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

IN SERVICE:10-8

JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On September 15, 2002, 31-year-old Richmond (B.C.) RCMP Constable Jimmy Ng was on a routine call proceeding through a green light when a Honda Civic travelling at an extremely high rate of speed ran the red light striking the police car in the driver's door. Cst. Ng was extricated, treated, and transported by paramedics to hospital where he was pronounced dead. The suspect fled the scene and turned himself in at Richmond Hospital some hours later with his lawyer. Constable Ng was a 6 year veteran of the RCMP. He is survived by his parents.

On August 21, 2002, 41-year-old South Simcoe Police Service (Ontario) Constable Alan Kuzmich was on duty and investigating an incident involving a stolen motorcycle in the Town of Bradford, Ontario when he was struck by a motor vehicle and killed instantly. Constable Kuzmich had served as a police officer for 19 years and is survived by his wife, Joanne and two children.

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

CONSENT ENTRY WAIVES PRIVACY INTEREST: *FEENEY* ISSUES NOT ENGAGED

R. v. C.K., 2002 MPBC 10019

The police attended the accused's residence to arrest him for the armed robbery of a gas station, but did not know whether they would find him there. The door was answered by the accused's mother and the police informed her that they were there to arrest her son for the robbery. The police were directed downstairs by the mother and told to wake up "the lazy bum". The police entered the residence and were escorted to a basement bedroom by the mother who pointed to a male in bed. The accused was woken up and arrested without a warrant for the robbery. The accused was provided the usual warnings, declined to contact counsel at that time, was handcuffed, and subsequently transported to the police station.

During a *voire dire*, the accused unsuccessfully attempted to have his subsequent statements ruled inadmissible, in part, by the warrantless entry and in-home arrest made by the police. Manitoba Provincial Court Justice Pullan found that the police were invited into the residence by the accused's mother. The police were wearing clearly identifiable jackets and made their purpose (arrest) well known to the accused's mother before entering the home. Although the police did not request entry, she invited them, escorted them through the house, and told them to wake him. Her consent was informed and she "made a reasoned choice to invite police into her residence to arrest her son". Thus, the entry was lawful and the issues arising from the *Feeney*[1] case were not engaged.

Complete case available at www.canlii.org

DISCREPENCY BETWEEN NOTES & TESTIMONY DOES NOT WARRANT NEW TRIAL

R. v. Swearengen, (2002) Docket:C35558 (OntCA)

The accused was convicted of sexual assault at trial, but had the conviction overturned on appeal by the Ontario Superior Court of Justice and a new trial was ordered. The Crown's case was dependent on the victim's version of the assault while the accused's case was dependent on his denial of

[1] [1997] 2 S.C.R. 13

it. The appeal court justice found that the victim's "testimony at trial contained several material assertions that were not contained in the notes a police officer made of a statement made by the [victim] immediately after the alleged assault". The discrepancies between the notes and the testimony on material matters was sufficient to require a new trial since findings of credibility may well have been different had the victim been properly cross examined on her previous statement. The Crown appealed to the Ontario Court of Appeal which set aside the order for a new trial. In restoring the conviction, Justice Catzman for the unanimous appeal court held:

> In our view, the mere fact that the notes taken by the police officer of the complainant's initial statement are different in material respects from the complainant's testimony does not, standing alone, warrant a new trial. Differences between the statement and the testimony do not, in and of themselves, provide a basis for the reassessment of the [accused's] credibility. The effect, if any, of the notes on the complainant's credibility would depend on many factors, including for example, the nature of the notes and the complainant's response to any alleged inconsistency. None of these factors were explored on the summary conviction appeal.

Complete case available at www.ontariocourts.on.ca

OPPORTUNITY TO PROVIDE BREATH SAMPLE AFTER ARREST NOT NECESSARY

R. v. Tavangari,
[2002] O.J. No. 3173 (OntCJ)

A police officer, who stopped the accused driving, detected a strong liquor odour on his breath and observed that his eyes were "glassy". As a consequence, the officer formed the suspicion that the accused was operating a motor vehicle with alcohol in his body and made a demand under s.254(5) of the *Criminal Code* that he provide a breath sample into an approved screening device. The device had been tested and found to be working by the officer at the commencement of his shift and again at the roadside in the presence of the accused.

A new mouthpiece, checked by the officer for obstructions, was used. Even though the accused's cheeks were puffed out with air, the first three attempts resulted in an insufficient sample reading and lack of an audible tone, which is normally emitted when air is received into the device. The officer removed the mouthpiece and had the accused blow into it without difficulty. The mouthpiece was placed back onto the device and a further three attempts again resulted in an insufficient sample being provided. After the sixth attempt, the officer informed the accused it was a criminal offence to fail or refuse to provide a breath sample, he would receive a 90-day licence suspension if he failed to provide a sample, and that his vehicle would be towed. When asked if he understood the consequences, the accused responded, "Yes".

A seventh, eighth, and ninth test also resulted in an insufficient sample reading. The officer again demonstrated how to provide a sample and informed the accused that the tenth test would be his last. The accused again provided an unsuitable sample. Despite telling the accused he could provide no further tests, the officer administered an eleventh and twelfth test, also resulting in an insufficient sample. A thirteenth test was subsequently administered by another police officer using a different approved screening device, but again an insufficient sample reading resulted. After the thirteen opportunities to comply with the demand over a 29-minute period on two separate approved devices, the officer concluded that the accused had been provided ample opportunity to comply, terminated testing, and arrested him for failing to provide a breath sample. After the arrest, the accused then asked for a further opportunity to provide a sample.

At trial the accused argued, "once a person has been arrested the police are required to provide a further opportunity [to provide a suitable sample] on request… regardless of the circumstances". In rejecting the accused's submission, Justice Kenkel of the Ontario Court of Justice found that the determination of whether a person has failed or refused to comply with a screening device demand will involve an examination of "all of the circumstances of the entire transaction between the police officer and the accused". Although there may be cases where a subsequent post-arrest offer to comply with a demand may not amount to a failure or refusal to provide a sample, this was not one such case. Here, the officer made "exhaustive efforts" to obtain a sample and a fourteenth test was not required as "there was no reasonable prospect that the accused would provide a suitable sample". Justice Kenkel held:

> The accused had been warned in a very detailed way after the 6th test that failure to provide a suitable sample was a criminal offence. He was warned at that time in detail of the consequences of the failing to provide a suitable sample, including the administrative licence suspension and the towing of his car. Knowing this the accused failed 7 more times to provide a proper sample. Three of the final tests were administered after the accused was warned on the 10th test that there would be no further tests. The only inference available on the evidence before me is that the failures to provide a sample were deliberate and that [the accused] had no intention of providing a suitable sample despite his statements to the contrary.

As a result, the accused was convicted of refusing or wilfully failing to provide a breath sample.

THREAT REQUIRES EXPRESS or IMPLICIT REFERENCE TO DEATH or BODILY HARM

R. v. Abdallah, 2002 ABPC 126

The accused was charged with uttering threats to cause death or bodily harm under s.264.1(1)(a) of the *Criminal Code* arising from an incident where he was driving a vehicle stopped at an intersection, stuck his head out the window and yelled at the female victim, "Fucking bitch. I'm going to get you back for ratting me out". The victim had previously provided a statement to the police alleging the accused had committed criminal offences. Although she was not afraid nor take the threat seriously, the victim pretended to call the police on her cell phone. Section 264.1(1)(a) of the *Criminal Code* reads as follows:

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

Bodily harm is defined in s.2 of the *Code* as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature".

The *actus reus* of threatening is the uttering of the threat to cause death or bodily harm while the *mens rea* is whether the words spoken as a threat, to the reasonable person, were meant to intimidate or be taken seriously. In determining whether the words constitute a threat, the court must look at them objectively taking into account the circumstances and manner in which they were uttered as well as the person to whom they were spoken. Words spoken in jest or in a manner in which they could not be taken seriously would not be a threat, since they could not lead a reasonable person to conclude they were meant to intimidate or to be taken seriously. Two questions arose at trial:

1. Is it necessary that the victim take the threat seriously? and
2. Did the words uttered constitute a threat to cause death or bodily harm as required in s.264.1(1)(a) of the *Criminal Code*?

Must the threat be taken seriously?

Following a review of the case law, Justice Semenuk of the Alberta Provincial Court concluded that it was "unnecessary for the complainant to take the threat seriously" or even that they appreciated that they were being threatened. All that is required is "that the accused meant the threat to intimidate or be taken seriously". There is no requirement that the threat did in fact intimidate or that it was taken seriously.

Did the words imply bodily harm?

Although Justice Semenuk found the words uttered by the accused were meant to be taken as a threat, there was no explicit threat to cause death or bodily harm. In such cases where "the threat is not express the Court is left to draw an inference by necessary implication from the words used and all the surrounding circumstances as to whether it constitutes a threat to cause death or bodily harm". In the Court's view, the words uttered by the accused in this case were ambiguous and did not necessarily refer to death or bodily harm. Notwithstanding that the Court found the words used were meant to intimidate or be taken seriously, there was a reasonable doubt as to whether the threat implied death or bodily harm. As a consequence, the accused was acquitted.

Complete case available at www.albertacourts.ab.ca

TRANSIT BUS DISTURBANCE CRIMINAL

R. v. Mudarth, 2002 ABCA 176

A police officer gave evidence at trial that as he approached an Edmonton transit bus and when he was inside it, he heard the accused, who was very upset, swearing and shouting at a transit employee. The officer testified that there were about 20 people on the bus who became "very interested" in what was occurring and supported his action in having the accused leave the bus. The officer offered to drive the accused wherever she wanted to go, but she refused. Since the accused refused to leave the bus and the police were concerned with her conduct, the transit passengers were transferred to another bus and the accused was arrested and removed. The accused was convicted of causing a disturbance under s.175(1)(a)(i) of the *Criminal Code* and her application to appeal to the Alberta Court of Queen's Bench was dismissed. The accused further applied for leave to appeal to the Alberta Court of Appeal arguing that the trial judge erred in finding that a there was a disturbance and that it occurred in a "public place".

Section 175(1)(a)(ii) creates an offence for a person "who (a) not being in a dwelling-house, causes a disturbance in or near a public place, (i) by fighting, screaming, shouting, swearing, singing, or using insulting or obscene language". Furthermore, s.175(2) allows the court to "infer that a disturbance was caused or occurred from the evidence of a peace officer". The legal test for determining whether conduct amounts to a disturbance was settled by the Supreme Court of Canada in *R. v. Lohnes* [1992] 1 S.C.R. 167:

> ...the disturbance contemplated by s. 175(1)(a) is something more than mere emotional upset. There must be an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public. There may be direct evidence of such an effect or interference, or it may be inferred from the evidence of a police officer as to the conduct of a person or persons under s. 175(2). The disturbance may consist of the impugned act itself, as in the case of a fight interfering with the peaceful use of a barroom, or it may flow as a consequence of the impugned act, as where shouting and swearing produce a scuffle. As the cases illustrate, the interference with the ordinary and customary conduct in or near the public place may consist in something as small as being distracted from one's work. But it must be present and it must be externally manifested. In accordance with the principle of legality, the disturbance must be one which may reasonably have been foreseen in the particular circumstances of time and place.

In this case, the evidence of the police "established that the accused was swearing, using obscene language and shouting and that there were members of the public who heard it, reacted to it, and eventually were inconvenienced as a result of the [accused's] conduct". This fell within the definition set out in *Lohnes*.

Section 175 also requires that the disturbance occurs "in or near a public place". A "public place" is defined in s.150 of the *Code* as including "any place to which the public have access as of right or by invitation, express or implied". Justice Picard of the Alberta Court of Appeal found "no error in the trial judge concluding that the ETS bus fell within s.175". The application for leave to appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

TO SERVE & PROTECT: A FRAMEWORK FOR LEADERSHIP

Sgt. Mike Novakowski

"*The measure of a person is not the number of servants they have, but the number of people they serve*".
Author unknown

Introduction

The expression "to serve and protect" is a motto used by law enforcement agencies throughout North America. This motto, which not only reflects a police ideology, can also be used as a framework for leadership and provide a foundation from which an authentic leader can derive the necessary underpinnings to be effective. As can be inferred from the maxim, this philosophy of leadership is rooted in two concepts; serving (those you lead) and protecting (the integrity of the leader/follower relationship).

LEADING BY SERVING

The "leading by serving" principle is underscored by asking the simple question, "How can I best serve those

> 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

around me?" However, this enquiry must be genuine, and not a Machiavellian approach; fraudulently expressing interest knowing it may be received by the follower as authentic. To best serve the follower, a leader must serve the needs of the ones they lead while at the same time also serve by setting an example.

Serving the Needs of the Follower

By definition, the terms "lead" and "serve" (or follow) pose a paradox. How can one lead or determine direction but also follow? Quite simply, the role of the leader is not to impose their own will on others, but to remove the obstacles that block the group's way in achieving the group's goal. Thus the leader of the group, through facilitation, serves its members in their march forward. Michael Stanley described this servant leadership philosophy as "working your way to the bottom"[2]. He suggests that the traditional management pyramid be inverted; the leader at the bottom and the follower at the top. Thus the leader is now in a supportive role, to serve those responsible on the front line.

> He who wishes to lead the people must walk as if behind them.
> Verse 66, *Tao Te Ching*

Leading by serving is janitorial, or a behind the scenes style of leadership. It is choosing service over self-interest. The proponents of servant leadership argue that the leader's role is to determine the will of the group and provide the support to advance that will, while the critics maintain that most followers want a leader "with a plan"; to set the direction[3]. However, through serving, the leader harvests the respect, trust, and confidence of their followers. When the time comes to make an unpopular or tough decision, the leader will have the support and respect of the group.

Each member of a group has individual personal needs. The leader, in recognizing this, selflessly serves the group's needs, which are given priority over the leader's own. This does not prevent the leader from benefiting as a result of their own action, but by yielding to the group and putting the group's well being above their own, the leader will also benefit. Serving the needs of others before one's own is serving oneself[4] and true benefit blesses everyone, including the leader[5]. Thus, "enlightened leadership is service, not selfishness"[6].

Serving by Role Modelling

A key to serving one's followers is providing a model that the followers can look up to. The espoused values of the leader must be demonstrated through practice and by exhibiting high standards for followers. In the words of leadership guru Warren Bennis[7], leadership is "character in action". In the same vein, James O'toole[8] quotes popular Girl Scouts leader Frances Hesselbein whose comments are apposite:

> [L]eadership is basically a matter of how to be, not how to do it. Leaders need to lead by example, with clear, consistent messages, with values that are 'moral compasses', and a sense of ethics that works full time (p.40)

Author Perry Smith[9] suggests that individuals within an organization will observe whether the leader is committed to what they value. Not only must the leader talk the talk, they must also walk the talk. The leader must act consistently with their values or their followers will not take them seriously[10]. To this end, leaders must be able to correlate vision and behaviour with values and "do the right thing in a moment of truth"[11]. This congruity between value centredness and high standards of emulation is a cornerstone of leadership. Stephen Covey[12] asserts that modelling (living your principles) is the foundation from which people come to believe in their leader. From this, relationships are built (mentoring) eventually leading to followers perpetuating the system and cultivating other leader/follower structures. The leader has thus started a cycle that continues among the followers who become leaders within their own circles of influence.

[2] Stanley, Michael F. (1995). Servant leadership in the fire service; It's never lonely at the top when you're leading from the bottom. *Fire Engineering*, Vol, 148 Issue 8, p.30.
[3] Kiechel III, W. & Rosenthal, M. (1992). The Leader as Servant. *Fortune*, Vol. 125 Issue 9, p.121
[4] Secretan, Lance. (2000). Honey or Vinegar. *Industry Week*, Vol. 249 Issue 12, p.23.
[5] Heider, John. (1985). *The Tao of Leadership*. Los Angeles, Ca.: Humanics Ltd.
[6] Spears, Larry. (1995). *Reflections on Leadership: How Robert K. Greenleaf's Theory of Servant Leadership Influenced Today's Top Management Thinkers*. Toronto, Ont.: John Wiley & Sons, Inc.
[7] Bennis, Warren. (1999). *Old Dogs, New Tricks*. Provo, Utah: Executive Excellence
[8] O'Toole, James. (1995). *Leading Change: Overcoming the Ideology of Comfort and the Tyranny of Custom*. San Francisco, Calif.: Jossey-Bass Inc.
[9] Smith, Perry. (1998). *Rules and Tools for Leaders: How to Run an Organization Successfully*. Garden City Park, N.Y.: Avery Publishing Group
[10] Nanus, Bert (1989). *The Leader's Edge*. Chicago, Ill.: Contemporary Books, Inc.
[11] Bennis, Warren. (1999). *Old Dogs, New Tricks*. Provo, Utah: Executive Excellence
[12] Covey, Stephen. (1991). *The Seven Habits of Highly Effective Families*. New York, N.Y.: Simon & Schuster Inc.

LEADING BY PROTECTING

> To determine the value of a leader, you must look at who's doing the following.
> Author unknown

Leaders not only need to serve their followers but must also protect the integrity of the leader/follower arrangement. Every system of leadership has three key stakeholders; the follower, the leader, and the relationship. The system could be an organization, a family, or a team. To protect or safeguard this system, a leader must protect the shared values that the system stands for, protect the individuals within that system, and protect the relationship between the leader and the follower.

Protecting Shared Values

The idea of protecting values as a basis for leadership has been challenged. The detractors of this theory argue that it is simply a pleasant, but unrealistic, concept. They claim that in the name of inclusion and mutual respect, organizational decision-making is delegated to the will of the many, destroying discipline and organizational effectiveness in the process[13]. However, at its nucleus, value based leadership advocates the commitment of individuals to their deeply held values that in turn acts as a compass to guide decision-making. Using this metaphor, there is only one true north; doing the right thing.

Values keep people focussed, direct them on long-term vision, and guide their choices when there is conflict[14]. Values such as respect, integrity, fairness, and honesty become the pillars for the organization. In turn, these values form the basis for a shared vision. James Kouzes and Barry Posner[15] recognize that leaders must enlist others in a common vision by appealing to their values. Within the organization, these values "coalesce into a prevailing ideology that guides the organization's behaviour"[16]. This ideology, or vision, creates a "focus on the identity of the organization, which when clearly communicated to every employee, helps orient team-member decision making and activity"[17]. Margaret Wheatley uses the U.S. Army Special Forces as a powerful example where the vision of the organization guides quick decisions where access to commanders is impossible and appropriate choices of action must be made in a moments notice.

Thus, an organization that leads by values has only one boss; the values[18]. The result is an organizational environment with committed employees guided by established moral and ethical values. Although some argue that value based leadership is weak and ineffective, its strength lies in protecting the internal integrity of the organization fostered by an atmosphere of mutual respect and collaboration.

Protecting the Follower

A leader must protect the uniqueness of the follower. Followers must be viewed as individuals with their own hopes and dreams and must not be used as the means to justify the ends. Leaders must strengthen their followers by empowering them, providing choice, developing competence, and offering visible support[19]. In addition, the leader must not allow the follower to go below their personal bottom line. Just as the leader must demonstrate character and the courage of their convictions, the leader must protect the follower by not allowing the follower to compromise the shared organizational values.

Protecting the Relationship

Early theories of leadership focussed on personal traits and behaviour patterns of leaders. Today, the focus is on the interactions, or relationships, between the leader and their followers. Effective leadership requires the inclusion of all individuals; it is a dialogue, not a monologue[20]. An authentic leader "treats each follower as an individual and provides coaching, mentoring and growth opportunities"[21]. In this vein, leadership requires open communication and trust with employees. The effective leader focuses on people, ensuring they have adequate resources to fulfil their targets. They encourage openness to diverse points of view and solicit valid feedback from as many sources as

[13] O'Toole, James. (1995). *Leading Change: Overcoming the Ideology of Comfort and the Tyranny of Custom*. San Francisco, Calif.: Jossey-Bass Inc.
[14] Kouzes, James. (1995). *Achieving Credibility: The Key to Effective Leadership*. New York, N.Y.: Simon and Schuster Inc.
[15] Kouzes, James M. and Posner, Barry Z. (1995). *The Leadership Challenge*. San Franscisco, Calif.: Jossey- Bass Inc.
[16] Nanus, Bert (1989). *The Leader's Edge*. Chicago, Ill.: Contemporary Books, Inc., p.64.
[17] Wheatley, Margaret (1995). Margaret Wheatley's Lessons From a Workplace. CRM Films.
[18] Blanchard, Ken and O'Connor, Michael. (1997). *Managing By Values*. San Francisco, Calif.: Berrett-Koehler Publishers
[19] Kouzes, James. (1995). *Achieving Credibility: The Key to Effective Leadership*. New York, N.Y.: Simon and Schuster Inc.
[20] Kouzes, James. (1995). *Achieving Credibility: The Key to Effective Leadership*. New York, N.Y.: Simon and Schuster Inc.
[21] Bass, Bernard M.; Steidlmeier, Paul (1999). *Ethics, Character, and Authentic Transformational Leadership Behaviour*. Leadership Quarterly, Summer99, Vol 10, Issue 2, p181.

possible[22]. It is through this process that a shared sense of community develops and followers are provided and enjoy the opportunity to make a worthy contribution to the organization[23].

Conclusion

The challenge of a leader is to balance the act of serving with the act of protecting. Although serving may carry the connotation of submission, and conversely, protecting carries the connotation of dominance, the task of the leader is to engage in both activities to the appropriate degree. Leading by serving is not acting as a "doormat", but requires courage, commitment, and character in meeting the followers' needs. Protecting is not about exercising authoritative control, but involves collaboration, mutual respect, and shielding the integrity of the relationship. Between this paradox of serving and protecting lies an effective leader.

NO PRIVACY IN EMPLOYMENT RECORDS PROVIDED TO SOCIAL ASSISTANCE AGENCY

R. v. D'Amour,
(2002) Docket: C35927 (OntCA)

The accused, who was unemployed, applied for and received social assistance under Ontario's *General Welfare Assistance Act*. Shortly thereafter, she commenced and continued employment for the next two years without reporting her earnings to the Community Services Department (CSD). Had she reported this income, she would have had her benefits reduced. A caseworker with the CSD, who had received information that the accused had not reported her income, requested that she produce her T4 slips for the previous three years or her benefits would be withheld until she complied with the request. The T4 slips were provided to the CSD worker and it was determined that the accused had received her benefit cheques without reporting income. The matter was referred to the police for criminal prosecution along with copies of her T4 slips and other documentation. The police charged the accused with fraud and issued subpoenas for the original documentation from their various sources. She was convicted at trial.

The accused appealed to the Ontario Court of Appeal arguing that her *Charter* rights under s.7 (self incrimination) and s.8 (search and seizure) had been violated because of the manner in which the documentation was obtained and that the evidence should be excluded under s.24(2). Although she accepted that the CSD could require her to produce income and employment information as a condition to receiving benefits and could also use that information for regulatory purposes, she contended that the Crown could not use the information in the criminal trial process. Although the Crown used original documents at trial, these originals would not have been subpoenaed but for the information contained in the copies she provided to CSD.

Self Incrimination

Section 7 of the *Charter* protects a person's right not to be forced to assist the state in proving its case against them. Entrenched within this protection is the right of the individual to choose whether or not to co-operate with the state. If a person chooses not to assist the state, they must be left alone. For example, where a person provides a compelled statement (either oral or written), that statement is conscripted and it, and any evidence derived from it, are equally protected. However, "documents that exist prior to, and independent of, any state compulsion do not…constitute evidence "created" by the person required to produce those documents. With certain narrow exceptions, neither the compelled production of such documents, nor the subsequent use in a criminal proceeding of such documents, attracts the protection of the principle against self-incrimination". In rejecting the s.7 claim, Justice Doherty for the unanimous Court held:

> The T4 slips produced to [CSD] by the [accused] were created prior to, and entirely independent of, any compulsion that the Department may have exerted upon the appellant to produce those documents. The [accused] was not under any statutory compulsion to create, or even keep, the T4 slips. Indeed, the [accused] did not create the T4 slips but received a copy from her employer. Even if it could be said that the state compelled the [accused] to produce the T4 slips, the T4 slips did not constitute evidence created by or emanating from the [accused]. The T4 slips existed entirely independent of the appellant. Production of them to the Department did not constitute self-incrimination. The subsequent use of the T4 slips also did not implicate the principle against self-incrimination.

[22] Bennis, Warren and Townsend, Robert. (1991). *Reinventing Leadership: Strategies to Empower Organization*. New York, N.Y.: Simon and Schuster Inc.
[23] O'Toole, James. (1995). *Leading Change: Overcoming the Ideology of Comfort and the Tyranny of Custom*. San Francisco, Calif.: Jossey-Bass Inc.

> The prosecution did not seek to use possession of the T4 slips by the [accused] for any communicative purpose, such as to prove knowledge or to imply an admission against interest. The documents spoke for themselves and constituted evidence of employment income.

Search and Seizure

Section 8 of the *Charter* protects a person's reasonable expectation of privacy. In this case, the accused recognized that she did not have a reasonable expectation of privacy if the T4 slips were only used for determining her benefit eligibility or to prosecute her for breaches of the provincial statute. However, she argued that once the police obtained the documents an unreasonable seizure occurred because she had a reasonable expectation that the documents would not be given to the police in furtherance of a criminal prosecution. Even though in some cases the difference between regulatory enforcement and the criminal process has constitutional consequences, in this case the reasonable person could not expect that the documents provided to CSD would not be used in criminal proceedings involving the fraudulent receipt of benefits. Where the prosecution took place, either in provincial offences court or criminal court, made no difference in whether the person would have a reasonable expectation of privacy. The nature of the state conduct did not change; it was the same allegation (fraudulent receipt of benefits) but to different degrees (criminal v. provincial). Since the accused did not have a reasonable expectation of privacy, s.8 was not engaged and the evidence was admissible. Her appeal from conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

POLICE ACADEMY INSTRUCTOR TOP COP AT SHOOTING COMPETITION

The British Columbia PPC Provincial Championship Shooting Tournament was held at the Port Coquitlam and District Hunting and Fishing Club range during the August long weekend. RCMP Sgt. Steve Wade, firearms instructor at the Police Academy, was one of the many competitors. Sgt. Wade came in first place in the Distinguished Master classification of the Duty Pistol event and was the top Police Officer in the Duty Pistol class of the tournament.

SEARCH OF PRISONER's MAIL REASONABLE: NO EXPECTATION OF PRIVACY

R. v. Lamirande & Guimond, 2002 MBCA 41

The accused Lamirande and Guimond were arrested, along with others, and charged with the murder of a store employee during the course of a robbery. Lamirande appealed her manslaughter conviction arguing, in part, that her right to be free from unreasonable search and seizure had been violated when the police examined her documents when she was admitted to a correctional institution. Guimond appealed, among other grounds, that his right to silence had been violated when the police persisted in questioning him after he told them he did not wish to speak and for not being told the interview was being video recorded.

Search and Seizure (Lamirande)

Lamirande was lodged by the police at a remand centre and was then transferred by correctional authorities to a correctional institution. Upon admission to the correctional institution, her personal property was searched including her mail, which was opened. The Crown argued that some of the documents, which were notes and poetry, contained references confirming that the accused was associated to an aboriginal street gang (the Indian Posse) and provided statements from which a jury could draw inferences she had knowledge of the robbery. The accused was convicted at trial, but appealed to the Manitoba Court of Appeal arguing that the search of her mail violated her right to be secure from unreasonable state intrusion, a protected right under s.8 of the *Charter*.

Although Lamirande was an incarcerated prisoner and agreed that a search for weapons or contraband was valid, she argued that the documents were private and she maintained a reasonable expectation of privacy in them. This, it was suggested, prevented the authorities from reading them. On the other hand, the Crown asserted that Lamirande had a gang association and the province of Manitoba not only had an extensive contraband and search policy created pursuant to the provincial Corrections Act, but also an institutional Gang Management Strategy which prohibited the

possession of gang paraphernalia in any form, including "poems or documents evidencing gang involvement or activities". Furthermore, the Crown submitted, correctional facilities have an interest in safety and security and the power to search, inspect, and read documents flowed naturally from this objective. In addition, the Crown asserted that the accused was aware of the search procedures from a previous matter where she entered the correctional institution and that she knew any document in her possession would be seized and read. Thus, it was argued, the accused did not have a reasonable expectation of privacy.

The right to be secure against unreasonable search and seizure is only triggered when a person can demonstrate they had a reasonable expectation of privacy. In determining whether a person has a reasonable expectation of privacy, the court must use a "'totality' of circumstances through a 'multi-factor analysis'". Chief Justice Scott, for the unanimous Manitoba Court of Appeal, agreed with the trial judge that "there was no expectation of privacy given the inherent nature of a prison facility and the documents themselves". The "relationship between the parties (jail keeper and accused), the place where the information was obtained (prison), the manner in which it was obtained (a search upon admission), and the seriousness of the crime (manslaughter)" formed the context against which the expectation was to be assessed. Without an expectation of privacy, s.8 was not engaged and this ground of appeal was dismissed.

Right to Silence (Guimond)

Following the accused Guimond's arrest, two separate teams of police officers interviewed him. Although the interview was videotaped, the police did not specifically advise him of this despite standard police policy to seek permission from the detainee before videotaping. Guimond argued that the police violated his right to silence by tricking him into talking, since he did not know the interview was being recorded. He submitted that the police told him the statement would be taken down in writing and deliberately lulled him into a false sense of security by leaving their notebooks outside the room knowing the interview was being recorded. Furthermore, he asserted that the police continued to question him despite his desire not to speak which was communicated to the police several times. The trial judge concluded that the error in not informing the accused of the recording was inadvertent, that he was fully aware the interview was being videotaped (the camera was in plain view), and that the statements were not induced by the police. Thus, the interview was admitted into evidence.

The right to silence entrenched in s.7 of the *Charter* protects a person's right in making a meaningful choice as to whether to speak to the police or not. Guimond was told on arrest of both his right to counsel under s.10(b) as well as that he was "not bound to say anything". In rejecting this portion of his argument, Chief Justice Scott stated:

> Guimond's fundamental right to make a free and meaningful choice whether to speak or remain silent was not violated. He was fully informed, and chose to speak to two teams of police officers at length about the facts surrounding the robbery. He could not have believed for an instant that his responses to the police officers were off the record or that no record of the conversation was being or could be made. Whether in the end the conversation was recorded, or written down by hand, or notes were made later, Guimond was well aware that he was speaking "on the record". There is no air of reality in the assertion that Guimond was somehow misled by the police when he was told that anything he said will "be taken down in writing and used as evidence". He knew he did not have to speak to the police.

The Manitoba Court of Appeal also upheld the trial judge's finding that the accused's statement was voluntary. Although police trickery may in some situations neither violate the right to silence nor undermine voluntariness, it may, if it shocks the community, render a statement inadmissible. However, this case was not such a case. The Court stated:

> Even if the police conduct had been deliberate in failing to advise Guimond of the fact his testimony was being videotaped, he was fully aware of his right to remain silent and chose not to do so. This is not a case…where the police engaged in a deliberate trick to induce the accused to talk. Here the choice was made freely, the only dispute being at best over the way in which the evidence was recorded. These circumstances would hardly "shock the community".

The accused's appeals were dismissed.

Complete case available at www.canlii.org

Editor's note: An appeal in this decision has been filed with the Supreme Court of Canada.

TRACE AMOUNT OF COCAINE INSUFFICIENT FOR CONVICTION

R. v. Marusiak, 2002 ABQB 774

The accused picked up a prostitute in his truck as he drove through an area of Calgary known as the "stroll". After being asked for a cigarette by the prostitute, the accused gave his cigarette package to her and she kept it until they arrived at a desolate area near some railroad tracks, which was commonly frequented and used for exchanging sexual favours. While there, the accused joined in and smoked what he believed was cocaine from a crack pipe provided by the prostitute. Two uniformed police officers approached the vehicle. They identified themselves and ran checks on the names of both the accused and the prostitute. The police were led to believe that the accused had narcotics in his vehicle after the prostitute, who was in violation of the conditions of her recognizance, spoke to them. A search of the accused's truck and person was conducted and trace amounts of cocaine were found in the prostitutes crack pipe and in the accused's cigarette package. The items were seized and the weight of the residue was negligible, weighing 0.0 grams. Following a chemical analysis, it was determined the items contained trace amounts of cocaine and the accused was convicted at trial of possession. The trial judge reasoned that the accused was at one point in possession of a useable amount of cocaine (more than the residue which was left over) since he smoked a pipe full of crack. The accused appealed his conviction to the Alberta Court of Queen's Bench.

Justice Sullivan concluded that the trial judge erred in his determination that there was sufficient evidence to support the conviction. The doctrine of *de minimus non curat lex* (the law does not concern itself with trifles) should have been applied. "The principle behind this ancient legal maxim in connection with narcotics is that the law should not concern itself with very small quantities of drugs" and may be applied where there are minute traces or residue (non useable or measurable quantities); particularly when "the very nature of the substance has changed in character so that it can no longer be used for any purpose" (ie. burned after being smoked).

Furthermore, for a charge of possession of cocaine, the court must be satisfied that the accused had the required knowledge or control of the drug. In this case, "the residue in the pipe was barely detectible, if at all, with the human eye, nor did it bear any weight that would qualify as a useable amount". Justice Sullivan had "serious concerns over whether an individual can have requisite knowledge of, or control over, a substance of such a minute, immeasurable, unusable quantity, a substance which that individual does not even realize is present". Moreover, the pipe belonged to the prostitute and was left in the truck after she was removed by the police. There was sufficient doubt about whether the accused had control over the pipe. Likewise, there was insufficient evidence that the accused had knowledge of the cocaine inside his cigarette package. The prostitute had the package in her possession for a brief time and there was insufficient evidence to prove the accused was responsible for the trace amount of cocaine found within it.

Finally, even though the accused testified he believed he was smoking crack cocaine, there was inconclusive evidence that was in fact what he had smoked. The Certificate of Analysis identified the nature of the trace amounts of substance found in the pipe, but could not demonstrate how or when it got there. Thus, Justice Sullivan held that the Certificate did not conclusively prove what the accused actually smoked. The conviction for possession of cocaine was set aside and an acquittal was entered.

Complete case available at www.albertacourts.ab.ca

UNLAWFUL IMPAIRED ARREST NOT ARBITRARY

R. v. Barci, 2002 BCPC 0327

A police officer approached a vehicle stopped in a parking lot after he had observed it being driven. While speaking to the driver, the officer detected a strong odour of liquor coming from the vehicle, noted the accused's eyes were watery with dilated pupils, and that his head "bobbed" as he looked around. The accused's speech was thick and slurred and he had difficulty removing his wallet from his pocket and producing his driver's licence. After asking the driver to step from the vehicle, the officer noted a strong smell of liquor emanating from the accused. The officer formed the opinion that the accused's

ability to operate a motor vehicle was impaired by alcohol and placed him under arrest. He was handcuffed, placed in the police car, read his s.10 *Charter* rights, read the breath demand, and issued a 24-hour driving suspension under British Columbia's *Motor Vehicle Act*. After being transported to the police station and subsequently providing samples of 120mg% and 100mg%, the accused was released from custody on a Promise to Appear.

During the *voire dire*, the officer testified that the accused had identified himself satisfactorily and there was no evidence at the scene to preserve nor did he need any other evidence beyond the breath samples to prosecute the impaired charge. Furthermore, there was no reason for the officer to believe that the accused would not attend court when served with the Promise to Appear. The accused argued that the arrest was unlawful because the officer failed to comply with s.495(2) of the *Criminal Code* and was therefore an arbitrary detention contrary to s.9 of the *Charter*. Thus, the evidence obtained as a result of the detention, including the breathalyser readings, should be inadmissible under s.24(2).

The accused submitted that impaired driving is a hybrid offence and the officer was satisfied with the accused's identity and no further evidence required securing or preserving. As for the breath samples, the accused must comply with a lawful demand under s.254 of the *Code* and an arrest is not necessary to ensure compliance with the demand. On the other hand, the Crown submitted that the "public interest" factors in s.495(2) is not an exhaustive list and must take into account "public policy considerations underlying the section". The need to prevent the repetition of criminal offences was achieved by the arrest. Had the arrest not been made, the officer would have been unable to prevent the accused from entering his car and driving.

Justice Lenaghan of the British Columbia Provincial Court held that the arrest was unlawful because the officer failed to comply with s.495(2) of the *Code*. Justice Lenaghan wrote:

> By his own admission, the officer knew the identity of the accused, was not concerned about securing or preserving evidence, and had no reason to believe that, if released, the defendant would not subsequently appear in court to be dealt with according to law. Nor, in the circumstances, could the officer have reasonably been concerned about the continuation or repetition of the offence of impaired driving or the commission of another criminal offence. Not only had he issued a 24-hour suspension to the defendant but, more importantly, had made a lawful demand to the defendant, pursuant to s. 254 of the Criminal Code. (I am satisfied on all the evidence that the officer had the requisite reasonable and probable grounds to make the demand.) The defendant either had to comply with or, if he thought he had a reasonable excuse not to do so, refuse this demand. In either case, in my view, the defendant would have been taken from the scene to the police station. If he complied, his lawful duty was to accompany [the officer] to have the samples taken and analyzed. If he refused, then, in my view, based on the evidence before the court of the symptoms observed by the officer, [the officer] would have been justified in arresting the defendant for refusing to provide samples of his breath. The concerns expressed by Crown counsel are, therefore, on the evidence before me, unconvincing and could not justify the arrest of the defendant.

However, not all unlawful arrests are arbitrary detentions under the *Charter*. The Court stated:

> Each unlawful arrest must be considered on its own, taking into consideration all the surrounding circumstances. To amount to an arbitrary detention, there must be something capricious about the arrest so that it may be said that no reasonable person could genuinely have believed that grounds for the arrest existed, that is to say, there was a complete absence of reasonable and probable grounds.

In this case, the actions of the officer in arresting the accused could not be regarded as capricious or arbitrary. Justice Lenaghan held that "[a]t its worst, [it] was an error made in good faith" while "[a]t its best, it was putting the cart briefly before the horse". Thus, the detention was not arbitrary and the application to have the evidence ruled inadmissible was dismissed.

Complete case available at www.provincialcourt.bc.ca

CARELESS DRIVING DOES NOT REQUIRE PROOF OF *MENS REA*

R. v. Morrison, 2002 YKCA 15

The accused, who was driving at or near the speed limit, was convicted of careless driving under s.179 of Yukon's *Motor Vehicles Act* when he struck an intoxicated pedestrian at night wearing dark clothing crossing a road mid block while it was snowing. There were other pedestrians in

the area and the accused did not stop even though other vehicles were coming to a stop. Section 179 of the *Act* reads as follows:

> Every person who drives a vehicle on a highway
> (a) without due care and attention, or
> (b) without reasonable consideration for persons using the highway,
> is guilty of the offence of driving carelessly.

The accused appealed to the Yukon Court of Appeal arguing that the verdict was unreasonable. He submitted that although he failed to meet the standard of care of the ordinary prudent driver in the circumstances, the trial judge failed to consider whether the accused was blameworthy.

The Yukon Court of Appeal, in a unanimous judgement, dismissed the appeal. Careless driving is a strict liability offence not requiring proof of blameworthiness or *mens rea*. All that is necessary is that the Crown proves that the person committed the prohibited act. The accused would then have to prove he took all reasonable care (what a reasonable person would have done) to avoid the circumstances. In this case, the trial judge found the accused breached the standard of conduct required by s.179 and therefore did the prohibited act.

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

WARRANTLESS DWELLING ENTRY UNREASONABLE, BUT EVIDENCE ADMITTED

R. v. David,
(2002) Docket:C26614 (OntCA)

Police entered a residence and found the bodies of two female adults and a child. One female adult (the accused's mother) had died from sledgehammer blows to the head while the other adult female (the accused's aunt) and her 10 year old son (the accused's cousin) died as a result of ligature strangulation. Neighbours informed the police that the 21-year-old accused lived in an apartment during the week while attending university and would come home on the weekends. One neighbour told police they had seen the accused at the residence 4 days before the bodies were discovered. After several unsuccessful attempts to contact the accused, police entered his apartment without a warrant 28 hours after the bodies were discovered and after the police obtained an opinion from a justice of the peace that there were insufficient grounds for obtaining a warrant. While entering the apartment, the police observed bloodstained clothing. This was later seized under the authority of a warrant the police subsequently obtained based on the observations made during the warrantless entry. A DNA warrant was also obtained and a sample of the accused's blood was seized for analysis. At trial, the accused was convicted of three counts of first-degree murder for the deaths of his mother, aunt, and cousin.

The trial judge concluded that the warrantless entry was not authorized by statute and therefore violated the accused's right to be secure against unreasonable search and seizure protected under s.8 of the *Charter*. However, he found the police acted in good faith and under exigent circumstances, which mitigated the seriousness of the breach. The police honestly and reasonably believed they should enter the accused's apartment to check if he was a victim or to question him as a suspect, and limited their entry and search for those purposes. The police entered because "they were concerned not only with their duty to interview [the accused] as a possible perpetrator, but also with their duty to notify him as a next of kin of his family's death, and also with their duty involving concerns for his safety as a possible victim". Further, the blood stained clothing was real, non-conscriptive evidence found in plain view. The police would have had reasonable grounds to obtain a search warrant anyways based on evidence discovered at the crime scene. Thus, the clothing's discovery was inevitable. The charge was serious and the bloodstained clothing and DNA analysis important pieces of evidence. The evidence was admissible because its admission would not bring the administration of justice into disrepute.

The accused appealed his conviction to the Ontario Court of Appeal arguing in part, that the trial judge erred in failing to exclude the evidence resulting from the warrantless entry into the accused's apartment. Although the accused conceded that the police may enter a home for the purpose of preserving life, he argued that the police did not have an objective basis for believing he was injured or dead within his apartment and therefore exigent circumstances did not exist. Moreover, even if the entry was authorized, the accused submitted that the plain view doctrine does not apply to police observations made during emergency entries of this nature.

In dismissing the accused's appeal, Justice Simmons for the unanimous Ontario Court of Appeal held the trial judge's conclusions were not in error. The trial judge's findings of exigent circumstances and good faith were supported by the evidence and he did not err in his s.24(2) analysis.

Complete case available at www.ontariocourts.on.ca

LATE NIGHT HYDRO ENTRY UNREASONABLE, BUT EVIDENCE ADMITTED

R. v. Pham, 2002 BCCA 503

Police, executing a search warrant on a home to search for evidence of theft of electricity, discovered two rooms containing about 180 marihuana plants, venting, lighting, and an electrical bypass. While the police were in the process of obtaining a second search warrant to seize the evidence of the grow operation, the accused entered the residence through a locked door. She was arrested and provided her s.10(b) *Charter* rights. During a *voire dire*, a statement made by the accused was ruled inadmissible by the trial judge because of a s.10(b) violation. Although she had been advised of her right to counsel, the police did not give her access to a lawyer within a reasonable time.

The trial judge also found that the first warrant was obtained in violation of the accused's right under s.8 of the *Charter* to be protected against unreasonable search and seizure. The police relied upon the electrical meter readings made by a B.C. Hydro employee, which were taken at 1:28 am when he went onto the accused's property. The *B.C. Hydro and Power Authority Tariff* only allows Hydro employees free access to meters if they enter at a reasonable time. The trial judge concluded that the time the employee went onto the property was not reasonable and therefore his entry amounted to a trespass. Since the Hydro employee was an agent of the Crown, his actions violated s.8 of the *Charter* and the meter reading was excised from the warrant. Without this evidence, there was insufficient grounds upon which to grant a warrant and it was consequently quashed. However, the evidence was ruled admissible under s.24(2) of the *Charter*. The trial judge found the police and the hydro employee acted in good faith and the trespass was onto the accused's property, not into her home, which mitigated its seriousness.

The accused subsequently appealed her convictions of possession of marihuana for the purpose of trafficking, production of marihuana, and theft of electricity arguing, in part, that the trial judge misapplied the proper analysis for exclusion. She submitted that the trial judges findings of good faith were unreasonable. In rejecting this ground of appeal, Justice Ryan for the unanimous British Columbia Court of Appeal held the trial judges findings were reasonable. The Hydro employee, who had not been directed by the police, believed he had the authority to enter onto the accused's property at the time he did, the entry was disclosed by police in the information to obtain the warrant, and the police did not deliberately withhold anything from the justice of the peace. Justice Ryan also rejected the argument that the trial judge failed to consider the s.10(b) breach in admitting the evidence resulting from the search. In Justice Ryan's view, there was not a sufficient connection between the s.10(b) violation and the s.8 breach for them to be considered together. The appeal was dismissed.

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

INCOMPLETE RECORDING OF INTERVIEW DID NOT BREACH DISCLOSURE DUTY

R. v. Jordan, 2002 BCCA 330

The accused, who had previously been convicted of manslaughter for supplying a lethal amount of liquor to a female alcoholic, was placed on a recognizance under s.810.2 of the *Criminal Code* after a police officer swore an information that he had reasonable grounds to believe the accused would commit a personal injury offence. Following his arrest for breach, he was interviewed by the police, which was audio recorded. Unfortunately, the officer pushed the play instead of the record button, and the first 45 minutes on side one of the tape was blank. Realizing his mistake, the investigator made notes of the first half of the interview from memory. Although the Crown had no intention of entering the interview as evidence since it was exculpatory, the tape and notes were properly disclosed to the accused. At trial, the accused was

convicted of two counts of breaching his recognizance. He appealed to the British Columbia Court of Appeal arguing, among other grounds, that the Crown breached its duty of disclosure by failing to preserve and disclose evidence, which deprived the accused from making full answer and defence which is protected under s.7 of the *Charter*. In rejecting this ground of appeal, Justice Donald, for the unanimous British Columbia Court of Appeal, stated:

> The Crown gave the [accused] what it had, including notes of the unrecorded part of the interview. Nothing that existed was withheld. While the police are well advised to record interviews like this, the law does not require them to do so. Here, the absence of a recording was inadvertent and the officer did his best to recall what the [accused] said. The error was inconsequential because the [accused's] position was the same throughout the entire interview in maintaining his innocence.

Thus, "the non-recording of the first half of the interview did not deprive the right to make full answer and defence". Furthermore, the accused argued that because the officer suggested he could tell the accused's side of the story in court if he gave a statement, this amounted to a binding commitment on the Crown to lead the exculpatory statement without the need of the accused testifying on his own behalf. Justice Donald found the accused "had the opportunity to put his version into evidence by giving sworn testimony, but he cannot force the Crown to lead an exculpatory statement in the circumstances of this case".

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

UNINTENTIONAL 'GATING' PROCEDURE NOT AN ABUSE OF PROCESS

R. v. Benson, 2002 BCCA 291

The accused was originally charged with two counts of robbery for the removal of money from Liquor Store cash registers. About three months later a warrant was issued for his arrest. The accused was in custody at a correctional centre where he had been serving an unrelated sentence and the warrant was not executed until the day of his release, some two months after the warrant was issued. At trial, the accused was convicted of two counts of the lesser included offence of theft on the robbery charges. The accused appealed to the British Columbia Court of Appeal contending, among other grounds, that the delay in issuing and executing the arrest warrant was an abuse of process.

In referring to what he called "gating", the accused argued that the police had reasonable grounds to charge him for the robbery offences, but the delay in issuing the warrant and subsequently executing it at the gate of the correctional centre on the day of his release amounted to an abuse of process and *Charter* violation. An affidavit was filed by the police, which outlined the chronology of events beginning with the initiation of the investigation. Although Justice Thackray for the unanimous appeal court called the accused's gating submission interesting, he dismissed the accused's appeal and stated:

> While the investigation did not proceed with great haste, I am satisfied that because of case loads, illness and an unexplained lack of information about the whereabouts of the [accused], the process was neither deliberately delayed nor designed to accomplish the gating procedure about which the [accused] complains.

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

ABBOTSFORD POLICE WIN SOCCER GOLD AT NORTH AMERICAN CHAMPIONSHIP

The Abbotsford Police Department (B.C.) won gold in the men's recreational division at the 2002 North American Police Soccer Championships held in Los Angeles, California from September 4th-8th. Representing the smallest police department in the tournament, Abbotsford was undefeated in five straight games and out scored their opponents 12-1. On their way to the final, Abbotsford was victorious over Ventura County (California), Halton Regional (Ontario), New Jersey, and Philadelphia. In the final, Abbotsford beat York Regional (Ontario) 2-0. The Soccer Championships hosts men and women law enforcement soccer teams from all over North America and Bermuda. Past host cities have included Abbotsford (1996), Philadelphia (1997), Bermuda (1998), Vancouver (1999), St. Louis (2000), and Toronto (2001). This was not Abbotsford's first win in

the competition. They won gold in 1999 and were runners up in 1996 and 2001. Next year's tournament is in New York while the Abbotsford Police Department is scheduled to host the event in 2005. Congratulations!!!

LIVING ON THE AVAILS PROVIDES FOUNDATION FOR POSSESSION OF CRIME PROPERTY & LAUNDERING

R. v. Friesen, 2002 SKCA 32

The accused, who ran an escort dispatching service, was convicted of two counts of living on the avails of prostitution of another person (s.212(1)(j) *Criminal Code*), but acquitted of possession of property over $5000 obtained by crime (s.354(1) *Criminal Code*) and laundering proceeds of an enterprise crime offence (s.462.31(1) *Criminal Code*). The trial judge concluded that s.212(1)(j) could not provide the foundation for either of these offences. Crown appealed the acquittals to the Saskatchewan Court of Appeal arguing that the trial judge misconceived the relationship between s.212(1)(j) and ss.354(1) and 462.31(1), and that this may affect future prosecutions of this nature.

Possession of Property Obtained by Crime

Section 212(1)(j) is targeted at those who parasitically live off the earnings of a prostitute and creates an offence for a person to live wholly, or in part, on the avails of prostitution. Section 354(1) makes it an offence for a person to be in possession of property knowing that it was obtained from the commission of an indictable offence. Justice Cameron, for the unanimous Saskatchewan Court of Appeal, held there was no reason why these two sections could not operate together. He stated:

> A person who lives parasitically, in whole or in part, on the earnings of a prostitute may, if that person comes in for a share of the earnings, acquire property therewith and be in possession of that property. That is what happened here. The [accused] routinely received a proportionate share of the earnings of the prostitutes, deposited her share into a bank account, and then withdrew money from time to time for the purposes, among others, of acquiring the house she lived in, a car, a piano, and so on. It is this property, acquired by her while living on and using the avails of prostitution for these and other purposes that formed the subject matter of the charge under s.354(1). In other words she was charged with the possession of this property, knowing it hade been obtained by or derived, directly or indirectly, from the commission of the offence of living on the avails of another's prostitution.

Laundering Proceeds of Crime

Section 462.31(1) creates an offence for a person to use, deliver, dispose of, or otherwise deal with property or its proceeds with intent to conceal or convert it, knowing or believing that all or part of it was obtained or derived directly or indirectly as a result of the commission of an enterprise crime offence. An enterprise crime offence is defined as including an offence against s.212. If the accused laundered "her share of the prostitutes' earnings by turning it into interests in a house, a car, a piano and so forth, with the intent and knowledge required by the section", the trial judge should not have acquitted as he did. Both s.212(1)(j) and s.462.31(1) are capable of operating together.

Complete case available at www.canlii.org

MINOR WARRANT DEFECT DOES NOT RENDER ITS EXECUTION UNREASONABLE

R. v. Hebert,
(2002) Docket:C35808 (OntCA)

The police obtained a faxed copy of a search warrant that did not contain the time after which the warrant could be executed. The officers confirmed by telephone that the warrant could be executed after 11:00am and did execute it after this time, when the accused was not present. The accused was found guilty but appealed his drug conviction to the Ontario Court of Appeal arguing that the warrant was invalid and executed in a unreasonable manner. In dismissing the appeal, the Court found "the defect in the copy of the warrant had no effect on the way it was executed and in no way compromised the accused's privacy interests or any right he may have had to know the contents of the warrant had he been present when it was executed". The minor defect in the copy of the warrant did not render the manner in which the warrant was executed

unreasonable. Moreover, the fact the officer who swore the information to obtain the warrant did not identify the particular officer by name who provided him information was not significant and did not render the warrant invalid. Although "the officer could have been more precise in identifying which officer directly provided information to him", the officer swore that all the officers provided reliable information. Similarly, the officer's failure in fully detailing the criminal records of the three confidential informants was not fatal. There was no evidence that the partial details provided were inaccurate or that the full criminal records would have impacted the justice of the peace's decision to grant the warrant. Furthermore, "the information provided by the confidential informants and the officers' reasons for believing that information were sufficient when considered in their totality to justify the issuing of the warrant. There was some confirmation of material aspects of the information provided by the informants in the other parts of the information. The [accused] did live where the informants said he lived and he did have a record for drug trafficking".

Complete case available at www.ontariocourts.on.ca

BODILY HARM INCLUDES 'EMOTIONAL REPERCUSSIONS'

R. v. MacLeod, 2002 NSCA 24

The accused was convicted by a jury of sexual assault causing bodily harm. He had met the victim at a bar and had been invited into her apartment for a drink or to smoke some hashish after the two had walked with each other from the bar. Sometime thereafter, the accused pinned the victim to her bed by straddling her and held her wrists while attempting to force his penis into her mouth. He also threatened to knock the victim's teeth out if she did not keep quiet. During the struggle with the accused, the victim suffered bruises to her neck and arms that lasted a week and a number of small cuts to her face caused by the sharp edges of the rings she was wearing, one of which left a scar. Further, the victim was visibly shaken after the event and had testified she suffered emotionally, which adversely affected her willingness to be intimate in her current relationships. The accused appealed his conviction to the Nova Scotia Court of Appeal arguing in part, that the injuries sustained by the victim were insufficient to meet the threshold of "bodily harm".

Bodily harm is defined in s.2 of the *Criminal Code* as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". Bodily harm is not restricted to physical injury, but has been interpreted by the Supreme Court of Canada to include "psychological harm"[24]. In dismissing the accused's appeal, Justice Saunders for the unanimous Nova Scotia Court of Appeal noted the physical injuries in this case were at the low end of the scale. However, "relatively minor physical injuries" can constitute "bodily harm" in sexual assault cases and the injuries suffered by the victim were not trifling, considering the "emotional repercussions" experienced by the victim. As a result, there was adequate evidence upon which a jury could find the accused guilty of causing bodily harm while committing a sexual assault.

Complete case available at www.canlii.org

UNLAWFUL DETENTION ARBITRARY, BUT STATEMENT ADMISSIBLE

R. v. E.W., 2002 NFCA 49

The accused was arrested for historical sexual offences at about 6:00 pm., but did not appear before a justice of the peace until about 5:46 pm. the following day. After the accused was taken into custody, the police interviewed his estranged wife which was completed at about midnight. However, during the next morning and up until 3:20 pm. that afternoon, the police took no action with the investigation. Furthermore, there was no explanation of why the police waited until the afternoon to ask the accused if he would provide a statement. At the time he was brought before a justice, the accused was providing a statement to the police. After completing the statement the accused was granted judicial interim release with conditions.

The accused argued that he had been arbitrarily detained when he was arrested and unlawfully held in custody for almost 24 hours before appearing before a justice. Had the interview not been interrupted to

[24] R. v. McGraw [1991] 3 S.C.R. 72

permit the hearing before a justice of the peace, the 24-hour time limitation imposed by s. 503(1) of the *Code* would have been breached. The trial judge concluded that the accused was not arbitrarily detained and he was convicted of the sexual offences for which he was charged. The accused appealed to the Newfoundland Court of Appeal arguing, among other grounds, that the trial judge erred in concluding that the accused was not arbitrarily detained in violation of s.9 of the *Charter*.

Arbitrary Detention

Section 503 of the *Criminal Code* guarantees the accused an opportunity to seek release from custody and requires that a person held by police be brought before a justice without unreasonable delay and in any event within 24 hours. What constitutes unreasonable delay will depend on the particular facts of the case and the 24-hour time limitation is the outer limit of permissible detention. In some cases, even though 24 hours has not expired an unreasonable delay could nevertheless occur. In this case the police were unable to explain the delay in interviewing the accused. There was "no evidence that the delay was due to other demands that affected the ability of the police to deal with [the accused] or the investigation expeditiously". Justice Welsh, for the unanimous Newfoundland Court of Appeal, held:

> Where there has been a delay in taking an arrested person before a justice of the peace, that delay must be justified as reasonable. Justification requires an evidentiary foundation. In this case there is no explanation for more than six daytime hours during which [the accused] was held in custody. This is a significant period of time particularly when considered in light of the purpose of section 503(1).
>
> In the result, the conclusion was followed that [the accused's] detention contravened section 503(1) of the Criminal Code. His detention was, therefore, unlawful.
>
> That unlawful detention also constituted an arbitrary detention under section 9 of the Charter. The violation of section 503(1) was not a mere technical error. Nor was it explained by activities of or exigencies faced by the police. [The accused] had the fundamental right to have his detention assessed by a justice of the peace without unreasonable delay.

The Court found that "the length of the delay, the surrounding circumstances, and the failure of the police to account in any way for their failure to bring [the accused] before a justice of the police without unreasonable delay resulted in an arbitrary detention". Thus, his right under s.9 of the *Charter* was violated.

Statement Admissibility

The accused argued that the statement made by him should be ruled inadmissible under s.24(2) of the *Charter* as remedy for the s.9 breach. In assessing whether the statement was admissible, the Court would (1) have to determine whether there was a causal link between the s.9 *Charter* violation and the statement and if so, (2) would the administration of justice be brought into disrepute if it were to be admitted into evidence. Bearing in mind that the delay in obtaining a statement is not by itself sufficient to establish a causal connection, under the first prong of the analysis the accused would have to demonstrate that he would not have provided the statement to police if he had not been detained until the late afternoon. The accused was unable to establish that his detention at the point it became arbitrary had any relationship with or connection to him providing a statement. There was no oppressive of improper conduct by the police nor was the delay in bringing the accused before a justice designed to increase the likelihood of obtaining a statement. Since the accused was unable to prove the necessary causal connection between the arbitrary detention and the giving of his statement, s.24(2) was not engaged and the statement was admissible.

Complete case available at www.canlii.org

NON-PRESUMPTIVE CARE & CONTROL REQUIRES RISK OF DANGER

R. v. Burbella, 2002 MBCA 106

The accused re-attended the accident scene where he had driven his vehicle into a snow filled ditch, which caused extensive damage to his vehicle and rendered it wholly inoperable. When the tow truck and police arrived, the accused got behind the wheel of the vehicle at the request of the tow truck operator and turned the engine on to disengage the steering mechanism which assisted with the recovery of the vehicle. When the accused exited the vehicle, he was promptly arrested by police and charged with care and control of a motor vehicle while impaired. At trial, the accused did not dispute that he was impaired but testified that he had consumed alcohol after the accident and prior to his

re-attendance at the scene. The accused was convicted by the trial judge, but appealed to the Manitoba Court of Appeal arguing that there was no risk of the vehicle being put in motion and therefore his conduct did not constitute a danger to the public, the evil s.253 of the *Criminal Code* is intended to address.

After examining several Supreme Court of Canada judgements, Chief Justice Scott for the Manitoba Court of Appeal concluded that the "purpose of [s.253 of the Code] is to protect the public from the danger which can occur when an impaired person gains control of a motor vehicle". Furthermore, "the risk of putting a vehicle in motion so that it could become dangerous is…an element of care and control, which is the risk…the care and control legislation seeks to prevent".

There are two methods by which the Crown can prove care and control; (1) by resorting to the presumption found in s.258(1)(a) of the *Code* (occupant of the driver's seat) or (2) by proving actual (non-presumptive) care and control. If the Crown uses the care and control presumption, the absence of danger will not afford a defence. However, an intention not to drive may rebut this presumption. If rebutted, the Crown can nonetheless seek a conviction if it can be proven that the accused was in actual care and control.

Where the Crown relies on actual care and control short of driving, they must demonstrate the accused engaged in "acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous[25]". In this case, non-presumptive care and control had not been proven. The Crown was unable to rely on the presumption nor was the necessary element of danger present to prove actual care and control. The accused's conviction was overturned and an acquittal was entered.

Complete case available at www.canlii.org

Note-able Quote

"*Arguably, as a parolee, he has or should have a much reduced expectation of privacy and should be subject to police scrutiny and some searching that would be unacceptable with respect to citizens who are not under sentence*[26]". OntCJ Justice Duncan

[25] R. v. Ford [1982] 1 S.C.R. 231

[26] **R. v. Catroppa, [2002] O.J. No. 3399 (OntCJ)**

PAROLEE VEHICLE SEARCH UNREASONABLE, BUT EVIDENCE ADMITTED

R. v. Catroppa,
[2002] O.J. No. 3399 (OntCJ)

After stopping the accused driving, a police officer queried him on CPIC and learned that there was a parole suspension warrant outstanding. The accused was arrested, handcuffed, and placed in the police car. The officer returned to the accused's car, searched it, and found a flick knife in a lidded console, which the officer had to open, between the front seats. The evidence was that officer searched the vehicle without a warrant "incident to arrest and for valuables, since [the vehicle] was being seized". The accused was subsequently charged with possession of a prohibited weapon (the flick knife). At trial the accused argued, in part, that he was the subject of an unreasonable search and seizure contrary to s.8 of the *Charter*. He suggested that "the search incident to arrest power was not available [to the officer], since the underlying purposes for that power were not applicable nor in the arresting officer's mind" at the time of the search. The Crown sought to justify the search both as an incident to arrest and as an "inventory search".

Search Incident to Arrest

Although the arrest itself was proper, Justice Duncan of the Ontario Court of Justice found the search to be unreasonable as an incident to arrest. Searches incident to arrest can be for the purpose of finding evidence of an offence or for safety. In this case, the accused was not arrested for an offence (it was a parole suspension warrant) and "officer safety was not a concern as the [accused] was already in custody, handcuffed in the patrol car".

Inventory Search

The Crown also failed to justify the search as an "inventory search". Although Justice Duncan held that "the police have authority to enter [a lawfully seized] vehicle for the purpose of itemizing and safeguarding objects in plain view and the driver has no reasonable expectation of privacy in respect of such a search", the officer had to open the closed console to locate the knife. The inventory search is restricted to itemizing

visible valuables and does not authorize searches beyond plain view. To the extent the officer exceeded the "plain view" scope of the inventory search, the opening of the closed console was unreasonable and violated the accused's protections under s.8 of the *Charter*.

Evidence Admissibility

Even though he found a *Charter* breach, Justice Duncan nonetheless admitted the evidence. The violation was not serious. There was a significantly reduced expectation of privacy, the search was brief, minimally intrusive, and it "barely crossed the line". Furthermore, the knife was reliable evidence and necessary for a successful prosecution.

DETENTION & SEARCH UNLAWFUL: POLICE LACK ARTICULABLE CAUSE

R. v. Savory,
[2002] O.J. No. 2715 (OntCJ)

Two police officers on routine patrol in a high drug and related crime area stopped at a coffee shop. They used a technique where one officer would enter a door, and anyone who attempted to leave upon the police entering would be intercepted by the second officer at another door. At the coffee shop, one officer entered the west door and the accused was seen exiting out a second door. At the same time, the female shop owner pointed at the accused, as he was leaving. The second officer saw the accused leaving. The owner was pointing at the accused while looking at police. The officer observed the man, now in the entrance of a neighbouring store, look out and duck back into the entranceway. The officer approached the man and asked him to come back into the coffee shop. As they re-entered the coffee shop, the police heard the shop owner, who did not speak good English, mention the word "threaten" as she pointed at the accused. The man said he had no identification and the officer searched his pockets. Although no identification was found, the officer did find crumpled money. While being searched, the accused verbally identified himself.

He was subsequently arrested for investigation of threatening. After finding the crumpled money in the accused's pockets, the police became very suspicious that he may be involved in drug activity. The accused was told to open his mouth and lift his tongue. Although he merely wiggled his tongue, an officer observed the glimpse of a piece of crack cocaine wrapped in plastic. The accused was arrested for possession of crack cocaine, but the accused attempted to swallow the drugs. An officer applied pressure under the accused's cheekbones to prevent him from swallowing. The second officer yelled at the accused to spit the crack out and tried to get his hands around the accused's throat. During the struggle in which both officers sustained cuts to their hands from the clawing of the accused, he successfully swallowed the contents of his mouth. No further attempt was made to retrieve or detect the presence of drugs from within the accused. At trial, the accused made an application that the evidence be inadmissible because the police violated his s.8 (search and seizure) and s.9 (arbitrary detention) rights under the *Charter*.

The Detention

The first step in determining whether s.9 has been violated is whether there was in fact a detention. Justice Shamai of the Ontario Court of Justice concluded that the accused had been detained when he was asked to accompany the officer back into the coffee shop. The accused was a young black man on foot in a high crime area. Although race was not an issue in the investigation itself, the issue of race can be a significant factor in determining whether the accused exercised free choice. Having found the accused detained, the Court then examined whether the detention was arbitrary. For a detention not to be arbitrary, the police must have at minimum an articulable cause. Although the accused's actions were suspicious ("he concealed himself in a doorway after exiting the donut shop upon the entry of the police officers"), the police did not have an articulable cause to detain him. Justice Shamai stated:

> In the case at bar, I am of the view that while [the officer] was in execution of his duties in following [the accused] while his partner investigated the gesture of the shop owner. [The officer] was entitled to pursue his duties by asking questions of [the accused]. In these circumstances, he had nothing amounting to articulable cause…. He didn't know what sort of criminal conduct he was investigating. He only knew that the shop owner…was pointing at [the accused] as he left the store, and that the store was located in an area whose law abiding citizens and business owners had asked police for help

against drug users and dealers and other criminals. At the point where he asked [the accused] to accompany him back into the store he was in fact asking him to help the police know why the shop owner pointed at [the accused] when he left. He had no knowledge of an offence; he was enlisting [the accused] in finding out whether he had done something wrong. Although he describes [the accused] as co-operative and coming voluntarily, my view is that realistically [the accused] had no choice. The fact that he did not fight nor did he protest is not evidence to the contrary, especially as his rights on detention, or his choices, were in no way described to him. In these circumstances, requiring him to do what the officer wanted, without articulable cause, amounted to an arbitrary detention.

The Search

Since the stop on the street was an arbitrary detention, the search could not be justified as an incident thereto. Even if it could be argued that the police did have articulable cause, a search would only be justified on officer safety grounds arising in the circumstances. In this case, the Court concluded the "search had nothing to do with officer safety" and stated:

> [P]olice action in connection with a properly founded detention must be determined contextually. The British Columbia Court of Appeal [has limited the ambit of search powers permissible on a proper detention] to the requirements of the offence being investigated, and at most, to issues of officer safety raised by the circumstances. Here, [he accused] was searched for the purpose of ascertaining his identity. He gave his name as he was being searched. That should have enabled the next proper stage of investigation. In my view there was no proper reason for a search of his pockets to be conducted as and when it was. At best, a search could be justified in ensuring officer safety through the investigation of the offence. No issue as stated in terms of officer safety: the search was explicitly for the purposes of aiding in the identification of [the accused]. The discovery of crumpled Canadian currency was outside the ambit of any proper search: there was no proper search at this stage. To further intrude into [the accused's] security of the person by attempting to search his mouth and requiring him to lift his tongue in a certain manner, then grabbing his throat and his face to make him spit and/or not swallow are entirely unwarranted and unreasonable actions in the circumstances.
>
> I might say that the only point of the officers' testimony on which I seriously doubted their good faith was when [the officer] said he wanted to remove the suspected cocaine from [the accused's] mouth for [the accused's] protection. No further action was taken by the police to assist [the accused] once the officers were convinced that he had swallowed the cocaine, the very thing they were trying to guard against, to take their evidence at face value. As to the rest of their actions, I have the impression that they believe their powers to be much broader than the prescriptions of common-law and constitution show them to be.
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> The search here exceeds constitutional bounds and amounts to a gross invasion of [the accused's] privacy and bodily integrity, not to mention his dignity. The demand for [the accused] to open his mouth was unrelated to the only lawful and limited purpose for which an unwarranted search might have been performed in these circumstances. Once an unlawful and unwarranted search was underway, to further explore [the accused's] body cavity, his mouth, in the middle of a restaurant, was a serious overstepping of police authority to search. Even if some search might have been permissible pursuant to the detention for articulable cause, the steps taken by the officers far exceeded that boundary.

Furthermore, the search could not be justified as an incident to arrest. Neither police officer had reasonable grounds (subjective/objective circumstances) upon which to base an arrest nor could they state what the offence was that they believed had been committed. Even though the "police are entitled to investigate further after an arrest is made", in this case the officer did not make an arrest for an offence, but arrested for investigation. The accused successfully satisfied the court that his rights under s.8 and 9 of the *Charter* had been infringed.

Note-able Quote

"*The duties which a police officer owes to the state are of a most exacting nature. No one is compelled to choose the profession of a police officer, but having chosen it, everyone is obliged to live up to the standard of its requirements. To join in that high enterprise means the surrender of much individual freedom".* Calvin Coolidge (1872-1933)

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