registered. On the other hand, a person who was fingerprinted on arrest and had the charges disposed of in their favour will have the same expectation of privacy as a person who had never been charged. However, the ongoing retention of fingerprints does not automatically become unconstitutional when charges

are disposed of in the accused's favour. The person's right to be left alone by the state will only be triggered if and only when they ask for their prints to be returned or destroyed unless the police can demonstrate in special circumstances why further retention outweighs the persons privacy interest. Moreover, there is no constitutional duty on the police to advise the person that they may apply to have their prints destroyed, although it would be helpful and appropriate. The accused is in the best position to know of the outcome of the charges and can access this information through their counsel. Furthermore, a person who already has their fingerprints retained and stored as a result of other convictions or outstanding charges cannot claim a reasonable expectation of privacy since there would be "no constitutional significance" in their retention following a favourable disposition on another charge.

In this case, because the accused did not request the destruction of his fingerprints, their retention did not violate s.8 of the *Charter*. Thus, the evidence was admissible.

Complete case available at www.ontariocourts.on.ca

CONFRONTING SUSPECT WITH EVIDENCE: FUNCTIONAL EQUIVALENT OF AN INTERROGATION

R. v. McKenzie,
(2002) Docket: C33215 (OntCA)

Following the arrest of the accused for murder and the advising of his right to counsel, he told the investigating police detectives he wanted to contact a local criminal lawyer. He was transported to the police station and 20 minutes later he was taken to an interview room, equipped with video recording equipment, where he stated, "I want my lawyer". He was told to sit down and identify himself and explained the interview was being audio and video recorded and again was informed of his right to counsel. The accused again asked for his lawyer and was escorted to a phone where he left a message after being unsuccessful in speaking to him. He was taken back to the interview room, cautioned regarding statements, and he advised the police that he had nothing to say. When asked if he wanted to make a statement the accused informed the officers that he wanted to speak to his lawyer.

An undercover officer to whom the accused had earlier confessed was brought into the room and advised the accused he was a police officer, told him to take care of himself, and left. A detective then played a portion of the taped conversation between the accused and the undercover officer where he admitted killing the victim. After listening for 6 minutes, the accused got up and asked to be taken back to cells. He was told to sit down and while the detectives were completing their notes he stated he had "sunk himself" and "might as well start doing [his] 25 now". The accused was taken from the interview room and while in the elevator enroute to cells stated, "I'll be 59", which was taken to mean he would be 59 years old before being released from jail. Later in the cell area he said, "He got me drunk, he got me totalled" and "at least I can enjoy a good sleep now".

At trial, the accused unsuccessfully attempted to have the remarks at the end of the interview, in the elevator, and in the cell area excluded as a breach of his s.10(b) *Charter* rights. He argued that he had not been provided a reasonable opportunity to contact counsel when the police elicited these statements from him. The trial judge concluded that although an accused must have access to counsel "before he is questioned or otherwise required to provide evidence", in this case the accused was not being questioned. The police simply exposed their case to him and he chose to freely make the statements. The accused appealed to Ontario's top court.

Was the Statement Elicited?

The right to counsel places a duty on the police to cease questioning or otherwise attempting to elicit evidence from a detainee who asserts their right to counsel until they have been afforded a reasonable opportunity to consult with a lawyer. The right is more than simply being afforded an opportunity to place a telephone call but requires speaking with a lawyer or at minimum, being given a reasonable opportunity to do so. Although the accused was allowed to use a phone, he did not speak to a lawyer nor was he given a reasonable opportunity to do so before being confronted with the taped confession. Even though no direct questions were posed to him, the conduct of the police amounted to the "functional equivalent of an interrogation". Furthermore, since the accused did not speak to a lawyer and obtain advice about his rights and various

police conduct he should be cautious of, the police were able to manipulate him into a mental state in which he was more likely to talk. In summary, there was a causal link between the police conduct and the making of the statements such that they were "elicited" and since the accused was not provided a reasonable opportunity to consult counsel, his s.10(b) *Charter* right had been violated. Since the statements were conscriptive and their admission would render the trial unfair, they were excluded under s.24(2) of the *Charter*. Not satisfied that a jury would necessarily convict had the impugned statements been excluded despite there being a very strong case against the accused, the Ontario Court of Appeal quashed the conviction and ordered a new trial.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"For the police, justice and equality are ideally inseparable. Thus, they must act impartially in terms of the decision to make an arrest and in terms of the ensuing treatment given an individual during the arrest process. Beyond the legal and philosophical basis for equality is the professional ethic which calls for universality of treatment[31]". James W. Sterling

WEAPONS WARRANT SEARCH UNCONSTITUTIONAL

R. v. Hurrell,
(2002) Coket:C36968 (OntCA)

The police applied for and were granted a search warrant under s.117.04(1) of the *Criminal Code* which reads as follows

s.117.04(1) *Criminal Code*
Where, pursuant to an application made by a peace officer with respect to any person, a justice is satisfied that there are reasonable grounds to believe that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the justice may issue a warrant authorizing a peace officer to search for and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

This section is not an offence based provision involving the search for evidence to prove that an offence has been or is being committed, but a preventative search authority designed to prevent serious injury and death from the use of firearms and other dangerous objects. As a result, the police entered the accused's home and seized 12 firearms, 2 cross bows, 11 containers of ammunition, and his firearms acquisition certificate. Under s.111(1) of the *Code*, the police made an application for an order prohibiting the accused from possessing firearms and other specified items. The accused made an unsuccessful application to the Ontario Superior Court of Justice seeking a declaration that s.117.04(1) was unconstitutional and could not be saved by s.1 of the *Charter*. Further, the accused sought an order quashing the warrant and the return of all the seized items. The accused appealed to the Ontario Court of Appeal arguing, among other grounds, that the section does not require that the justice be satisfied there are reasonable grounds to believe the weapons will be found at the place to be searched.

Reasonable Grounds

Moldover J.A., for a unanimous Ontario Court of Appeal, found that s. 117.04(1) does not require that the police officer seeking the warrant have reasonable grounds to believe that weapons or other items sought are likely to be found on the person or premises to be searched. Although the officer requires reasonable grounds to believe it is "not desirable" (or "not advisable", which "envisages an identifiable threat of serious or significant harm likely to be caused by firearms or other dangerous objects to the safety of specified individuals"), in the interests of public safety for a person to possess the weapon, it does not require reasonable grounds to believe the person possesses such a weapon. This deficiency makes the section incurably overly broad and permits the police to undergo fishing expeditions by invading a person's privacy when they have no reason to believe or suspect that the person has weapons in their possession. To this end the provision is unconstitutional and cannot be saved by s.1 of the *Charter*.

In finding that s.117.04(1) was in need of a "constitutional overhaul", the Court of Appeal suspended its' declaration of invalidity for six months to give Parliament the opportunity to amend the legislation in compliance with the *Charter*. In the meanwhile, any warrants issued within the six-month exemption period should be in compliance with the Attorney General's draft legislation presented during argument, which read as follows:

[31] (1972) Change in Role Concepts of Police Officers; **Professional Standards Division of the International Association of Chiefs of Police**.

s.117.04(1) *Criminal Code*: Attorney General's Draft Legislation
Where, pursuant to an application made by a peace officer with respect to any person, a justice is satisfied by information on oath that there are reasonable grounds to believe that the person possesses a weapon, prohibited device, ammunition, prohibited ammunition or explosive device in a building, receptacle or place, and that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess the weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the justice may issue a warrant authorizing a peace officer to search the building, receptacle or place and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

The Court also quashed the warrant and ordered the return of the items seized from the accused's home. Once the items were returned, the Court suggested that the police may make a demand under s.117.03(1) of the *Code* requiring the accused produce the necessary documents for inspection and seize any items illegally possessed or seek a fresh warrant under the re-worded s.117.04(1).

Editor's Comments: The warrantless search provisions of s.117.04(2) of the *Code* are inextricably linked to s.117.04(1). For the police to search and seize without a warrant under s.117.04(2), the pre-conditions of s.117.04(1) must be satisfied and warrant impracticability (exigent circumstances) must exist. Thus, the proposed wording must also be read in conjunction with s.117.04(2) if an officer utilizes the warrantless search provision.

Complete case available at www.ontariocourts.on.ca

INVESTIGATIVE NECESSITY: LAST RESORT REQUIREMENT?

R. v. Holtam, 2002 BCCA 339

The police were called to a home after a neighbour, who had gone to check on the occupants, found the premises in darkness, the front door unlocked, and the resident mother and her young 6-year-old daughter seriously injured inside the house. The responding officers located the daughter in the living room area and the mother in a bed in a nearby room, both grievously wounded and later pronounced dead. During a further search of the home, an officer discovered an 8-year-old boy with serious head wounds in a semi-conscious condition in the stairwell going up to his bedroom. No signs of forced entry or burglary were detected and since the premise was in darkness, it could be inferred that the attacker was familiar with the layout of the home. The accused, who was the husband and father of the deceased, was not at home and the only member of the family not yet accounted for.

The police subsequently learned from a neighbour that the accused's vehicle had been parked at the house about 7 am, which was unusual because he usually left for work at an earlier time (6:30 am). An officer called the accused at his workplace and, pretending that he was investigating a driving complaint, was told by the accused that he left home at about 6:30 am. The police attended the accused's workplace, arrested him, and seized his clothing and letters found in his wallet from a woman indicating he was having an affair. The accused was released shortly thereafter, as the police did not think they had sufficient evidence to lay a charge.

Later, as a result of an undercover operation, the police surreptitiously audio and video recorded a conversation at a hotel room where the accused confessed to the murders. A DNA examination of the accused's clothing found blood traces from the children on his shirt and shoe seized at the time of his arrest. Blood splatter patterns on the accused's shirt were also consistent with the downward swinging of a weapon. The accused was convicted by a jury of two first degree murder counts and one count of attempted murder. The accused appealed to the British Columbia Court of Appeal arguing, in part, that the trial judge erred in admitting the items seized from the accused at the time of his initial arrest as well as the taped conversation.

Reasonable Grounds and the Seizure

The accused submitted that the police did not have reasonable grounds to arrest him, thus the seizure of the clothing and letters were not proper as an incident to arrest. During the trial, the court concluded the officer had reasonable grounds, subjectively held and objectively supportable, to make the arrest. Although the statement made to the officer over the telephone about the time he left the residence (which provided a time discrepancy as to the accused's departure) was ruled inadmissible, the circumstances surrounding the discovery of a "fresh" scene where a brutal and serious crime took place at a residence where the police knew the accused lived and from which the accused was absent were sufficient to meet the reasonable belief standard. The proper test for reasonable grounds is

whether "a reasonable person placed in the position of the officer [is] able to conclude that there were indeed reasonable…grounds for the arrest". Hall J.A., for the unanimous appeal court, found the trial judge applied the proper test. Since the arrest was lawful, "the police were entitled to seize the items they did from the [accused] at the time of his arrest including the clothing, which later furnished DNA evidence and the letters…, which were relied upon by the Crown as disclosing a motive for the crimes". As the police were "acting legitimately in seeking to discover possible evidence linking the [accused] to the crimes", they were properly searching within the scope permissible as an incident to lawful arrest.

The Taped Conversation

The accused challenged the admissibility of the intercepted conversation between him and the undercover officer, surreptitiously recorded at the hotel room under judicial authorization, by contending that the requirement of investigative necessity was not properly demonstrated as required by s.186(1)(b) of the *Criminal Code*. Although the trial judge had concerns about the lack of progress in the investigation, such as the delay in submitting the exhibits for DNA testing, he nonetheless concluded that the police "do not have to exhaust all other forms of investigations before embarking upon an application" and ruled the conversation admissible. In upholding the trial judge's decision, Hall J.A. found that "investigative necessity" test is not investigative "last resort", but rather a "no other reasonable alternative method of investigation"[32] enquiry.

In this case, at the time of the intercept application neither the accused nor his mistress were going to cooperate with the police and even if they had the DNA evidence on the accused's clothes prior to the intercept, there may be other reasons why it would be there since the crime occurred in a family setting. Moreover, the police were concurrently relying on warrants issued under ss.487.01 (general warrant) and 184.2 (one party consent) of the *Code*, which also provided a proper basis for the admission of the evidence. The accused's appeal was dismissed and the conviction upheld.

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

[32] The Court adopted the test from R. v. Araujo, (1998) 127 S.C.C. (3d) 315 (S.C.C.)

WARRANTLESS ENTRY TO PROTECT LIFE REASONABLE

R. v. Jamieson, 2002 BCCA 411

A municipal police agency responded to a 911 call of a man running from a house suffering from grievous acid burns to his face and body. The police, who were familiar with the victim, had information that suggested there may be dangerous chemicals from a clandestine drug lab inside the house. He had ordered and picked up chemicals consistent with the manufacture of amphetamines in the months prior and had been twice found in possession of items the police suspected were related to the manufacture of drugs. The police also had information that the victim had acid thrown at him while inside the house. Further, the police received information that a distraught young woman also came from the home and was repeatedly asking if the police found "Jessica". The police placed a call to the residence but there was no answer from inside, no movement was heard or seen, and no one answered the door after repeated knocking.

The municipal police contacted the RCMP, whom they relied upon for expertise in situations involving the investigation and dismantling of clandestine drug labs. Three officers entered the home without a warrant 2 ½ hours after the 911 call to look for suspects and/or victims, injured or dead. They were only in the premises for 10 to 15 minutes, opening doors and windows but had an opportunity to observe equipment used in the manufacture of drugs. Because the officers had not checked whether the heating and cooling apparatuses were operational, an officer re-entered to ensure the lab was not cooking. The following day, the police obtained a search warrant in connection with the aggravated assault and production of a controlled substance.

The trial judge concluded that the police had reasonable grounds to believe that other persons might be in the residence and had a duty to ensure the persons inside and in the vicinity of the house were safe by entering it. He found that the officers' primary motive for entering was to protect public safety, not to investigate. The police were justified in entering the residence because there "were exigent circumstances" and "the police had an obligation to act decisively and out of a concern for the safety of individuals who

might be in the home and for the safety of individuals in the immediate vicinity". The accused appealed to the British Columbia Court of Appeal.

Warrantless Entry

Although the accused agreed that the police entered in the performance of their duties, he argued that the police entered primarily to investigate drug offences, and not for the purpose of protecting the public. He suggested that the time between the 911 call and police entry (2 ½ hours), the failure of the police to use the fire department for entry, and an officer's admission that he did not have reasonable grounds prior to the entry to obtain a warrant was demonstrative of the investigative nature of the motive. Furthermore, the information the police relied upon to obtain the warrant was acquired during the warrantless and unreasonable entry and thus the warrant should be ruled invalid.

In unanimously dismissing the appeal, Saunders J.A. for the British Columbia Court of Appeal concluded that the warrantless search of the home was prima facie unreasonable and the Crown bears the burden of rebutting the presumption. If the search was conducted for the purpose of investigating crime, the criteria necessary for a search warrant must be satisfied. In this case however, the police were acting in the performance of their duty to protect public safety and the admissibility of the evidence hinged on a two-stage inquiry:

1. Did the police conduct fall within the general scope of any duty imposed by statute or recognized at common law? The *RCMP Act*, which was binding on the responding RCMP officers, and the *Police Act*, which was binding on the municipal officers, both imposed a statutory duty on the police to protect life. Further, under the common law the police have a general duty to protect life, which is not limited to protecting the lives of victims of crime.
2. If the answer to question 1 is yes, did the police conduct involve an unjustifiable use of powers associated with the duty? In finding that the police were justified in entering without a warrant, Saunders J.A. stated:

> The level of danger suspected was high and was associated to the various rooms of the residence so that examination of one room only was not a viable response to the concern. There was no practical way to determine whether a lab was cooking or others were in the house injured other than by entering. It was known that one person in the house had already suffered grievous injuries to his face and head through contact with a highly caustic substance. The duty pursued was the protection of others. The purpose of the first entry was to look for "bodies" and was of limited duration.
>
> Notwithstanding the [accused's] privacy interest in the residence, …the law permitted the police to enter the home, provided the entry was no more extensive than required to ensure safety. In this case the entry was of limited duration, considering the deliberation required to avoid chemical accident. I conclude that there was strong and persuasive evidence…the entry…was legally justified in the circumstances, and thus not an unreasonable search within the meaning of s.8 of the *Charter*.

Not Using the Fire Department

The Court found the RCMP personnel were specially trained to deal with clandestine labs and associated dangerous materials and persons entering the premises were required to have such training.

The Delay

Although an excessive delay could support the view that entry was made for an investigative purpose, the delay was reasonably explained by the time required for the specially trained officers to be contacted at their home, travel to their work place to obtain the necessary protective equipment, travel to the accused's home, and gear up. This was all done to enter a suspected chemical laboratory where one person had already been seriously injured by a caustic substance.

Absence of a Warrant

Even though the police may have had time to obtain a telewarrant, it is an investigative tool directed towards the crime prevention aspect of police duties and requires reasonable grounds. However, the duty of the police to protect life and property does not depend upon establishing reasonable grounds to obtain a search warrant. The accused's appeal was dismissed.

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

Note-able Quote

"*…I have seen competent leaders who stood in front of a platoon and all they saw was the platoon. But great leaders stand in front of a platoon and see 44 individuals, each of whom has aspirations, each of whom wants to live, each of whom wants to do good*". *General H. Norman Schwarzkopf*

POLICE PROACTIVENESS & DETAINEE DILIGENCE

R. v. Anane,
(2002) Court File No. 183/01 (OntSCJ)

The accused failed a roadside screening test after a police officer found him trying to change the flat tire of his vehicle. The accused admitted being the driver, was having difficulty changing the tire, and the officer detected a strong smell of liquor on his breath. The officer then read the accused his right to counsel. The accused acknowledged he understood but did not respond as to whether he wished to call a lawyer. The accused was then transported to the police detachment where he was asked to read a notice of the right to counsel posted on the wall of the cell area. He again acknowledged that he understood his rights but when asked if he wished to contact counsel, he responded "I don't know the number to my lawyer". When offered legal aid duty counsel, the accused stated he did not wish to speak to duty counsel "right now". The accused was told he would be released that day if there was "nothing else". Prior to the breath samples, the intoxilyzer technician also advised the accused of his right to counsel and asked him if he wished to contact a lawyer. The accused replied "no" and when asked if he was sure replied, "Yes, I don't want a lawyer". The accused subsequently provided two breath samples of 144mg% and 143mg% respectively.

The accused argued that his right to counsel under s.10(b) of the *Charter* had been violated. He testified that when he stated he did not know his lawyer's number he did want to speak to him. However, he did not name his lawyer or ask for a telephone book because the officer didn't give him the opportunity when he immediately offered duty counsel. Furthermore, when the technician offered him the chance to speak with a lawyer he thought, as a result of his contact with the investigating officer, that he did not have the option because nothing had been done for him to get in contact with his lawyer when he said he did not know his lawyer's number.

In convicting the accused of care and control over 80mg%, the trial judge found that the accused's s.10(b) right had not been violated and that the accused's primary concern was being released. Once he knew he was likely to be released, the trial judge found the accused lost interest in contacting a lawyer. Although the police could have done more to help the accused, he himself should have been "a bit more proactive". The accused appealed to the Ontario Superior Court of Justice. Dambrot J. agreed with the trial judge that the police should have asked the accused if he wanted to use a telephone book or other assistance before immediately offering duty counsel:

> It is beyond dispute that a police officer who arrests an accused must comply with both the informational and the implementational components of the right to counsel guaranteed by s. 10(b) of the Charter. When an accused requests the assistance of counsel, it is incumbent on the police officer, as part of the obligation to comply with the implementational component of s. 10(b), to facilitate contact with counsel…Where a request is made to contact counsel, the police are obliged to provide the means for doing so. They must provide access to a telephone, in conditions of privacy, and a telephone book, or other similar assistance, where necessary…(references omitted)

If the accused had provided breath samples at this point, his s.10(b) right would have been violated. However, the officer held off questioning or taking samples (not out of respect for the accused's rights -- but done nonetheless) and presented the accused to the intoxilyzer technician who again advised him of his right to counsel. The accused did not want to speak to a lawyer and did not ask for assistance in obtaining the number. The technician cured the investigating officer's error and the accused was not diligent in exercising his rights, which suspended the police obligation to hold off and facilitate counsel. In this case, "police proactiveness and detainee diligence" weighed out equally and there was no violation of the accused's s.10(b) *Charter* right. The appeal was dismissed.

LEGAL LAUGHS

The day after his client was found guilty, lawyer Thompson rushed into court jubilantly waving a thick sheaf of papers. "Your Honour, Your Honour," he cried. "I've just uncovered new evidence that requires reopening my client's case." The judge stared at the lawyer. "New evidence?" the judge inquired. "What sort of evidence?" "My client has an extra $10,000, and I only found out about it today!"[33]

[33] Source: Behrman, Sid. (1991). The Lawyer Joke Book. Dorset Press: New York, NY.

ROADSIDE TEST USED TO CONFIRM, RATHER THAN FORM, OFFICER's BELIEF

R. v. Bennett, 2002 ABQB 625

A police officer stopped the accused after he was observed drive into a parking lot at an excessive speed, make a sudden, wide irregular u-turn, and park in front of a grocery store. Upon exiting his vehicle, the accused immediately relinquished his car keys to the officer. After surrendering his driver's licence, credit card, and Costco card to the officer, the accused was convinced he had misplaced his licence. The officer noted an odour of liquor on the accused's breath, slurred speech, and bloodshot eyes. After reading the roadside screening demand, the accused provided a sample of his breath and failed. This confirmed the officer's opinion that the accused was impaired and also indicated that the accused's BAC was at least 100mg%. A subsequent intoxilyzer test resulted in two samples being taken which exceeded the legal limit.

At trial, the accused was acquitted of both impaired driving and over 80mg%. Although he did not make any notes, the officer testified his standard procedure was to allow a 20 minute time lapse if he had reason to believe that a driver had recently consumed alcohol. He testified that by administering the test he therefore had no reason to be concerned. The accused testified that he had been drinking two minutes before his encounter with the police, which resulted in an unreliable roadside fail reading. Thus, the officer lacked reasonable and probable grounds to give the breath demand. As a consequence, the breath demand violated the accused's rights under s.8 of the *Charter* and the Certificate of Analysis was excluded under s.24(2). The Crown appealed to the Alberta Court of Queen's Bench arguing that the trial judge applied the wrong test in determining whether there was a breach of the accused's s.8 rights.

Reasonable Grounds

Section 8 of the *Charter* protects a person from unreasonable search or seizure, which includes the taking of breath samples pursuant to the demand of a police officer. However, s.254(3) of the *Criminal Code* permits the lawful taking of breath samples where the police officer has reasonable and probable grounds to believe that a person has committed an offence under s.253 of the *Code* (impaired driving/over 80mg%). Reasonable grounds under this section requires "that the police officer subjectively have an honest belief that the suspect committed the offence" and, objectively, there must exist reasonable grounds for this belief. Furthermore, the "existence of reasonable and probable grounds must be based upon facts known by or available to the peace officer at the time [they] formed the requisite belief". The assessment is not one of approaching the evidence in "a piecemeal fashion" or by testing "individual pieces of evidence that support the presence of reasonable grounds", but by answering the question, "does the totality of the evidence available to the peace officer at the time [they] formed the belief support an objective finding that [they] had reasonable and probable grounds to believe the ability of the driver was impaired by alcohol".

In this case, there was no evidence that the roadside test was inaccurate or unreliable. The trial judge did not take issue with the credibility of the officer but second-guessed his testimony concerning reasonable grounds and speculated that the roadside test was unreliable. Alberta Court of Queen's bench Justice Kenny held that "there is no legislated or common law duty on the officer to inquire when the driver last consumed alcohol" unless there was evidence that would indicate this to be the case. The trial judge solely focused his doubt on the reliability of the test without considering the whole of the evidence; this was an error in law. Even apart from the roadside test, there existed substantial evidence of impairment that would support subjective reasonable and probable grounds while objectively, a reasonable person placed in the position of the officer would be able to conclude that reasonable and probable grounds existed. The "roadside test merely confirmed, rather than formed", the officer's belief.

Since reasonable and probable grounds existed for the demand, the accused's rights under s.8 were not violated. The acquittal was set aside and a new trial was ordered.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

"If you don't stand for something, you'll fall for anything". Don Shula

CONTINUED IMPAIRED ARREST ARBITARY: CHARGES STAYED

R. v. Paquette, 2002 SKPC 18

A police officer stopped the accused to confirm whether he was wearing a seatbelt and formed the opinion the accused was impaired. The accused admitted to having a "few drinks" and the officer noted a smell of liquor on the accused's breath, that his eyes were glossy, and that his speech was slurred. The accused subsequently provided two breath samples of 170mg% and 160mg%. Fifteen minutes after the breathalyser tests the accused was lodged in cells. Although he did not recall what condition the accused was in, the senior officer on duty (who was also the breathalyser technician) testified he detained the accused because of the readings and that he, and the only other officer on duty at the time, had to resume patrol duties and could not drive the accused home, nor could they wait for someone to pick him up. The documents were left for another officer to serve and about 10 hours later the accused was released.

At trial, the accused argued that he had been arbitrarily detained contrary to s.9 of the *Charter*. Although the trial judge found the initial arrest and detention of the accused for the purpose of breath samples lawful under the *Criminal Code* ("to "secure and preserve evidence of or relating to the offence", i.e. to conduct breathalyser tests"), he agreed the continued detention after the tests was arbitrary. Goliath J. of the Saskatchewan Provincial Court concluded:

> I find that the continued detention of the accused after the completion of the breath tests was not justified under Section 498 of the Criminal Code. I am of the view that where such detention is not justified or authorized it may in some circumstances, but not in every case, be "arbitrary" within the meaning of Section 9 of The Canadian Charter of Rights and Freedoms. I find that in this case the detention of the accused beyond the time it would have taken to complete the breath tests and the unusual documentation and service, or at the very latest, beyond the time it would have taken to return him to his home or to make arrangements to have him picked up, was arbitrary. His continued detention was for reasons of convenience and perhaps lack of resources, rather than necessity or legal justification. (emphasis in the original)

As a result, a stay of proceedings was ordered.

Complete case available at www.lawsociety.sk.ca

CAT LEADS COPS TO GROW-OP

R. v. Erickson, 2002 BCSC 785

The accused was arrested for assault causing bodily harm against his girlfriend. His effects, including his house keys, were taken from him and he was lodged in cells. The accused asked the police that his parents be allowed to attend his home to remove his dog and obtain clothing for his two children he had custody of from a previous marriage. The investigating officer, who was considering obtaining a warrant and concerned that the parents might remove potential evidence of the assault, explained that they would arrange his request provided the police could accompany his parents into the home. A second officer, who knew nothing of the details of the assault investigation, was requested to accompany the parents and to ensure only children's clothing and the dog were removed. The officer was also told to keep his eyes open in case he observed anything that might be evidence of an assault.

While in the house, a cat entered the main floor and the accused's mother informed the officer that the cat did not belong in the house. The cat ran down the stairs, into the basement, and the officer gave chase to retrieve it. While in the basement retrieving the cat, the officer observed venting, electrical cords, and ballasts leading from a door under which light could be seen. Later, the accused's mother took a bag of garbage from the home and placed it on the street along side other bags that had already been placed outside. The officer seized the garbage, took it to the police station, and found it to contain a bloody shirt and several marihuana seedlings.

During this visit however, the dog was not taken from the home because the parents did not have an appropriate vehicle to transport it. This, along with the observations, was reported to the investigator of the assault who made arrangements for a second visit later that day so the dog could be removed. A tele-search warrant was subsequently obtained under the *Controlled Drugs and Substances Act* and evidence relating to a charge of unlawfully producing a controlled substance was seized.

During the *voire dire* to determine the admissibility of evidence, the accused argued, among other grounds,

that his apparent consent to enter the residence was not valid and the information obtained from this entry could not be used to support the issuance of the search warrant. He contended that the condition imposed by the police that they would have to accompany his parents into the home did not give him a choice and that he merely acquiesced to allowing the police entry. In short, the accused suggested his right under s.8 of the *Charter* was violated when the police searched first (made observations while in the home without a warrant) and obtained judicial authorization later.

Consent

Justice Melnick of the British Columbia Supreme Court held that the police acted reasonably. The accused did have a choice as to whether he would allow the police to enter. He could have told the police that he would not have his parents enter the home if the police were going to accompany them. Notwithstanding that it was possible for the police to have the parents go in unaccompanied and then search them when they emerged from the house, this would have been impractical. As for the dog, the door could have simply been opened and the dog called out. Although the accused may not have anticipated that the basement would be entered, the officer went into the basement in good faith to retrieve the cat, which was unconnected with "keeping his eyes open" for evidence. He did not use the cat as a pretext to go down into the basement to search. Melnick J. stated:

> Although the additional purpose of [the officer] "keeping his eyes open" was not a legal activity by him in the circumstances, the discovery of what turned out to be evidence of the grow operation in the basement did not flow from that illegal activity. That is, there was no nexus between the two activities as he did not go down into the basement as part of his improper mandate to look over the premises for evidence relating to the assault charge, but rather in response to the unanticipated appearance of the cat and the cat going to the basement.

However, had the officer taken advantage of being in the house and entered the basement to look for evidence, all of his observations would have been excised from the warrant and the remaining evidence would have been insufficient to obtain a warrant. Since the entry into the home and the subsequent trip into the basement was lawful, the warrant was properly issued and the evidence was admissible.

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

LIQUOR SEARCH UNREASONABLE: OFFICER LACKS SUFFICIENT GROUNDS

R. v. Campbell, 2002 BCSC 553

Two police officers patrolling a beach known as a hot spot, particularly in the summer weekends where young persons frequented and consumed alcohol and drugs, observed a group of 6 to 8 young persons standing around a parked vehicle. A female in the group appeared to be drinking what the officers suspected was alcohol. After the officers parked their vehicle and approached the group to investigate, a male carrying a backpack began to walk away. The male had been standing on the same side of the car as the female, 15-20 feet away, but had not been observed having any dealings or contact with her. One of the officers checked the female, who was under age and had been drinking vodka, and served her with a ticket for being a minor in possession of liquor. The second officer stopped the male to investigate whether he was carrying any liquor in his backpack and asked for identification, which the accused failed to produce (although he did identify himself verbally).

The officer asked to search the accused's backpack, but was refused. This demand was repeated and after two further refusals, the accused was arrested for obstruction of justice. No *Charter* warnings were provided, but the accused was taken over to the police vehicle and the officer again demanded to search the backpack, which again was refused. The accused's reluctance to permit the search of his backpack raised the suspicions of the officer that he may be carrying something more than alcohol. The other police officer, who was unaware the accused had been arrested but had overheard the search demand and refusal at the police vehicle, told the accused his bag was going to be searched and took it from him. At this time the accused volunteered that there were drugs in the bag and the police opened it and found marihuana, psilocybin, and cocaine. The accused was also searched and $103 found in his pants pocket was seized as proceeds of crime.

As a result, the accused was charged with three counts of trafficking and one count of possession of proceeds of crime. During the trial *voire dire* to determine the

admissibility of evidence, the accused argued, among other grounds, that his right to be secure against unreasonable search and seizure was violated and the evidence was inadmissible under s.24(2) of the *Charter*.

Reasonable Grounds and the Search

Section 67 of British Columbia's *Liquor Control and Licensing* Act (*LCLA*) permits police officers to search persons and places (except residences) without a warrant where the officer believes on reasonable and probable grounds that liquor is unlawfully possessed or possessed for an unlawful purpose. This section also creates an offence if a person obstructs the search. A lawful search under this section requires the existence of reasonable and probable grounds. The Crown submitted that, although the accused was of legal age to possess liquor and that there was no evidence he was consuming or supplying liquor to minors, the police nonetheless had reasonable grounds to believe he had committed an offence under the *LCLA.* The beach was a well known area for minors to gather and consume alcohol and/or drugs, the officers had personal experience in this regard, it was late on a summer weekend, backpacks were commonly used in transporting alcohol and/or drugs, the accused failed to produce identification, and the accused walked away from the group as the police approached. On the other hand, the accused argued that the objective criteria only amounted to a mere suspicion, insufficient to meet the reasonable belief standard required for a warrantless search.

British Columbia Supreme Court Justice Smith concluded that the police did not have the objective evidence to support a belief that the accused had committed or was about to commit an offence under the *LCLA*. The accused, who appeared to be hanging around with a group of young persons, was 15-20 feet away from a female who had been seen drinking but had not been seen to have any contact or dealings with him. Since there were no reasonable grounds to search the accused, there were also insufficient grounds to arrest him for obstructing the search when he refused to let the officers look into the backpack.

Although reasonable grounds developed after the accused informed the police that his backpack contained drugs, this statement was only made after his arrest without being given the appropriate *Charter* warnings. Because the officers knew or ought to have known that they did not objectively have reasonable grounds to search the accused, the s.8 *Charter* violation was serious. Furthermore, the obstruction arrest was made only to allow the police to search the backpack incidental to arrest and the absence of any *Charter* warnings supported the appearance that the officer had no intention of pursuing the charge. The police conduct did not demonstrate good faith nor a mere technical breach and the evidence was ruled inadmissible under s.24(2) of the *Charter*.

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

INCORRECT ADVICE FROM LEGAL AID RESULTS IN ACQUITTAL

R. v. Watts, 2002 BCPC 0235

After responding to a complaint, a police officer found the accused in a parked motor vehicle and demanded he provide a sample of his breath. The accused accompanied the officer to the police station where a call was placed to Legal Aid. Evidently, on the advice received from the legal aid lawyer, the accused refused to provide a breath sample. The accused was charged with impaired driving and refusing to provide a breath sample. At trial, the accused was acquitted of both charges. On the impaired charge, British Columbia Provincial Court Judge Angelomatis found that although the officer had reasonable grounds for the demand, the evidence was insufficient to warrant a conviction. On the refusal charge, the judge concluded that because the Legal Aid lawyer is appointed by the state, if they provide incorrect legal advice (misinformation or disinformation) the person who receives that advice is not criminally responsible. On the other hand, a person who pays for a lawyer themselves would not gain an advantage from this mistake. Interestingly, the judge followed a number of Ontario cases on this point even though he disagreed with them personally, had a problem with them professionally, found them unpalatable, disagreeable, irrational, and in direct conflict with common sense.

Complete case available at provincialcourt.bc.ca

Note-able Quote

"*There are two types of leaders in the world today: those who are interested in the fleece, and those who are interested in the flock*" Author Unknown

NEW SUPREME COURT OF CANADA JUDGE APPOINTED

On August 8, 2002, Madame Justice Marie Deschamps was appointed from the Quebec Court of Appeal to the Supreme Court of Canada. Chief Justice McLachlin stated, "Justice Deschamps is a dedicated judge, who brings to the Court a wealth of expertise and experience". Canada's top court is comprised of nine justices, three of which must be from Quebec. For more information on the Supreme Court of Canada, visit their web-site at www.scc-csc.gc.ca

RIGHT TO COUNSEL MUST BE REAL

R. v. Jacobs, 2002 BCPC 0227

The accused was taken to the police detachment to provide breath samples. After the booking process, he requested an opportunity to speak to a local lawyer. He was placed in a phone room that had a receiver, but no dial pad. The procedure in place was for the police or jail staff to make the call on the detainee's behalf, then transfer the call to the phone room. This process prevents the detainee from speaking to persons other than counsel. Although the accused's lawyer was not on an available list of local lawyers, the officer did locate a listing in the phone book with an office, home, and fax number. The officer called only one of the numbers, but could not recall at trial which one he had dialed. The phone rang, but there was no answer. After the officer informed the accused that there had been no answer, the accused requested Legal Aid. He subsequently spoke with a Legal Aid lawyer for 3-4 minutes. During a *voire dire* on the impaired driving and over 80mg% charges, the accused argued that his s.10(b) *Charter* right had been violated because the police failed to take adequate steps to contact his counsel of choice and the Certificate of Analysis should be excluded under s.24(2).

A detainee has the right to counsel of their choice and the police took away the accused's ability to implement that right himself when they provided him a telephone without a dial pad. Once the police assume responsibility for facilitating contact with counsel on the detainee's behalf, they must take all reasonable steps to ensure the right to counsel is real, not simply theoretical. In determining what are reasonable steps, the court will examine what steps the detainee may have taken if they were provided the means to do so. In this case, the officer only called one of the phone numbers in the telephone directory listing for the accused's lawyer. Had the accused been given a fully functional telephone and the directory, it would have been his responsibility to call the numbers and would be reasonable to conclude he would have called both numbers and been reasonably diligent in doing so. In short, the accused "was a detainee whose liberty and rights were being limited by the state at that moment" and the police had "a duty to do at least as much as [he] reasonably would have done". The Certificate of Analysis was excluded and the charges were stayed.

Complete case available at www.provincialcourt.bc.ca

LEGAL LAUGHS

Fonseca, an unscrupulous lawyer for a man arrested for murder, bribed a man on the jury to hold out for a verdict of manslaughter. The jury was out for a very long time, and finally they returned with a verdict of manslaughter. Fonseca rushed up to the juror. "Here's your money," he said. "I'm much obliged to you, my friend. Did you have a very hard time?" "Sure did," replied the man, "an awfully hard time. The other eleven wanted to acquit."[34]

CONSENT OF OWNER OVERRIDES PRIVACY INTEREST OF TEMPORARY HOUSEGUEST

R. v. Scheck, 2002 BCSC 1046

The accused, an 18 year old female, resided rent free in a spare bedroom at her grandmother's home, but could only stay there if she obeyed the rules of being home by midnight, keeping the bedroom tidy and clean, behaving herself, and having no one else in the house. Because the accused failed to keep her room neat, her grandmother would enter the room to clean it up. When the accused

[34] Source: Behrman, Sid. (1991). The Lawyer Joke Book. New York, NY.: Dorset Press.

complained to her grandmother about this, the grandmother asserted that she could do what she wanted in her own house. After being informed that the accused was involved in a relationship with a drug dealer, the grandmother entered her bedroom and found a sock under the bed mattress containing money and plastic bags. This was reported to the RCMP and two officers attended the residence. The officers were invited in and located the sock stuffed with money and cocaine between the mattress and box spring. One of the officers testified that he considered obtaining a warrant but concluded it was not necessary because the homeowner had invited him in. At trial on a charge of possession of cocaine for the purpose of trafficking, the accused argued that her right to be secure from unreasonable search and seizure protected under s.8 of the *Charter* had been violated and the evidence should be excluded under s.24(2).

Section 8 of the *Charter* protects the person, not property, and a person asserting the right does not require a propriety or possessory interest in the premises searched or articles seized. Although a warrantless search is presumptively unreasonable, the accused must first establish a reasonable expectation of privacy in the place searched or items seized if s.8 is to be engaged. In this case, British Columbia Supreme Court Justice Meiklem found the accused could not demonstrate a reasonable expectation of privacy. She was not present at the time of the search nor had her grandmother relinquished the right to enter or exercise control over the room she owned. The spare room was being used temporarily and gratuitously by the accused and the door did not have a lock. If the accused left the door closed when she left the home, she found it open when she returned. Despite testifying to a subjective privacy expectation, it was not objectively reasonable in the circumstances. Furthermore, even if the accused had an expectation of privacy, it could be overridden at the discretion of her grandmother. Her grandmother consented to the search, which was both voluntary and informed. There was no breach of the accused's rights and the evidence was admissible.

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

Note-able Quote

"Tell me and I'll forget. Show me and I may remember. Involve me and I'll understand" Confucius

POLICE LIABLE IN CUSTODIAL DEATH OF INTOXICATED MAN

Roy et al. v. Attorney General of Canada et al., 2002 BCSC 1021

The plaintiffs, the wife and three stepchildren of a man who died in police custody, brought an action under the *Family Compensation Act* alleging the police were negligent in failing to seek medical treatment for his intoxicated condition. The plaintiffs sought damages for loss of guidance, loss of financial support, and loss of household services. The deceased, who was 56 years old, was arrested by police for being intoxicated in a public place under the *Liquor Control and Licensing Act* after a citizen called police to report observing a drunk male stumble to the ground while trying to get into his car. The attending officer found a male lying on the ground and concluded he was severely intoxicated. Following the attendance and assistance of a second officer, the deceased, who was non responsive, was picked up, carried to, and placed in the back of the police vehicle. He was transported to the police station where he was placed on a blanket and dragged to the "drunk tank".

His personal effects were removed and he was rolled into the recovery position in the event he vomited. Although he was drowsy, had difficulty communicating, and very limited physical reaction to his surroundings, no medical check was performed. About 23 minutes after being booked in, the jail guard checked the deceased and found his snoring and breathing had stopped. Attempts to revive him were unsuccessful and he was transported to and later pronounced dead at the hospital. The most likely cause of death was acute alcohol ingestion. This occurs when large amounts of alcohol are consumed and act as a central nervous system depressant, leading to coma, respiratory depression, and eventually respiratory arrest. If timely medical intervention is sought and the alcohol toxicity detected, death can be averted. To be successful in a lawsuit alleging negligence, the plaintiff must establish the following:

- the police owed the deceased a duty of care;
- the police breached the standard of care expected; and
- the death was a proximate cause of the breach of the standard of care.

Duty of Care

The police owe prisoners in their custody a duty of care, particularly when a prisoner is intoxicated. Intoxicated persons are vulnerable and an arrest for being drunk in public is often founded in a concern about the person's safety. "The standard of care to which the police are held is that of "a reasonable police officer, acting reasonably and within the statutory powers imposed upon [them], according to the circumstances of the case"". Police policy manuals may assist the court in determining the standard of care. In this case, the RCMP national policy required an incarcerated person who is "not fully conscious" medically examined while the provincial and detachment policy required a person of "questionable consciousness" to be medically assessed. A state of reduced mental awareness, in which a person is not readily responsive, may prevent a prisoner from communicating their symptoms to the police or request assistance. Furthermore, diminished awareness may mask other serious conditions, preventing their detection while other medical conditions may mimic the symptoms of alcohol intoxication. The prisoner, being under the control of the authorities, is entirely dependent on the police to obtain medical assistance on their behalf.

After weighing the risks to the prisoner and the burden on the police in having prisoners medically assessed, British Columbia Supreme Court Justice Neilson concluded that the standard of care must be conservative and where there is any doubt about the prisoner's level of awareness, they should be medically assessed. Notwithstanding however, prisoners who are intoxicated, but consistently responsive to their environments, may be incarcerated without an examination. The standard of care also "imports a requirement that the officer dealing with the prisoner conduct an appropriate investigation in making a determination as to the prisoner's level of awareness". Neilson J. stated:

> [I] would expect such an assessment to include, at a minimum, an attempt to converse with the person about how much he or she has had to drink, and what other causes there may be for his or her condition. I would expect some attempt to make him or her respond to basic commands to assess the level of awareness. I would expect the officer do a basic physical examination to determine if the person has suffered any injuries, and whether the vital signs such as pulse and breathing are stable. I would also expect the officer to investigate the circumstances in which he or she was found, including speaking to available witnesses about their observations. If these enquiries show the prisoner's responsiveness is minimal, or if they do not reveal sufficient information for a police officer to reach a conclusion that the prisoner is conscious and not in jeopardy, the standard of care requires the officer err on the side of caution and take the prisoner for medical examination before he or she is incarcerated.

Breach of the Standard of Care

Because the deceased was in a state of "questionable consciousness" showing signs of severe intoxication, the officers had a duty in accordance with the standard of care to determine whether he required a medical examination before incarceration. Since the police "did not perform any adequate assessment or investigation into [the deceased's] state of consciousness or its cause", they failed to meet the standard of care required.

Proximate Cause

Neilson J. concluded that if the deceased had been medically assessed, the progression of his respiratory distress would have been identified and he would have received immediate assistance to save him. Thus, the breach of the standard of care was a proximate cause of the prisoner's death. However, the court also recognized that the deceased "was not a passive participant" in his death and had self-ingested a large amount of alcohol placing himself at risk. This self-induced intoxication was a basis for finding the deceased 50% responsible for his own death. The plaintiffs were awarded damages for loss of guidance, loss of financial support (past and future), and loss of household services, which were reduced by half due to the deceased's contributory negligence.

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

Note-able Quote

"I am frequently struck by the sense that we spend very little time considering evidence which the Crown hopes will prove the defendant was driving while…impaired, and the majority of the time putting the police officers on trial regarding their investigation[35]*"* BCPC Associate Chief Judge Stansfield

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[35] R. v. Jacobs, 2002 BCPC 0227.