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 October 6, 2002, 54-year-old Surete du Quebec Corporal Antonio Arsenault was setting up cones to block off the left lane of a highway where a bus had broken down, when he was struck by an oncoming vehicle. Ministere des Transports du Quebec worker Jean-Yves Therrien was also hit and killed in the incident. Corporal Arseneault had served as a police officer for 32 years and is survived by his wife Jocelyne and daughter Julie.

Corporal Arseneault's death brings the number of peace officers killed in the line of duty in Canada this year to nine, seven of which were traffic related fatalities.

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

MANITOBA'S TOP COURT SANCTIONS POLICE SAFETY SEARCH

R. v. Mann 2002 MBCA 121

The police, responding to information of a break and enter in progress, found the accused, who matched the suspect description, walking on a sidewalk close to the scene. The attending officers stopped the accused to question him and conducted a "security search" by patting him down, looking for items that may be used as weapons. In the front pouch of his pullover sweater, the officer detected, by touch, something soft. The officer then went inside the pouch and found a baggie of marihuana. The officer testified that the soft item might be concealing something hard like a weapon behind it, and he was not about to stop his protective search for this reason. At trial the accused was acquitted because the judge concluded that the officer had no reason other than perhaps curiosity to go beyond the external pat down search when he felt something soft. Thus, the search was unreasonable and the evidence was excluded under s.24(2) of the *Charter*. The Crown appealed to the Manitoba Court of Appeal arguing that the trial judge erred in holding the search unreasonable and in excluding the evidence.

Justice Twaddle, writing for a unanimous Manitoba Court of Appeal, set aside the acquittal and ordered a new trial. Using the two-prong analysis of the *Waterfield* test (a legal analysis for determining the common law powers of the police adopted from the English case of *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.)) the Court concluded the police were justified in both detaining as well as searching the accused. When the police conduct constitutes a *prima facie* interference with a person's liberty or property (in this case the detention itself and the search that followed), the court must consider two questions:

(1) does the police conduct fall within the general scope of any duty imposed by statute or recognized at common law; and

(2) does the police conduct, albeit within the general scope of such a duty, involve an unjustifiable use of police powers associated with the duty.

The Detention

In concluding that the police power to detain a person without arresting them exists under the common law and meets both prongs of *Waterfield*, Justice Twaddle stated:

> Applying the first branch of the Waterfield test to the case at bar, I do not think there can be any doubt that the temporary detention of a person who matches the broadcast description of someone suspected of involvement in a recently committed serious crime in the immediate neighbourhood falls within the general scope of the duties of a police officer to prevent crime and protect

> life and property. Similarly, applying the second branch of the test, the temporary detention of the accused for the limited purpose of inquiry was entirely justified by the similarity of the accused's appearance to the description of the suspect broadcast to the officers. Indeed, it would have been a serious neglect of duty for the police officer to have permitted the accused to have walked into the night, so to speak, without stopping him, requesting identification and enquiring as to where he had come from. In stopping the accused for questioning, no unjustifiable use of a police power was involved. The detention was thus authorized by the common law.

The Search

In holding that the protective pat-down search also satisfied *Waterfield* and was authorized at common law, Justice Twaddle stated:

> Although the pat-down search was prima facie an unlawful interference with the accused's liberty, the search fell within the police duties to preserve the peace and protect life; this, because an armed detainee would present a threat to the public peace and to the lives of the police officers and any passing public. A pat-down search to ensure that the detainee was unarmed was a justifiable use of power associated with those duties

And further:

> [T]he pat-down search limited to a search for weapons was, in my view, both necessary for carrying out the police duties of preserving the peace, preventing crime and protecting life and reasonable having regard to the minimal infringement of the accused's right to personal integrity which the pat-down search involved. Moreover, the public purposes of preserving peace and protecting life weigh more heavily on the scale than the minimal infringement of the accused's right.

The accused had argued that it was unreasonable for the officer to search inside the pouch after the item he initially detected by touch was soft. He submitted that the officer would need to feel something hard or which "might conceivably be a weapon" before searching the pouch further. Although a protective search on detention is limited to weapons, a search of inside pockets may be reasonable where the external pat-down indicates something that may or could conceal a weapon. In rejecting the accused's submission, Justice Twaddle concluded:

> [A]s we are talking about a search undertaken for safety reasons, it would not be reasonable to place too rigid a restraint on a police officer's right to ensure that the detainee has no weapon or other object with which he might cause harm to the police, himself or members of the public. It is therefore my opinion that, so long as the court is satisfied that the search for weapons was conducted in good faith - and not as an excuse to search the detainee for evidence of a crime - the officer should be allowed some latitude. In the present case, the officer's explanation of why he searched inside the pouch - "... because I feel something soft in, in the front, it may be hiding something hard behind, another weapon or anything" - strikes me as a reasonable ground for extending the pat-down search to a search inside the pouch. There is certainly nothing to suggest that the officer was not acting in good faith in this regard.

Although the reasoning sounds consistent with numerous courts, which have dealt with investigative detention and articulable cause, Manitoba's top court directly applied the *Waterfield* test without addressing whether the officer had articulable cause for detaining and searching the accused.

Complete case available at www.canlii.org

CONGRATULATIONS, YOU'VE DECIDED TO BE A COACH, NOW WHAT?

Cst. Mike Lloyd

Field coaching can be challenging, rewarding and thought provoking. In some organizations coaching 'comes with the job', for others it may represent a stepping-stone to other roles or functions within the organization. Coaches themselves can often gain as much from the relationship as the new employee. Coaching can foster the development of new skills, revive some long dormant skills, and provide a fresh perspective on some aspects of your chosen profession. Let's begin to explore this by investigating what coaching and mentoring is all about.

Coaching Defined

Coaching is the process of exerting a positive influence in the motivation, performance, and awareness of areas for improvement and development of another person to help them be as effective as possible. This influence is linked to specific, measurable objectives.

Mentoring Defined

Mentoring is a process of developing an interdependent relationship between a mentor (usually someone older)

and protégé for the purpose of helping the protégé learn skills and behaviours to accomplish both short and long term goals, which the mentor has no stake in.

The Role of Coach

What are the expectations that are going to be placed on you as a coach officer? As a coach officer you are expected to be a role model, teacher, and leader. As well, you are a way to introduce a recruit to the policies, procedures, and methods that your organization uses to conduct its business. "Role model" is a powerful term denoting a person that is admired and given special status for the abilities that they possess. Role models are respected, emulated, imitated, and even envied for the position and status that they hold.

In the world that the new recruit is about to enter, the coach officer represents the portal. The recruit will see the occupation through the influential eyes of the coach officer. Why is the coach officer often held in such high regard? Because the coach officer has the practical experience that the new officer is seeking. The coach officer has done the job, and done it well.

Some implications of being a role model

A role model must lead by example, set the tone, and define professionalism. A role model always emphasizes the pursuit of excellence in all activities that they are involved in. Your behaviour and attitudes have a major influence on the individuals that you coach and therefore, you have to model the behaviour you wish to see.

As a teacher you are responsible to introduce the individual to a vast array of new skills and information about the career that they are about to embark upon. To be an effective teacher you must know your job and be able to use various teaching strategies to communicate this information to the people you train.

Author's Bio: Cst. Mike Lloyd has been a police officer since 1988 and is currently working in the Training and Education Unit, Officer Safety Section, Toronto Police Service, as a use of force instructor and has worked as a coach officer in the past.

Note-able Quote

"Don't cry when it's over. Smile because it happened"
Author unknown.

DETENTION ARBITRARY: OFFICER LACKS ARTICULABLE CAUSE

R. v. Robichaud, 2002 NBCA 46

A plain-clothes police officer set up surveillance from an unmarked police car in a parking lot of a Dairy Queen adjacent to a bowling alley because of an ongoing theft from vehicle concern. After observing several people go from the bowling alley to a parked black Jimmy SUV in the parking lot, spend a short time at, and then depart from the SUV, the plain-clothes officer requested a second officer check it. This second officer observed a vehicle of similar description moving through the parking lot approaching the roadway approximately 30 minutes later. The officer turned around and as he again approached the parking lot, the driver of the SUV turned around and proceeded back into the lot without leaving it and parked in a new spot. The officer checked the vehicle and found the accused, who was driving, had a slight odour of alcohol on his breath. The accused submitted to a breath test on an approved screening device, which ultimately led to failed breathalyser readings and charges of impaired driving and over 80mg%.

At trial, the judge found the stop arbitrary and a violation of s.9 of the *Charter* because the officer lacked an articulable cause to stop the vehicle. The breathalyzer results were subsequently excluded under s.24(2) of the *Charter*. The Crown successfully appealed to the New Brunswick Court of Queen's Bench. Justice Riordin found the detention to be justified in the circumstances because the "officer had reasonable cause to suspect that the driver of the vehicle was possibly involved in illegal activity". The detention was not arbitrary, was based on articulable cause, and the officer was "carrying out his duty to investigate suspected criminal activity". The accused appealed, this time to the New Brunswick Court of Appeal.

The Detention

Although New Brunswick's *Motor Vehicle Act* (s.15(1)(d)) allows the random stopping of motorists to check licence, registration, and insurance particulars, the officer was not using this statutory authority at the time of the detention. Thus, any support for a

lawful detention would need to be justified at common law under the articulable cause doctrine. Under the common law, "the police power to detain a person in the course of an investigation for criminal activity can only be justified if the police officer has articulable cause for the detention". Furthermore, a police officer may rely on hearsay to support the reasonable suspicion that the person is criminally involved in the activity under investigation. In this case, the evidence of the detaining officer did not support an articulable cause because he had only a "vague report of some activity around" the vehicle. Justice Larlee for the unanimous New Brunswick Court of Appeal stated:

> [The detaining officer] detained [the accused] in a parking lot, based on very spotty information that he had received from [the plain clothes officer], with the plan to check the vehicle for anything of suspicion. This might have been open liquor in the vehicle or anything in plain view that might have been taken from other vehicles. He wanted to check for suspicious activity. Bare suspicion…is not articulable cause.
>
> This detention took place in the parking lot adjacent to a bowling alley and a Dairy Queen restaurant not in an area, which one would normally associate with criminal activity such as a crack house…The black Jimmy could not be positively identified and the identity of the driver was unknown. I agree with the trial judge that [the accused's] s.9 Charter rights were infringed., and the police did not have lawful authority at common law to detain [the accused]. (references omitted)

Since the officer's subsequent observations of the accused which lead to the approved screening device demand were made at a time when the accused's s.9 right was violated, the evidence that flowed was inadmissible under s.24(2) of the *Charter*. The accused's acquittal was restored.

Complete case available at www.canlii.org

Note-able Quote

"*[T]he parameters under which violations of s. 9 of the Charter should be measured are conditioned by the adverb "arbitrarily" which sets the dividing line between detentions that violate s. 9, and those that do not. That line is drawn by applying the concept of articulable cause which requires more than explanation of subjective feelings, but requires the governmental agent's action to be justified by reasonable objective criteria*[1]". Newfoundland Court of Appeal Justice Marshall

[1] R. v. Burke (1997) 118 C.C.C. (3d) 59 (Nfld.C.A.)

LAW OFFICE SEIZURE PROVISIONS UNCONSTITUTIONAL

Lavallee et al. v. Canada; White et al. v. Canada; R. v Fink, 2002 SCC 61

Three separate appeals (from Alberta, Newfoundland, and Ontario) were brought before the Supreme Court of Canada arguing that the provisions for carrying out searches of law offices and seizing materials possibly protected by solicitor-client privilege (s.488.1 of the *Criminal Code*) violated ss.7 and 8 of the *Charter*. Section 488.1 creates a procedure in which the police, after executing a search warrant on a law office, are obligated to take special steps in securing seized materials. When a lawyer claims that documents are protected by solicitor client privilege, the police must place them in a sealed package and turn them over to a court.

The Attorney General, the client, or the lawyer on behalf of the client, then has 14 days to apply to a judge for an order concerning the disclosure of the material. The judge can inspect the documents, with the assistance of the Attorney General if necessary, and decide whether they should be disclosed. If the judge determines that the document is protected by solicitor client privilege, "the document remains privileged and inadmissible as evidence unless the client consents to its admission in evidence or the privilege is otherwise lost".

The majority of the Supreme Court of Canada (6:3) concluded, "s.488.1 of the *Criminal Code*…unconstitutionally jeopardizes solicitor-client privilege". Solicitor–client privilege (or legal professional privilege) "is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law" and "confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system". Section 488.1 "was enacted in an effort to…ensure that privileged communications made to a lawyer were properly exempted from the reach of [the state conducting a search of a lawyers' business premise]".

Although the lawyer acts as a "gatekeeper" to the privilege, it is the client who owns the privilege and all information protected by the privilege cannot be accessed by the state unless the client waives it. This privilege is a principle of fundamental justice in Canada and the client has an extremely high expectation of privacy in the documents in possession of their lawyer. Since the privilege must be as close to absolute as possible, the provisions of s.488.1 could only avoid *Charter* attack if they resulted in a "minimal impairment" of the privilege. Madame Justice Arbor, writing for the majority, found the provisions were constitutionally deficient because the privilege could be breached without the client's knowledge.

Since solicitor-client privilege is engaged at the time of communication, it does not require an affirmative assertion before it exists. Section 488.1 creates a situation where the privilege would be lost because a lawyer could fail to act by advancing the constitutionally protected right. "Therefore, s.488.1 allows the solicitor-client confidentiality to be destroyed without the client's express and informed authorization, and even without the client having an opportunity to be heard". Furthermore, the lawyer is required to make the privilege claim at the time of the search, which would trigger the other procedural safeguards. The privilege belongs to the client and the provisions do not adequately address the entitlement the privilege holder has to protect their rights. In fact, the client may not even know the privilege is threatened.

Jusitice Arbor went on to add that, even in cases where it would not be feasible to notify the client, independent legal intervention, such as a Law Society, should be involved to ensure protection of the privilege. Other fatal flaws to the current regime identified by the top court included (1) the lack of judicial discretion imposed by the provisions which mandate disclosure of the documents to the Crown in the event an application for privilege has not been made within the strict timelines and (2) the ability of the judge to request the assistance of the Attorney General by inspecting the potentially privileged document in helping to decide whether the material is privileged. In summary, Justice Arbor wrote:

> In short…s.488.1 fails to ensure that clients are given a reasonable opportunity to exercise their constitutional prerogative to assert or waive their privilege. Far from upholding solicitor-client confidentiality, s.488.1 permits the privilege to fall through the interstices of its inadequate procedure. The possible automatic loss of protection against unreasonable search and seizure through the normal operation of the law cannot be reasonable. Nor can the provision be infused with reasonableness in a constitutional sense on the basis of an assumption that the prosecution will behave honourably…if neither the client nor the lawyer has [initiated a review of the documents], or refrain from exercising the right to inspect the sealed documents, even though authorized to do so by the reviewing judge…

In concluding that s.488.1 violated s.8 of the *Charter* and could not be saved by s.1, the majority of the Court refused to read in or severe the existing law and suggested Parliament carefully redraft the legislation. They did however, provide general common law principles that would govern law office searches until Parliament completes its task:

- "No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.
- "Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
- "When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.
- "Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
- "Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.
- "The investigative officer executing the warrant should report to the Justice of the Peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.

- "If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
- "The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
- "Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.
- "Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

A Different View

Although the minority agreed s.488.1(4) allowing the prosecution (Attorney General) to read the documents while assisting the reviewing judge violated the *Charter*, the three dissenting justices concluded that s.488.1 could "be interpreted in a manner that comports with constitutional guarantees by assuming…that lawyers will discharge their obligations to their clients in a manner which reflects their status as…officers of the court, and…as independent professionals playing a key function in the life of the Canadian legal system". In their opinion, s.488.1 provided "reasonable and adequate safeguards against illegal searches or seizure and actually protected solicitor-client privilege, not destroy it". Justice Louis LeBel stated:

> [T]he picture of lawyers and staff passively standing by while the police rummage through the firm's files, seizing them and carting them away, appears highly hypothetical, to say the least. Even the most incompetent lawyer or the most absent-minded legal assistant or law clerk would not confuse a squad of RCMP or Sûreté du Québec officers armed with a search warrant, barging into the reception room, with the pizza man. In any firm, large or small, this kind of event should ring a few bells and trigger some kind of a response. A reasonably competent lawyer should be expected to realize that a question of privilege could arise, that he or she would need to review some or all of the files sought by the police and should make a claim of privilege where necessary.

The minority concluded that, with the exception of the prosecution assisting the judge in viewing the documents, s.488.1 satisfied the requirements of s.8 of the *Charter* in protecting persons from unreasonable search and seizure.

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

ADMINISTRATIVE REVIEW HEARING DOES NOT PRECLUDE CROSS EXAMINATION

Pointon v. Superintendent of Motor Vehicles, 2002 BCCA 516

A police officer followed the appellant's vehicle, stopped him in the driveway of his residence, and subsequently observed signs of impairment. As a consequence, the appellant provided samples of his breath that indicated a blood alcohol content of 160mg% and 170mg% and he was served with a 90-day administrative driving prohibition under s.94.1 of British Columbia's *Motor Vehicle Act* (the *Act*). Under s.94.4 of the *Act*, the appellant applied for a review and submitted affidavit evidence on his behalf, but the adjudicator confirmed the prohibition.

The appellant brought further proceedings under the *Judicial Review Procedures Act* seeking an order revoking the original prohibition as well as quashing its confirmation. The Supreme Court of British Columbia judge hearing this petition rejected the appellant's request, but ordered a new review hearing. At the second review hearing however, the adjudicator again confirmed the prohibition. Once again he filed a petition under the *Judicial Review Procedures Act*, which was rejected by a Supreme Court judge. The appellant further appealed to the British Columbia Court of Appeal arguing, among other grounds, that he was denied procedural fairness because he was not provided an opportunity at the hearing to cross-examine the police officer who issued the prohibition nor the technician who conducted the breathalyser tests.

Section 94.5 of the *Act* allows the adjudicator to consider any sworn or solemnly affirmed statements,

the report of the police officer issuing the prohibition, a copy of the certificate of analysis, and, in the case of oral hearing, any relevant evidence given or representations made (s.94.5(1)(d)). In concluding that the hearing is a judicial or quasi-judicial process and not simply an administrative inquiry as the Superintendent of Motor Vehicles suggested, Justice Lambert for the British Columbia Court of Appeal stated:

> The hearing is conducted by someone who has come to be called an adjudicator. The hearing contemplates a process of reasoning, leading to a conclusion based on evidence. It permits an oral hearing and if there is an oral hearing it requires that the additional relevant evidence given at the oral hearing must be considered. Most important, the oral hearing contemplates the weighing of the evidence and the making of findings of credibility on the road to balancing the evidence and reaching a conclusion on blood alcohol content.

Cross-examination is a crucial part to both the weighing of evidence and assessing its credibility. The administrative driving prohibition legislation does not exclude the right to cross-examine the police officer or breathalyser technician at the oral hearing, if it is requested and a proper foundation has been laid. A proper foundation for cross-examination can be laid by contradicting the evidence of the police and then by stating the basis upon which the police evidence is being contradicted. As a remedy, the Court revoked the administrative driving prohibition and quashed its confirmation.

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

POLICE ACADEMY OFFERS CAREER DEVELOPMENT COURSES

JUSTICE INSTITUTE OF B.C.

In order to meet the needs of police agencies and individual member's career goals, the Police Academy is launching a new program of **Career Development Courses** for police officers. Initially, a limited selection of Career Development Courses will be offered to police agencies and to individual police members on a cost recovery, fee-for-service basis.

The courses offered are selected from the Academy's Advanced Police Training curriculum and its Contract Law Enforcement Program and will provide candidates with practical knowledge and skills that will benefit the candidate's agency and will assist individuals to achieve their career goals. Many of the courses will provide accreditation toward a Police Sciences diploma or degree.

Service Increments

The Academy recommends that police agencies consider, where applicable, applying the successful completion of a Career Development Course toward service pay increment qualification. However, this is solely an interagency matter to which the Justice Institute is not a party. The Academy will make course outlines and course training standards available to police agencies upon request.

Registration

Since the Career Development Course program must be financially self-sufficient, it may be necessary to cancel any course where there are too few candidates registered to ensure the economic viability of the program. For that purpose the Academy has instituted the following registration policies:

Who may register

1. Career Development Course seats are offered only to recognized police agencies and to individuals who are serving members of a recognized police agency.
2. All candidates must pay the registration fees at the time of registration.

Late Registration

3. Registration will not be accepted while a course is in progress without the approval of the instructor and with permission in writing granted by the Program Director – Police Training Services. Under no circumstances will registration fees be pro-rated.

Withdrawal by a candidate

4. Registered candidates may withdraw from a course in which they are registered and receive a full refund provided the withdrawal occurs at least 7 calendar days prior to course commencement.

Course cancellation

5. The Academy may cancel any course at least 30 calendar days prior to its commencement.
6. A full refund of fees will be provided upon course cancellation
7. Where a course has not been cancelled, registration will remain open until the commencement of the course or until all seats are filled.

COURSE OFFERINGS

Intro to Criminal Intelligence

POL 636
December 2-4, 2002
0800– 1800 hrs

Location: Justice Institute of BC, 715 McBride Blvd. New Westminster, BC

Fees: $195.00

Course Length: 3 days (10 hours in class per day) + 10 hours practical exercises and a work-book.

Instructor: Mr. Peter Bell
Peter has been a practicing intelligence analyst for the past decade. He is currently employed as an intelligence analyst with the Organized Crime Agency of British Columbia. Peter served as a police officer in Australia for 15 years before retiring at the rank of Detective Sergeant in 1998. Between 1998 and 2000, Peter served as the National Intelligence Training Coordinator with the Australian Bureau of Criminal Intelligence and then as the Senior Strategic Intelligence Analyst with the Australian Federal Police. Peter holds a Masters in Education and is approaching the completion of a Doctoral thesis in the same discipline. He has developed and delivered intelligence training programs throughout Australia, Singapore, Hong Kong, the Middle East, and much of Southeast Asia.

Prerequisites:
Candidates must be members of an accredited police agency.

Texts and Equipment:
The instructor will provide: subject outline; book of readings; study guide; assessment module – workbook

Method of Course Delivery:
Lecture, class discussion, exercises

Evaluation Percentage:
Complete the activities at the end of each topic, the syndicate practicum and the Work Book contained in the Assessment Module. A 100% pass mark is required.

Tactical Surveillance Course

POL 646
February 17-21, 2002
0800– 1600 hrs. days 1,2,3 &5
1200– 2000 hrs. day 4

Location: Justice Institute of BC, 715 McBride Blvd. New Westminster, BC

Fees: $575.00

Course Length: 5 days

Instructor: Detective Bill Hudson
Bill has been an operational police officer for over 20 years with extensive experience in surveillance. He has instructed this Academy course for the past 8 years and is highly acclaimed as a presenter and provides a program that is current and relevant to the needs of modern police investigators.

Prerequisites:
Candidates must be members of an accredited police agency and hold a valid drivers license.

Texts and Equipment:
The Academy will provide all manuals, vehicles, video cameras, and radios.

Method of Course Delivery:
Lecture, demonstration, and simulation scenarios involving foot and vehicle surveillance.

Evaluation Percentage:
Complete the practice scenarios. Exam - minimum pass grade – 70%

For further inquiries contact:

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Check our website at www.jibc.bc.ca

Learning Together for Safer Communities

JUSTICE INSTITUTE OF B.C.

COURSE REGISTRATION FORM

(Fields marked with an asterisk * are mandatory for government reporting purposes. Information is protected under privacy legislation.)

CURRENT DATE: _____ HAVE YOU EVER TAKEN A COURSE AT THE JUSTICE INSTITUTE OF B.C.? ❑ YES ❑ NO

IF **YES**, JI STUDENT NUMBER (IF KNOWN):_____ PEN (IF KNOWN): _____

*LAST NAME	*FIRST NAME	MIDDLE NAME OR INITIAL
POSITION	ORGANIZATION	

The following is my: ❑ Work address ❑ Home address.

*STREET NAME AND ADDRESS		
*CITY/TOWN	*PROVINCE/STATE	*COUNTRY
*POSTAL CODE / ZIPCODE	E-MAIL ADDRESS	FAX ( )

EVENING OR HOME PHONE ( )	DAY PHONE ( )	CELL PHONE ( )	PAGER ( )

*DATE OF BIRTH (MM/DD/YY): _____ PREVIOUS NAME USED FOR REGISTRATION, IF ANY: _____ ❑ N/A

*IMMIGRATION STATUS: ❑ CANADIAN CITIZEN ❑ PERMANENT RESIDENT ❑ STUDENT VISA ❑ OTHER VISA ❑ NON-CANADIAN STUDYING OUTSIDE CANADA ❑ OTHER (SPECIFY) : ❑ UNKNOWN

*GENDER: ❑ MALE ❑ FEMALE ARE YOU OF ABORIGINAL HERITAGE? ❑ YES ❑ NO

DISABILITIES OR SPECIAL REQUIREMENTS (PLEASE DESCRIBE):

Many JI courses have prerequisites. Please read our course descriptions carefully before undertaking to register in a course.

COURSE NAME	COURSE NO.	START DATE	COURSE FEE
Note: Under current regulations JI courses are GST-exempt.		**TOTAL FEE**	

ENCLOSED IS MY COURSE FEE PAYMENT BY:

❑ Cheque or money order. Cheque issued by ❑ student or ❑ _____

❑ Mastercard ❑ VISA Name of Card Holder:

_____

CARD NUMBER: **EXPIRY DATE MM/YY**: __ __ / __ __

SIGNATURE OF CARD HOLDER:	JI USE ONLY: AUTHORIZATION NUMBER

❑ *Please check this box if you do not want to receive future mailings about JIBC programs.*

Send your registration form and payment or the same information by e-mail to:

Justice Institute of BC, 715 McBride Boulevard, New Westminster, BC, Canada, V3L 5T4

For registration only: Phone (604) 528-5590; Fax (604) 528-5653; e-mail: registration@jibc.bc.ca

Please use one registration form per student. Photocopy this form for use by each additional student.

ASKING ABOUT DRUGS EXCEEDS SCOPE OF SAFETY SEARCH

R. v. Wood, 2002 MBPC 10021

The police received a complaint from a woman that her boyfriend stole her cat and traded it to the accused in exchange for some drugs, which the police were able to confirm after interviewing the boyfriend at his residence. While exiting the boyfriend's home, the police by chance spotted, stopped, and questioned the accused. The accused told the officers he had accepted the cat for drugs and that he would direct the police to its location. The police advised the two men there would be no charges if the cat was located. Before the two men entered the police car for the drive to the accused's home, an officer asked whether they had any weapons or drugs on them. The accused, in response to the question, produced a receptacle containing marihuana roaches, a marihuana cigarette, a pipe, and a pair of scissors. The accused was charged with possession of marihuana, but argued that the drugs were discovered as a result of an arbitrary detention and an unreasonable search or seizure. Furthermore, the accused submitted he was not informed of his right to counsel upon detention as required by s.10(b) of the *Charter*.

Manitoba Provincial Court Justice Chartier concluded that "police officers have in certain circumstances, the right to detain a person for investigation of a criminal offence and to search that person for weapons to protect their safety during the detention" if (1) the officer is acting in the course of their duties, (2) the officer has an articulable cause to justify the detention, and (3) the detention and subsequent search are reasonably necessary.

The Detention

In this case, the officers were acting in the course of their duties. They were responding to a complaint of a stolen cat being traded for drugs and the investigation led to the accused, who was suspected of receiving the stolen cat. The officers also possessed the requisite articulable cause upon which to justify the detention. The accused told the officers that he had received the cat in exchange for drugs and that he could lead them to its location. Thus, "the police were entitled in these circumstances to briefly detain the accused to pursue their investigation".

The Search

In deciding whether the police were entitled to search the accused, the Court concluded that a search was justified if conducted only for safety reasons:

> The evidence before the court was that [the accused] was involved in the drug trade and as the officers knew this, it was certainly reasonable to believe he may be armed. To ensure officer safety, [the accused] was asked if he was armed. Under these circumstances I am of the view that [the accused] could be lawfully searched to ensure officer safety.

However, the police also asked the accused whether he had any drugs on his person. Their own evidence was that they did not have reasonable grounds to believe he had any drugs on him or that drugs were important for officer safety. Since a search incidental to investigative detention is a search for weapons only, not contraband, the question concerning drugs went beyond the scope of a safety search and should not have been asked. Justice Chartier stated:

> In this case, the police officers had no grounds to ask [the accused] whether he had drugs on his person and I cannot accept that he consented to producing the drugs or that he was aware of the potential consequences of voluntarily producing the drugs. I therefore am of the view that there was a breach of s.10(b) of the Charter.

Admissibility of Evidence

Despite finding that the accused's rights under the *Charter* were violated, the evidence was nonetheless admitted. Since the police were entitled to search the accused for safety even if he had not produced the items when asked, the drugs would have been found in any event during the search for weapons. The officers acted in good faith and admitting the evidence would not bring the administration of justice into disrepute.

Complete case available at www.canlii.org

Note-able Quote

" *'Violence' implies action which is thoughtless, random and without consideration. 'Use of Force' implies action that is purposeful, considered and rehearsed. Violence never solves anything. The Use of Force has resolved more conflict in human history than everything else altogether*". Vancouver Police Constable John Irving

RESISTING UNJUSTIFIED DETENTION REASONABLE

R. v. Rankine,
[2002] O.J. No. 3081 (OntCJ)

A police officer driving through a parking lot of a shopping plaza notorious for drug trafficking and drug use observed the accused, a known drug dealer. The officer, who was not investigating an offence at the time nor have reasonable grounds to arrest the accused, approached him and attempted to engage him in conversation about a topic the officer could not remember at trial. The officer testified that the accused did nothing wrong, had not been seen talking or transacting with anyone, had not made any phone calls, did not have a warrant for his arrest, nor did he try any doors of parked cars. As he came along side the accused, the officer observed that he was fidgety and uncomfortable, and turned and ran away. The officer yelled at the accused to stop, pursued him, and grabbed his arm. After the accused twisted and punched the officer in the chest several times, he was subdued, handcuffed, and searched. As a result of the search, the police found marihuana, scales, cash, and a cell phone. The accused was charged with assaulting a peace officer in the lawful execution of his duty and possession of marihuana for the purpose of trafficking.

Lawful Execution of Duty?

The Ontario Court of Justice found the officer was not in the lawful execution of his duty. The officer did not have reasonable grounds to arrest the accused at the time he grabbed him nor did he have an articulable cause to justify a detention under the common law. The officer was not engaged in any criminal investigation involving the accused or anyone else. Justice Edmondstone stated:

> [The officer's] only reason for detaining [the accused] was his knowledge of the area and of [the accused's] background and fidgety manner and running when the officer attempted to converse with him about some topic that the officer cannot recall. He had in my view no more than suspicions…

Since the officer was neither justified in arresting or detaining the accused, it was not unreasonable for him to punch the officer to get away. Thus, the accused was not guilty of assaulting a peace officer in the lawful execution of his duty. Moreover, the search was unreasonable as it was not incident to a lawful arrest. The drug evidence was excluded.

INTENTION TO DRIVE NOT NECESSARY FOR *DEFACTO* CARE & CONTROL

R. v Brahnuik, 2002 SKCA 104

The police responded to a complaint about the grossly inebriated accused entering his truck, starting it, and going to sleep across the bench seat in the parking lot of a bar. Police officers found his vehicle with the engine running, windows up, doors locked, and the accused slumped across the seat with his buttocks in front of the steering wheel, his feet on the floor by the operator's pedals, and his head towards the passenger door. After several attempts to arouse him, the police eventually were able to enter the truck and have him exit. At the police station, the accused subsequently provided samples of his breath which resulted in readings of 190mg% and 170mg%. The accused was charged with care and control while impaired and over 80mg%. At trial, the accused submitted that when he left the bar he was too intoxicated to walk, got into his truck, started it up to stay warm, and went to sleep. He testified he had no intention to drive the vehicle and argued that he was not in care and control.

Care and control of a motor vehicle can either be established by the statutory *Criminal Code* presumption or by proving actual non-presumptive, or *defacto*, care and control. Section 258(1)(a) of the *Code* creates a presumption that the person occupying the driver's seat is deemed to have care and control of a motor vehicle, unless they prove they did not occupy it for the purpose of setting the vehicle in motion (driving). Although the trial judge found the accused occupied the driver's seat, he successfully rebutted the presumption by testifying that he entered the truck to sleep, not to drive. *Defacto* care and control is defined as "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[2]". In convicting the accused of care and control with a blood alcohol content in excess of

[2] See R. v. Brahnuik, [2001] S.J. No. 816 (SPC)

80mg%, Saskatchewan Provincial Court Judge Nightingale stated:

> …I find…that [the accused] had actual care and control of the truck. I am satisfied that he possessed the immediate ability to set the vehicle in motion had he woken up, since it was running and in no way disabled. Indeed, the drunken, uncoordinated movements he made in response to the police commands to unlock the truck doors suggest strongly that he could easily have set the vehicle in motion through inadvertence. This set of circumstances establishes the *actus reus* of care and control. The *mens rea* is made out on the usual presumption that a person intends the logical consequences of their actions, demonstrated here by turning on the ignition and locking the doors; this shows an intent to exercise care and control of the truck and its fittings.

On appeal to the Saskatchewan Court of Queen's Bench, his conviction was overturned. Court of Queen's Bench Justice Dielschneider was of the view that simply because a person is in a position to use the vehicle or its fittings and equipment at some future time does not establish the necessary "control" required for the *actus reus*. The Crown appealed, this time to the Saskatchewan Court of Appeal. Justice Gerwing, for the unanimous appeal court, restored the conviction. Although the trial judge accepted that the accused had no intention to drive, his finding of actual care and control was consistent with the Supreme Court of Canada and Saskatchewan law.

Complete case available at www.canlii.org

Note-able Quote

"*I am not unmindful of the difficulties that sometimes face police officers. I am acutely conscious that our police forces perform an essential function in sometimes difficult and frequently dangerous circumstances. The police must not be officiously or unduly hampered in the performance of that duty. That is not a hollow piety; it is the law… They must frequently act hurriedly and react to sudden emergencies. Their actions must therefore be considered in the light of the circumstances… The performance of a policeman's duty is frequently attended with risk to others. But he is not liable to others for injury caused by the performance of duty if he acts reasonably*"[3]. Ontario High Court of Justice Reid

[3] Prior v. McNab (1976) 16 O.R. (2d) 380 (H.Ct.)

OFFICER HAD MORE THAN A DESIRE TO SATISFY CURIOSITY

R. v. Tomtene, 2002 SKQB 280

At 2:00 am. a police officer of a rural detachment observed a vehicle approaching a highway from a farm field. The officer was aware of numerous complaints during seeding season from area farmers who had batteries, tools, and fuel stolen from their seeding equipment left in the fields at night. The officer stopped the vehicle and noted an open bottle of beer on the dash and a partial case of beer behind the front seat. The accused had an odour of liquor on his breath, his speech was slurred, and his eyes were bloodshot. He was arrested, Chartered, and transported to the detachment for breathalyser tests which consequently resulted in readings of 220mg% and 210mg%. The accused was subsequently convicted of care and control while over 80mg%. The accused appealed his conviction to the Saskatchewan Court of Queen's Bench arguing that the police officer did not have reasonable grounds to stop the vehicle, thus violating his s.9 *Charter* right to be free from arbitrary detention.

Although Saskatchewan's *Highway Traffic Act* authorizes a police officer in the execution of their duties to require a person to stop their vehicle, the officer was not stopping him for any traffic related purpose. However, Saskatchewan Court of Queen's Bench Justice Matheson noted that the common law allows police officers to stop persons where there is reasonable cause to suspect (a constellation of objectively discernible facts) that the detainee is criminally implicated in the activity under investigation. The basis for such a detention must result from more than a hunch or desire to satisfy curiosity.

Although case law does not state exactly how many facts are required for "reasonable cause to suspect", it does require "more than one "fact"". In this case, the officer observed the accused's vehicle at 2:00 am. during spring seeding time driving on a farm field about to exit onto a highway and knew of numerous complaints from farmers during spring seeding time of thefts from their fields. Considering these facts, Justice Matheson found that "it is quite impossible to conclude that they do not form a reasonable basis for suspicion

of involvement in criminal activity". Thus, the detention was not arbitrary and the appeal was dismissed.

Complete case available at www.canlii.org

FACT or FICTION?

A Charlotte North Carolina lawyer purchased a box of very rare and expensive cigars, then insured them against unacceptable fire (among other things). Within the month, having smoked his entire stockpile of these great cigars, and not yet having made even his first premium payment on the insurance policy, the lawyer filed a claim against the insurance company. In his claim, the lawyer stated the cigars were lost "in a series of small fires". The insurance company refused to pay, citing the obvious reason: the man consumed the cigars in the normal fashion. The lawyer sued…and won!

In delivering the ruling, the judge agreed with the insurance company that the claim was frivolous. However, the judge stated that the cigars were insurable and that the insurance company had guaranteed that it would indeed insure them against fire---without defining what is considered "unacceptable fire"---and was obliged to pay the claim. Rather than endure a lengthy and costly appeal process, the insurance company accepted the ruling and paid $15,000 to the lawyer for his incendiary bamboozle.

After the lawyer cashed the cheque, the insurance company had him arrested on 24 counts of ARSON! With his own insurance claim and testimony from the previous case being used against him, the lawyer was convicted of intentionally burning his insured property and sentenced to 24 months in jail and a $24,000 fine[4]!!! A beautiful legal system at work.

[4] This information was received as an unsolicited e-mail and claimed to be a true story. Apparently the story was the 1st place winner in a recent criminal lawyers award contest.

MANITOBA COURT OF APPEAL UPHOLDS RANDOM, ROVING VEHICLE STOPS

R. v. Powroznik, 2002 MBCA 110

A police officer randomly stopped the accused driving. An odour of liquor led to a failed roadside screening test and subsequent failed breathalyzer tests. The accused was convicted at trial of over 80mg% and Crown entered a stay of proceedings on the impaired driving charge. The accused successfully appealed to the Manitoba Court of Queen's bench by arguing that the stop was not authorized at common law because it was not part of an organized stationary check stop programme to identify drinking drivers, but was more akin to a roving, random stop[5]. Since the officer did not have an articulable cause for the stop (a requirement of the common law), Justice Beard found the detention arbitrary and in violation of the accused's rights under s.9 of the *Charter*. The matter was referred back to the trial judge to determine whether the breathalyser evidence should be excluded under s.24(2) of the *Charter*.

The Crown then appealed to the Manitoba Court of Appeal arguing that Manitoba's *Highway Traffic Act* (*HTA*) authorizes the random and arbitrary stopping of motorists, regardless of whether there is an organized programme or not. Section 76.1 of the *HTA* permits a police officer in the execution of their duties to stop a motor vehicle.

> s.76.1 *Highway Traffic Act*
> A peace officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop, and the driver of the motor vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as such, shall immediately come to a safe stop and remain stopped until permitted by the peace officer to depart.

Justice Philp, for the unanimous Manitoba Court of Appeal, concluded that the power to randomly stop motorists derived from s.76.1 was a valid and constitutional legislative enactment that, although permitting arbitrary detentions, was saved by the justificatory analysis in s.1 of the *Charter*. The accused's conviction was restored.

Complete case available at www.canlii.org

[5] See 2002 MBQB 131

Editor's Note: Although a detention will be considered arbitrary when it is made without "articulable cause"[6], the random and therefore arbitrary stopping of motorists, sometimes referred to as "cherry picking"[7] or "routine checks"[8], may be permissible either at common law or under the authority of statute. For example, in British Columbia s.73(1) of the *Motor Vehicle Act* authorizes the arbitrary stopping of motorists:

> s.73(1) *Motor Vehicle Act*
> A peace officer may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as a peace officer, must immediately come to a safe stop.

Similarly, in Alberta, s.119 of the *Highway Traffic Act* justifies random vehicle stops:

> s.119 *Highway Traffic Act*
> A driver of a vehicle shall, immediately on being signalled or requested to stop by a peace officer in uniform, bring that vehicle to a stop and furnish any information respecting the driver or the vehicle that the peace officer requires and shall not start that vehicle until the driver is permitted to do so by the peace officer.

While in Ontario, it is s.216(1) of the *Highway Traffic Act*:

> s. 216 (1) *Highway Traffic Act*
> A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

In Quebec, s.636 of the Highway Safety Code justifies arbitrary detentions:

> s.636 *Highway Safety Code*
> Every peace officer recognizable as such at first sight may, in the performance of his duties under this Code and the Act respecting owners and operators of heavy vehicles (chapter P-30.3), require the driver of a road vehicle to stop his vehicle. The driver must comply with this requirement without delay.

Although permitting arbitrary detentions, these sections are justified under s.1 of the *Charter* as a reasonable limit to be free from arbitrary detention[9]. However, the detention of the motorist must be rationally connected[10] and limited to highway traffic matters and must be brief, unless other grounds are established to justify further detention[11]. Legitimate purposes related to enforcing driving laws and traffic safety include:

- producing documents drivers are by law required to possess such as driver's licences and insurance[12] and checking those documents against information available on CPIC[13]
- assessing the mechanical fitness of a vehicle[14]
- checking the sobriety of drivers[15]

When the justification for continued detention is neither related to the original purpose nor based on an articulable cause of other unlawful activity, any prolonged detention becomes arbitrary.

Random stops are also justified under the common law only if they are conducted as part of an organized program, such as an advertised drinking driving campaign[16]. Random, roving stops however, where the officer has the sole discretion on whether to stop motorists, are not justified at common law.

Thus, in those provinces that do not have statutory authority permitting the arbitrary stopping of motorists, the police cannot randomly stop vehicles unless they are detaining them as part of an organized program. All other stops must have, at minimum, an articulable cause justifying the detention. For example, Newfoundland traffic legislation requires objective (reasonable) criteria justifying the stop[17]:

> s.162 *Highway Traffic Act*
> Where a traffic officer reasonably considers it necessary…(d) to stop a motor vehicle on a highway to ensure that this Act and the regulations are being complied with, the officer may direct traffic according to his or her discretion, notwithstanding anything in this Part, and every person shall obey the officer's directions.

[6] R. v. Griffin (1996) 111 C.C.C. (3d) 490 (Nfld.C.A.) appeal to S.C.C. dismissed [1997] S.C.C.A. No. 32
[7] R. v. Del Ben [2000] O.J. No. 812 (Ont.S.C.J.)
[8] R. v. Calder [2002] O.J. No. 3021 (Ont.S.C.J.)
[9] R. v. Wilson (1993) 86 C.C.C. (3d) 145 (B.C.C.A.), see also R. v. Ladouceur (1990) 56 C.C.C. (3d) 22 (S.C.C.), R. v. Hufsky [1988] 1 S.C.R. 621,
[10] R. v. Del Ben [2000] O.J. No. 812 (Ont.S.C.J.)
[11] Brown v. Durham Regional Police Force (1998) 43 O.R. (3d) 223 (Ont.C.A.), R. v. J.R. [2000] O.J. No. 930 (Ont.S.C.J.)
[12] R. v. Ladouceur [1990] 1 S.C.R. 1257 at p.1287, R. v. Wilson (1993) 86 C.C.C. (3d) 145 (B.C.C.A.).
[13] Brown v. Durham Regional Police Force (1998) 43 O.R. (3d) 223 (Ont.C.A.)
[14] R. v. Ladouceur [1990] 1 S.C.R. 1257 at p.1287, Brown v. Durham Regional Police Force (1998) 43 O.R. (3d) 223 (Ont.C.A.),
[15] R. v. Ladouceur [1990] 1 S.C.R. 1257 at p.1287, R. v. Wilson (1993) 86 C.C.C. (3d) 145 (B.C.C.A.)
[16] R. v. Griffin (1996) 111 C.C.C. (3d) 490 (Nfld.C.A.) appeal to S.C.C. dismissed [1997] S.C.C.A. No. 32
[17] R. v. Griffin (1996) 111 C.C.C. (3d) 490 (Nfld.C.A.) appeal to S.C.C. dismissed [1997] S.C.C.A. No. 32

DRUG 'INDICATORS' PROVIDE ARTICULABLE CAUSE: DETENTION & SEARCH JUSTIFIED

R. v. Calderon & Stalas,
(2002) Court File No. 01-0107 (OntSCJ)

An OPP officer, who had attended a drug interdiction course, was on night shift with his partner when they observed a large 2000 Lincoln automobile with B.C. licence plates travelling 10 km/h over the speed limit. The licence plate was queried on CPIC and the officers learned the registered owner was Budget Car and Truck Rentals in British Columbia. The vehicle was stopped and police observed two duffle bags and an open road map on the back seat, food rappers on the floor, a cell phone between the two occupants who did not appear to fit the expensive car, and a pager. Another cell phone was seen in the glove box when it was opened to obtain the rental agreement.

At the drug interdiction course the officer had learned that "indicators" of a drug courier included: driving a large size, late model rental car to avoid the financial loss if it is seized; a large trunk providing space for contraband; the presence of road maps consistent with a driver wanting to know where they are going; fast food wrappers suggesting the occupants stay with the car because of drugs; and cell phones and pagers used to communicate with clients of the courier. Since many of the indicators were present during the vehicle stop, the officer's focus shifted from speeding to drug detection.

The driver was asked to step from the vehicle and asked if he would mind opening the truck. The driver stated he knew his privacy rights and did not want the police looking in the car. The officer then approached the passenger, who remained seated in the car, and asked him if there was any drugs, guns, or tobacco in the vehicle. The passenger was asked if he would mind the police searching the car and was told that if anything illegal were found he would be charged and that he could withdraw his consent at any time. The passenger said, "Sure, go ahead and look". The passenger was asked to stand at the front of the car. As he exited, the officer detected a fresh odour of marihuana from the interior of the car.

Shortly after commencing the search, the officer heard the driver say, "Don't let the police search the vehicle". The passenger then withdrew his consent. However, since the officer had already detected an odour of marihuana, he concluded he had reasonable grounds to arrest the occupants for possession of marihuana and continued the search despite the withdrawal of permission. Although he did not find any marihuana in the interior of the car, the officer opened the trunk and found two duffle bags containing 40 lbs. of packaged marihuana. The driver and passenger were arrested and charged with possession of marihuana for the purpose of trafficking under s.5(2) of the *Controlled Drugs and Substances Act*.

At trial, the accused argued, in part, that their rights under ss.8, and 9 of the *Charter* were violated. They submitted that stopping them for speeding was merely an excuse to conduct a drug investigation and had the effect of an arbitrary detention. Further, the search of the car was unlawful and therefore unreasonable. Thus, as a consequence of the *Charter* breaches, the evidence should be excluded under s.24(2). The Crown argued that there were no *Charter* violations and that the police had articulable cause for the detention and further, that the resultant search was reasonable.

The Detention

In summarizing the law of investigative detention, Ontario Superior Court Justice Kurisko stated:

> Where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some "articulable cause" for the detention, namely a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. The standard for reasonable suspicion is less demanding than that for reasonable belief and can arise from information that is less reliable than that required to show reasonable belief. A reasonable suspicion of the possibility of a crime is sufficient.
>
> The courts must act as the gatekeeper regulating the police power for investigatory detention so that street detentions do not end up being non-stationhouse incommunicado arrests. Each case depends on its own facts. The constellation of facts and circumstances must

be viewed as a whole, rather than isolating each in turn. The inquiry into the existence of an articulable cause is the first step in the determination of whether the detention was justified in the totality of the circumstances. The next step is to determine whether the investigatory action of the police (in this case, the search of the Lincoln) was justified and therefore reasonable.

If there is articulable cause that justifies the detention and the search, the detention is not arbitrary, the search is not unreasonable and there is no breach of s. 8 or s. 9 of the Charter. (emphasis added)

And further:

[T]he thread running through the [investigative detention and articulable cause] cases is the prerequisite principle that, viewing the facts and circumstances as a whole rather than isolating each in turn, the court must be satisfied there is a bona fide, clearly expressed and factually objective reason justifying not only the detention of the suspect but also the extent and nature of the investigation. Intuition and hunches confirmed by hindsight are not acceptable.

The accused argued that the so called "indicators" (fast food wrappers, an open map in a car, cell phones, and a late model rental car) were "clearly consistent with innocent vehicular traffic" and did not provide an objective basis amounting to an articulable cause for the drug investigation. Furthermore, the indicators were purely subjective, the detention was arbitrary, and if the court was to accept their validity, it would be recognizing a recipe for the arbitrary detention of any motorist. Moreover, the officers testified they had never found drugs in over 60 drug investigation stops, which, as the accused argued, demonstrated the inaccuracy and unreasonableness of the indicators.

Despite the accused's argument, the Court concluded that the police had the statutory power to stop the accused for speeding and that the continued detention for the drug investigation was based upon an articulable cause. Justice Kurisko stated:

Section 216(1) of the Highway Traffic Act authorizes the stopping of vehicles for what may be broadly described as highway regulation and safety purposes. … Where the police have highway traffic concerns and other unrelated concerns, then the limit on their conduct should be imposed by limiting their conduct after the stop so long as the other purposes motivating the stop are not themselves improper.

Stopping the Lincoln for speeding was legitimately connected to a highway safety concern. The fact that [the officer] suspected there was a possibility of drugs did not taint the lawfulness of the stop. The lawfulness of the subsequent investigative detention for drugs depends on whether there was articulable cause.

Counsel for the defendants have dissected the articulable cause indicators one by one. This sort of "divide and conquer analysis"…does not take into account the totality of the circumstances and runs contrary to the approach…which requires the court to view the facts and circumstances as a whole rather than isolating each indicator in turn.

When [the officer] stopped the Lincoln for speeding the fact that the Lincoln was a large car from British Columbia was certainly in his mind. He was alerted to look for other drug indicators. In the course of obtaining [the driver's] driver licence which he was legally entitled to do, [the officer] noticed several additional drug courier indicators: cell phones, a pager, an open map and fast food wrappers inside the car. The Budget Rental Agreement revealed the Lincoln was rented, another indicator. To add to his suspicion the terms of the Agreement restricted driving to the province of British Columbia.

The fact that the two duffle bags were on the inside of the car was extremely significant. [The officer] could not understand why they were not in the large trunk of this car. This was a factually objective and clearly expressed ground…confirming [the officer's] reasonable suspicion there might be drugs taking up the trunk space.

Furthermore, the drug courier indicators were not something [the officer] made up. He had been trained to look for them. [His partner] gave the same evidence … concerning the Drug Interdiction Course. [The British Columbia Court of Appeal has] said it is unrealistic to suggest police officers cannot act on the assumption that a fellow officer's advice is reliable. This would unduly hamper law enforcement. The same statement applies to the training that [the officers] received on the Drug Interdiction Course. The fact that [the officers] had not previously made a successful drug courier search based on the indicators does not necessarily invalidate the Drug Interdiction Course. [The officer] said he observed more indicators in this case than any prior stop.

In examination-in-chief [the officer] said he thought the Lincoln was "an expensive vehicle to be renting for what the driver and the passenger looked to me." He made this comment as an additional observation to the indicia he outlined for suspecting the defendants might be drug couriers.

Details of the meaning of this statement was not explored or explained in cross-examination. I cannot say whether [the officer] was referring to the age of the defendants, their dress, grooming or their racial or ethnic origin. (The defendants appear to be in the mid to late twenties age bracket. Both have dark skins. My

best guess is they are of East Indian or middle East origin.)

It was suggested in argument, that this remark masked a discriminatory bias based on irrelevant factors of colour and perhaps age. There is nothing in the evidence to indicate the extent to which the observation influenced [the officer] in his assessment of the situation other than as one of several drug courier indicators. There was no reflection of bias, discrimination or discourtesy during the investigation or after the arrest. The conduct and politeness of [the officer] and the other officers was exemplary and inconsistent with bias or prejudice, I am unable to attach special weight or significance to the comment

Viewing the facts and circumstances as a whole, rather than isolating each in turn, and bearing in mind that the standard for reasonable suspicion is less demanding than that for reasonable belief and can arise from information that is less reliable than that required to show reasonable belief, I find that when [the officer] decided to investigate he was not acting on a hunch. He had articulable cause (reasonable grounds) for suspecting there might be drugs in the Lincoln. Therefore, when [the officer] asked [the driver] to step out of the car to question him, the resulting detention for investigative purposes was not arbitrary within the meaning of s. 9 of the Charter. (references omitted)

The Search

The accused contended that the smell of marihuana alone did not justify the search, that the search was not incident to arrest, and that the consent to search offered by the passenger was not properly informed. Thus it was suggested, the search was unreasonable and a violation of the accused's s.8 *Charter* right to be secure against unreasonable search or seizure.

Plain Smell

The accused argued that the odour of the marihuana did not justify the continued search. In rejecting this submission, the Court accepted the evidence of the officer that through his training and experience he was able to conclude that the strong odour was fresh marihuana, as opposed to a burnt odour. Further, it was "unrealistic to think the smell of marijuana preceded the rental of the Lincoln" and "the only reasonable conclusion is that the smell came from marijuana placed in the Lincoln after it was rented by the defendants and was therefore in their possession at the time of the search". Moreover, the officer's reasonable grounds was based on more than just the smell and included the other drug indicators.

Search Incident to Arrest

A search that precedes an arrest can nonetheless be described as a search incident to arrest provided the officer has grounds to make the arrest before conducting the search. In this case, the officer had reasonable grounds to believe there were drugs in the car, but chose to search the interior and trunk prior to actually arresting the accused.

Informed Consent

For consent to be valid, it must be voluntary and the giver must be aware of (1) the nature of the police conduct they are consenting to, (2) their right to refuse the search, and (3) the consequences of giving the consent. Here, the officer asked the passenger if there were any drugs, guns, or tobacco in the vehicle, asked if the passenger would mind if he searched the car, told him that he would be charged if anything illegal was found, and told him he could withdraw the consent at any time. All the requirements of a consent search were satisfied; this placed the officer in a lawful position to detect the marihuana odour. In finding the search reasonable, Justice Kurisko held:

The duffle bags on the back seat instead of the trunk caused [the officer] to reasonably suspect there might be drugs in the trunk. Thinking he required more than reasonable suspicion [the officer] asked permission to search. However, the fact is that the consent of [the occupants] was not required. The totality of the circumstances that gave rise to the detention logically justified searching the Lincoln for drugs, especially the trunk without a warrant or permission.

The search met the Collins criteria: it was authorized by law (articulable cause/reasonable suspicion), the law itself is reasonable…and the search was carried out in a reasonable manner. [The officer] was not abusive or overbearing. He politely asked for permission to search. The contents of the interior of the Lincoln were not significantly disturbed. There was no search of the person. [The officer] even asked permission to look in the bags in the trunk even though the trunk reeked of marijuana. The search that resulted in the seizure of the marijuana was not unreasonable within the meaning of s. 8 of the Charter.

Even if he was wrong in his conclusions, Justice Kurisko held the admission of the evidence essential to substantiate the serious charge would not bring the administration of justice into disrepute. The police acted in good faith, sought permission to search the trunk, and were courteous throughout the investigation.

UNITED NATIONS CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS[18]

Article 1

Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

Article 2

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

Article 3

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Article 4

Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential , unless the performance of duty or the needs of justice strictly require otherwise.

Article 5

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 6

Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

Article 7

Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

Article 8

Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them. Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

[18] G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979)

OFFENCE ACT POWERS OF ARREST: BRIDGING THE GAP

Sgt. Mike Novakowski

British Columbia's *Offence Act* (the *Act*) contains various procedural rules for dealing with provincial offences. For example, s. 2 of the *Act* provides that all provincial offences are punishable on summary conviction. Where an enactment is silent on punishment, s.4 of the *Act* provides a general maximum punishment on conviction for a provincial offence of six months imprisonment, a $2000 fine, or both.

Section 133 of the *Offence Act* incorporates provisions of the *Criminal Code* respecting summary conviction offences into the *Offence Act,* where no or only partial provision is provided.

> s.133 *Offence Act*
> If, in any proceeding, matter or thing to which this Act applies, express provision has not been made in this Act or only partial provision has been made, the provisions of the Criminal Code relating to offences punishable on summary conviction apply, with the necessary changes and so far as applicable, as if its provisions were enacted in and formed part of this Act.

In the context of an arrest, if no arrest authority is found within a provincial statute or only partial provisions exists, the powers of arrest respecting summary offences under the *Criminal Code* apply to the provincial statute. In other words, the power of arrest for summary conviction offences found in s.495 of the

Criminal Code would be incorporated as forming part of the *Offence Act* and authorize arrest for provincial offences where no specific power of arrest has been created.

Section 495(1)(b) of the *Criminal Code* authorizes a police officer to arrest a person whom the officer finds committing a criminal offence (includes summary conviction offences).

> s. 495(1)(b) *Criminal Code*
> A peace officer may arrest without a warrant…(b) a person whom he finds committing a criminal offence,

However, prior to exercising the power of arrest under s.495 of the *Code*, the police officer must first give consideration to s.495(2) of the *Code*.

> s.495(2) *Criminal Code*
> A peace officer shall not arrest a person without warrant for
> (a) an indictable offence mentioned in section 553,
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
> (c) an offence punishable on summary conviction,
> in any case where
> (d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to
> (i) establish the identity of the person,
> (ii) secure or preserve evidence of or relating to the offence, or
> (iii) prevent the continuation or repetition of the offence or the commission of another offence,
> may be satisfied without so arresting the person, and
> (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

Therefore, prior to arresting a person for a provincial offence through s.133 of the *Offence Act,* which incorporates the provisions of the *Criminal Code* respecting summary conviction arrest, the arresting officer must consider public interest and court appearance. Public interest under the *Criminal Code* includes establishing the identity of the person, securing and preserving evidence, and preventing the continuation or repetition of the offence or commission of another offence.

In *Moore v. the Queen* (1978) 43 C.C.C. (2d) 83 (S.C.C.), the accused was observed by a police officer pass through a red light without stopping, which constituted a violation under the *Motor Vehicle Act*. The officer stopped the accused who subsequently refused to identify himself. In addition to an arrest under the *Criminal Code* for obstructing a police officer being proper, the Supreme Court of Canada also concluded that s.101 of the *Summary Convictions Act* [now s.133 of the *Offence Act*] was properly interpreted to incorporate s.450 [now s.495] of the *Criminal Code* and authorize the arrest of the accused for the offence of proceeding against the red light; it was necessary to establish the accused's identity (public interest).

Furthermore, s. 133 of the *Offence Act* not only incorporates the provisions of arrest respecting summary conviction offences, but also other provisions such as the use of force provisions of the *Criminal Code*. In *Little v. Peers* [1988] 47 D.L.R. (4th) 621 (B.C.C.A.), the plaintiff, who was arrested on an outstanding *Offence Act* warrant for non appearance on a traffic ticket, brought an action against the two arresting officers for false imprisonment and trespass. The Court found that s.25(2) of the *Criminal Code* (protection of persons administering and enforcing the law) applied to the execution of the warrant because s.122 [now s.133] of the *Offence Act* "incorporates all those provisions of the *Criminal Code* that apply in relation to summary convictions".

Summary

A police officer will have the authority to arrest for provincial offences by using the application of s.133 of the *Offence Act* if the following conditions are met:

- the provincial statute creating the offence is silent as to whether a police officer has the power to arrest for that offence;
- the police officer finds committing (i.e. committed in the officer's presence); and
- public interest or court appearance are not satisfied without arresting the person.

Note-able Quote

"The police culture is pragmatic and puts great emphasis on 'commonsense' and 'experience'. But police seem unaware that, logically, these two qualities contradict each other. If policing is 'all about commonsense', why do people have to experience police work before they can understand it? Police work is a great deal more than 'commonsense'"[19]. Home Office Research and Planning Unit, Her Majesty's Stationery Office

[19] London (1988) Home Office Research and Planning Unit. Her Majesty's Stationery Office. Edited by Peter Southgate.

WARRANTLESS DOORWAY ARREST REASONABLE

R. v. Bate, [2002] M.J. No. 234 (MBPC)

A mobile security guard called the police to report that when he approached a stopped truck with the driver's door open in a parking lot of a credit union, the driver closed the door and took off at a high rate of speed. The guard noted a puddle of vomit on the ground where the driver's door of the truck had been parked. The guard followed the accused, observed him run a stop sign, and confronted the accused when he stopped in an alley. The guard suspected the accused might be intoxicated After a few minutes, the accused drove down the alley and parked at the rear of a residence. After obtaining the assistance of other security guards, the police were called.

The two attending officers had a description of the truck, the licence plate number, and information the driver was staggering and had vomited. They spoke with the security guard who provided a description of the driver, indicated the driver was possibly impaired, and pointed out the residence the driver had attended. The officers were aware that the registered owner of the truck lived at the residence and they attended the back door and knocked. The accused, who matched the description of the driver, answered the door in stocking feet, opened both the inner wooden door and outer screen door, stood in the doorway, and asked, "What the fuck do you want?" An officer told the accused that they were investigating a possible impaired driver and asked if the truck, which was visible from the backdoor, was his. After confirming it was his truck, the police asked several more questions. In response, the accused told the police he had been drinking at Classic Billiards, that he had too much to be driving, and that his "buddy" just drove him home. Although initially reluctant, the accused provided his driver's licence to the officer.

While conversing with the accused, the officer noted a strong odour of liquor on the accused's breath and that his eyes were bloodshot. The officer formed the opinion that the accused was impaired, took hold of his arm and told him that he was under arrest. The accused tried to pull away, a brief struggle resulted, and he was subsequently handcuffed. He was confirmed to be the driver by the security guard and was read his right to counsel and the breathalyzer demand. At the police station the accused provided two samples of his breath and was served with a certificate of analysis.

During the voire dire to determine the admissibility of evidence, the accused argued, among other grounds, that the police conduct violated the principles outlined by the Supreme Court of Canada in *R. v. Feeney* (1997) 115 C.C.C. (3d) 129 (S.C.C.), breaching his s.8 right to be secure against unreasonable search or seizure. If the police had reasonable grounds to arrest him before they knocked on his door, they should have obtained a warrant. He also suggested that if the police did not have reasonable grounds to arrest, they had no right to enter onto his property to knock at his door in an effort to secure evidence against him. Furthermore, at the moment he attended the rear door, the accused argued he was detained and should have been provided his right to counsel. By failing to fulfill their obligation in this regard, the police violated his s.10(b) *Charter* right and any evidence following this point should be excluded under s.24(2) of the *Charter*.

The Crown argued that the police were entitled to approach the door and knock under the doctrine of implied licence. Furthermore, they were entitled to ask some questions to further their investigation. Following the answers to these questions, the officer's own observations, and the information received from the security guard, the officer formed the requisite reasonable grounds that entitled him to arrest the accused, who was on the doorstep and had left the sanctity of his home. Moreover, even if the Court did not accept the evidence that the accused was out on his doorstep at the time of arrest, and was still in the doorway as the accused suggested, the arrest was nonetheless justified as this was a case of fresh pursuit.

Implied License to Knock

Section 8 of the *Charter* protects "the privacy interest of an accused against unreasonable state intrusions" and nowhere does a person have a greater expectation of privacy than in their home. However, under the common law, the occupier of a home is deemed in law to grant permission to the public, including the police, to approach the door of their dwelling and knock for the purpose of conveniently communicating with them. This implied licence waives any privacy interest the occupier would otherwise have in the approach to the door of their residence. This licence however, does not extend

so far as to include situations where the state's intention is to gather evidence against the occupant.

If the police enter with the intention of securing evidence in mind, they can no longer rely on implied license to justify their entry onto the property. In this case, Justice Giesbrecht of the Manitoba Provincial Court concluded that the "investigation of a possible offence does not necessarily mean that the police are there to gather evidence". Although the police testified they entered onto the property to investigate the occupant for being an impaired driver, there were a number of reasonable explanations that could account for the citizen's complaint and impaired driving was only one of the possibilities. In holding that the police were lawfully present at the back door when they knocked and did not exceed the implied invitation to enter onto the property, Justice Giesbrecht stated:

> Even if the police are investigating a possible offence committed by an occupant of a house it is in my view permissible for them to go to the door in order to communicate with the occupant. Even if the police believe that an arrest may eventually flow from their attendance at the house, this does not revoke their implied license to attend the door of the house. If the occupant chooses not to answer the door, the police may be able to do nothing further. However, where the occupant does answer the door the police are entitled to communicate with that person.

And further:

> The police officers did not have grounds to obtain a warrant as they approached the door of the residence. While they were not entitled to attend the residence for the purpose of gathering evidence against the occupant, they were entitled to attend for the lawful purpose of communicating with the occupant. The fact that during the course of that communication they made observations which led to their reasonable grounds to make an arrest does not ex post facto make their attendance at the door of the residence unlawful. Based on the information they had received to that point they might for example have learned from the occupant that he had the flu or some other illness that would account for the observations made by [the mobile security guard]. The accused might not have displayed any signs of impairment. In that event the investigation would have been completed and that would be the end of the matter.

The Arrest

The accused argued that the warrantless arrest in the doorway of his home violated his *Charter* right under s.8 because he attended the door when the police knocked, which provided them with the opportunity to 'drag' him from the doorway so he could be arrested outside the dwelling. Since *Feeney*, absent some limited exceptions, a warrant is generally required to enter a dwelling house to effect an arrest. Although the police in this case did not have a warrant when they arrested the accused at his residence, at the time of the arrest the police were not inside the residence. The Court found that "entering a person's driveway and going up the outer steps to a person's house is a lot different than entering a person's home without a warrant" and moreover, "there is minimal intrusion on privacy where an individual is arrested on the doorsill of his residence". Justice Giesbrecht stated:

> The precise location of the accused at the time of the arrest can be described as follows: the outer screen door of the residence was open with the accused holding it open with his arm and possibly [the officer] having his leg against the door as he was standing on the stoop. The stoop is not large, only about three by four feet. The inner wooden door was also open and was behind the accused. The accused was standing on the ledge between the two doors. The best way to describe it would be to say the accused was standing on the doorsill or threshold of the door.

And further:

> The ultimate question is whether the arrest in this case occurred in a dwelling house. The fact that the accused came to the door in response to a knock by the police officers does not change the answer to that question in the particular circumstances of this case. I have found that the police were entitled to be at the door and to knock on it in order to communicate with the occupant. I am prepared to accept that the accused was standing on the doorsill in the open doorway of his house at the time of his arrest. At the same time I am not satisfied that in all the circumstances of this case it makes any difference whether he was standing on the doorsill or was standing one step away on the stoop. In my view in either event the arrest in this case did not occur in a dwelling house. The police were not in the house at the time of the arrest. While they were on the property of the accused, standing at the back door of his residence, they were entitled to be there pursuant to the common law implied invitation, which was not revoked prior to the arrest.
>
> An individual who is standing on the doorsill of his residence with the door open when he is arrested by police officers who are lawfully entitled to be at the door, is not arrested unlawfully even though the police do not have a warrant. He is not arrested in a dwelling house. In my view this conclusion is not inconsistent with the principles set out in the Feeney case.

.....

Once the accused attended to the door of his residence the officers quickly made the observations that led them to conclude that he was impaired. [The officer] indicated that the accused matched the description of the individual that had been driving a motor vehicle a short time before. He had information that the accused was the registered owner of the vehicle in question. In these circumstances he had reasonable and probable grounds to make a demand under Section 254(3) of the Criminal Code for the accused to provide breath samples and to accompany the officers for that purpose.

Instead of making a breath demand at that point, as he would be entitled to do if he had reasonable and probable grounds, [the officer] arrested the accused. I cannot find that this was unlawful just because the accused at the time was standing in the doorway of his residence. The situation would be very different if the police officers had gone inside the house to effect the arrest. It is not necessary in this case to determine if the result would be different if the door had not been open and the police had to open the door to effect the arrest.

What other practical alternative did the police have? Defence counsel submits that the officers could have sought the consent of the accused to accompany them. That is one option but it is certainly not a practical one in the circumstances of this case. The accused had greeted the police officers with the question, "What the fuck do you want?" His attitude did not change during the rest of the brief conversation. An informed consent to accompany the officers was highly unlikely.

In the absence of an informed consent, defence counsel submits that the only other legal alternative the police had was to leave one officer at the scene and have the other officer attend to a justice to obtain a Feeney warrant. In my view this alternative is completely impractical and would be pointless in circumstances such as those in the present case. There was no specific evidence as to how long it would have taken the officers to obtain such a warrant. However, even in a city such as Winnipeg where magistrates are on duty or on call at all hours it would not be unrealistic to expect that it would have taken at least an hour to obtain such a warrant. In the meantime the accused would have been out of the observation of the police officers, as they would not have had any right to enter the house in order to keep the accused under observation. As well the accused could at any time have revoked the implied consent for the police to be on his property. In these circumstances there would be little point in making the effort to obtain a warrant, as any attempt to secure accurate evidence of the blood alcohol concentration of the accused at the time of the driving would be lost.

Fresh Pursuit

Although the Court found the arrest lawful, Justice Giesbrecht nonetheless considered the Crown's alternative argument that the police were in "hot pursuit" of the accused. This submission was rejected because the police did not have reasonable grounds to arrest the accused before attending to the door. The fact the police formed reasonable grounds from their observations at the doorstep did not change the circumstances into one of hot pursuit.

Right to Counsel

The accused suggested that he was detained at the moment he answered the door, was not informed of his right to counsel under s.10(b) of the *Charter*, and any evidence obtained after this breach, including the observations of impairment, should be excluded under s.24(2) of the *Charter*. The right to counsel is triggered on arrest or detention. Here, the accused attended the door knowing that the police were there. He did not testify that he believed he was detained or that he was not free to go back into his home and close the door. He failed to satisfy the Court that he was detained when he answered the door or when he had the conversation with the police.

The police had the right to ask for identification and whether he owned the truck in the driveway. The questions were not made to secure evidence against him, but were appropriate enquiries of the occupant. However, the questions concerning where he had been and how much he had to drink were likely to secure evidence against the accused. These questions were not appropriate and the responses to them would have been ruled inadmissible had the Crown sought to have them entered into evidence. Nonetheless, the physical observations of the accused's impaired condition were made at a time the police were lawfully allowed to be at the door and were therefore admissible. The evidence including the Certificate of Analysis was admissible.

Editor's note: The common law has long recognized an implied licence for all members of the public, including the police, to approach the door of a residence and knock[20]. Implied licence however, relates to the approach to the dwelling, not to the premises generally[21], and ends at the door of the residence[22].

[20] R. v. Evans (1996) 1 S.C.R. 8 (S.C.C.) per Sopinka J. at para. 13, per Major J. at para. 40, R. v. Tricker (1995) 96 C.C.C. (3d) 198, R. v. Hallet [1967] 2 All E.R. 407,
[21] Anderson v. Smith 2000 BCSC 1194.
[22] R. v. Tricker (1995) 96 C.C.C. (3d) 198 (Ont.C.A.) at p. 203.

When a police officer acts "in accordance with this implied invitation, they cannot be said to intrude upon the privacy of the occupant[23]" and do not engage in unconstitutional activity[24]. Implied licence extends only to those activities for the purpose of communicating with the occupant and anything beyond this "licenced purpose" is not authorized. Synonymously, implied licence is known as implied invitation, invitation to knock[25], implied invitation to attend[26], implied licence to enter, door knocking, or knock and talk.

Scope of Implied Licence

In determining whether the activity of the police fell within the implied licence doctrine, the "underlying purpose or intent" of entry onto the property from the perspective of the police must be considered and carefully assessed[27]. In *R.* v. *Evans* (1996) 1 S.C.R. 8 (S.C.C.), police attendance by acting on an anonymous tip and knocking at the door for the purpose of securing evidence against the owner (by sniffing for a marihuana odour) exceeded the scope of implied licence. However, circumstances where the police are not investigating the occupant or are "in the legitimate pursuit of evidence"[28], short of conducting a search, may be lawful uses of implied licence. In *R v. K.L & S.L.* 1999 BCCA 37[29], police attendance at the residence of the accused to determine whether the accused owned a pair of shoes similar to the type of footprint left at the scene of a robbery "was a natural step in a series of enquiries in an investigation of possible suspects". The court found the "visit" of the police to the residence did not violate s.8 of the *Charter*. A circumstance where the sole purpose of the police officer is to ask questions of the homeowner, even investigative questions, does not exceed the bounds of implied right to approach and knock[30].

The approach to the residence will generally import the "requirement of a direct approach to the front door- not a trespassory detour elsewhere on the property to secure evidence[31]". Since the purpose of implied licence is to enable a person, police officers included, to reach a point in relation to the house where normal and convenient communication may occur, an open porch door may constitute an invitation to proceed past the porch door to the outer door of the house proper[32]. Likewise, an approach to a dwelling that necessitates driving on a driveway and through some trees leading to the residence does not fall outside the scope of implied licence[33]. However, the act of surreptitiously looking through windows of a house, amounting to a perimeter search, goes beyond any waiver of privacy rights implied through the invitation to knock doctrine[34]. Similarly, visual observations by police at a basement apartment window made from a side-yard at a distance of two inches, was a violation of a person's reasonable expectation of privacy[35].

A business establishment open to all members of the public impliedly invites those members to enter and there is no breach of privacy when a police officer enters the area of the premises to which the public is impliedly invited[36]. However, the police will be restricted from accessing private, non-public areas of the business[37]. The scope of implied invitation respecting a business establishment will be dependent on the circumstances and nature of the business.

Implied licence also "extends to situations where the very purpose of entry is to protect the interests of the property owner or occupant" provided the police officer has a reasonable suspicion (articulable cause) that criminal activity is being perpetrated against the owner or occupant of the property[38]. In *R. v. Mulligan* [2000] O.J. No.59 (Ont.C.A.) Sharpe J.A. held:

> It is plainly in the interests of a property owner or occupant that the police investigate suspected crimes being committed against the owner or occupant upon the property. For that reason, absent notice to the contrary, a police officer may assume that entry for that purpose is by the implied invitation of the owner, particularly where entry is limited to areas of the property to which the owner has extended a general invitation to all members of the public.

In *R. v. Hern* [1994] 149 A.R. 75 (Alta.C.A.), police entered a residence in response to a complaint of a break and enter in progress. While inside police

[23] R. v. Evans (1996) 1 S.C.R. 8 (S.C.C.) per Sopinka J.
[24] R. v. Van Wyk [1999] O.J. No.3515 (Ont.S.C.J.)
[25] R. v. Peters [1998] B.C.J. No.156 (B.C.S.C.), R. v. Van Wyk [1999] O.J. No.3515 (Ont.S.C.J.) at para.28.
[26] R. v. Piasentini [2000] O.J. No.3319 (Ont.S.C.J.)
[27] R. v. Evans (1996) 1 S.C.R. 8 (S.C.C.), R. v. Mulligan [2000] O.J. No. 59 (Ont.C.A.)
[28] Anderson v. Smith 2000 BCSC 1194
[29] Police attended the residence of the accused and spoke to his mother. Upon questioning of whether her son owned a pair of Converse Illusion brand shoes she presented, on request, the shoes.
[30] R. v. Van Wyk [1999] O.J. No.3515 (Ont.S.C.J.) at para.33,
[31] R. v. Van Wyk [1999] O.J. No.3515 (Ont.S.C.J.) at para.35.
[32] R. v. Bushman (1968) 4 C.C.C. 17 (B.C.C.A.)
[33] R. v. Johnson [1994] B.C.J. No.1165 (B.C.C.A.)
[34] R. v. Peters [1998] B.C.J. No.156 (B.C.S.C.)
[35] R. v. Laurin (1997) 113 C.C.C. (3d) 519 (Ont.C.A.)
[36] R. v. Fitt (1995) 96 C.C.C. (3d) 341 (N.S.C.A.) at p.346 affirmed (1996) 103 C.C.C. (3d) 224 (S.C.C.), R. v. Kouyas [1994] N.S.J. No.567 (N.S.C.A.)
[37] R. v. Kouyas [1994] N.S.J. No.567 (N.S.C.A.)
[38] R. v. Mulligan [2000] O.J. No,.59 (Ont.C.A.)

discovered a marihuana grow operation. In determining the reasonableness of the police entry and search of the residence, the Court found "an inference can be drawn that the owner would welcome police to stop a break-in and protect the residents".

Implied invitation to protect the occupant differs from implied waiver that gets an officer from the sidewalk to the doorstep to communicate with the occupant. Although they both waive the privacy expectation of the homeowner or occupant, the former concerns legitimate police enquiries in gathering information, such as neighbourhood enquiries following a break and entry (gets an officer to the door), while the latter involves the occupants expectation in the police acting on a reasonable suspicion (something more than a hunch but less than a reasonable belief) to protect the homeowner's interests (gets the officer onto the property and in some cases into the premises[39]).

Furthermore, homeowner interest waiver recognizes the need to investigate criminal activity perpetrated against the occupant, not by the occupant. Ultimately, the analysis will examine the motives of the police at the time of entry onto the property. In either case, the intention of the police is not to secure incriminating evidence against the homeowner. However, if while acting within the proper ambit of implied licence incriminating evidence is found, the entry and search is not turned into an unreasonable one merely because such evidence is discovered.

Revoking Implied Licence

Implied licence may be revoked on notice by the occupant[40]. Revocation may be done in advance of police attendance by the posting of signs[41] such as "No admittance to police officers[42]", security fences preventing entry, or by oral revocation while the police are on the property. Once the occupant revokes or withdraws the implied licence, they must provide a reasonable opportunity for the police to leave[43]. If a police officer is assaulted while departing, a conviction of assaulting a police officer will stand[44]. If circumstances arise that would otherwise permit the officer to remain on the property, such as effecting an arrest, the implied licence revocation would not require the officer to leave.

A police officer who is lawfully on property under implied licence who finds an occupant of that property committing an offence, may arrest that person and the subsequent arrest and continued custody will be lawful regardless of whether the occupant revokes the implied licence[45]. If the property owner withdraws the implied licence before the officer has grounds to make the arrest, the police officer must leave the property or risk becoming a trespasser. For example, where evidence of impairment was obtained after the implied licence was revoked causing the officer to be a trespasser, the officer is no longer acting in the lawful execution of his duty[46]. However, if grounds for arrest came into existence before the implied licence was withdrawn, the police are lawfully entitled to arrest.

INVESTIGATIVE POWERS IMPLICIT IN VEHICLE STOP LEGISLATION

R. v. Manickavasagar,
[2002] O.J. No. 2907 (OntSCJ)

A parking enforcement officer observed a Honda vehicle properly parked on a street where he has found many abandoned and stolen vehicles, including many Hondas. The engine was running, the windows were up, and unlike all other vehicles parked on the street, the Honda's windows were not frosted. Suspecting the vehicle might be stolen, he approached the vehicle to see if the ignition had been tampered, but found the accused sleeping in the vehicle with the seat fully reclined. Returning to his vehicle, the parking enforcement officer queried the licence plate on CPIC and learned the vehicle was under surveillance as a suspect vehicle in an armed robbery. This meant that officers would use their discretion in stopping the vehicle and if stopped, the occupants were to be identified and the information forwarded to the robbery investigator. The parking enforcement officer then called the police.

[39] See for example R. v. Kingbell 2002 SKQB 69
[40] R. v. Johnson [1994] B.C.J. No. 1165 (B.C.C.A.), R. v. Bushman (1968) 4 C.C.C. 17 (B.C.C.A.)
[41] R. v. Evans (1996) 1 S.C.R. 8 (S.C.C.)
[42] Robson v. Hallet (1967) 51 Cr.App.R. 307 per Diplock L.J.
[43] R. v. Tricker (1995) 96 C.C.C. (3d) 198 (Ont.C.A.) at p. 205 leave to appeal to S.C.C. refused (1995) 103 C.C.C. (3d) vi.
[44] R. v. Forsyth [1982] B.C.J. No. 469 (B.C.S.C.)
[45] R. v. Mulligan [2000] O.J. No. 59 (Ont.C.A.), R. v. Johnson [1994] B.C.J. No. 1165 (B.C.C.A.)
[46] R. v. Smith [1999] B.C.J. No. 908 (B.C.S.C.)

Police approached the suspect vehicle on foot to investigate (1) whether the accused had been drinking and was sleeping off the influence, (2) whether he needed medical attention, and (3) to identify the occupant in response to the CPIC surveillance entry. After receiving no response to knocking on the driver's window, the officer opened the unlocked driver's door and detected an odour of liquor, concluding it emanated from the vehicle and the accused. The officer nudged the accused's shoulder, waking him. He appeared groggy. After being asked for his driver's licence, the accused provided his wallet, which was placed on top of the car. Thinking the accused was concealing something when the officer observed him fumbling with his hand in the area of his right rear pants pocket, the officer told the accused several times to keep his hands in view.

After repeated requests to step from the vehicle, the accused exited. In plain view on the seat where the accused had been seated, the officer observed a handgun. The officer immediately grabbed the accused's jacket to gain control of him, to effect an arrest, to prevent him from re-entering the vehicle, and to prevent him from possibly reaching for another gun. In doing so, the officer detected, by touch, the presence of another handgun on the accused's person. The accused was handcuffed and charged with weapons offences; no alcohol related driving offences were pursued. During the *voire dire* to determine the admissibility of evidence, the accused argued that the actions of the police amounted to an unreasonable search and seizure and the evidence was inadmissible under s.24(2) of the *Charter*.

Statutory Authority

Justice MacDonald, of the Ontario Superior Court of Justice began his enquiry into the matter by examining the statutory authority of police officers to detain drivers of vehicles found in Ontario's *Highway Traffic Act* (*Act*). He concluded s.216 of the *Act* explicitly authorizes the police to stop, and therefore detain, the driver of a vehicle:

> s. 216 (1) *Highway Traffic Act*
> A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

Legitimate traffic related purposes to conduct such stops include checking driver's licences, insurance, sobriety, and mechanical fitness. Implicit within this section are investigative powers which would allow the police to approach the running and occupied vehicle, open the door, wake the driver, demand a driver's licence, and ask him to step from the vehicle. Similarly s.48(1) of the *Highway Traffic Act* also allows the police to stop vehicles, including stationary ones.

> s.48 (1) *Highway Traffic Act*
> A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under section 254 of the Criminal Code (Canada).

The odour of alcohol gave the officer a suspicion, which he intended to investigate further by having the accused exit the vehicle so he could observe other signs of impairment justifying a demand under s.254 of the *Criminal Code*. Having exited the vehicle, the gun on the seat was in plain view.

Common Law Authority

Under the common law, the police may detain people if they have an articulable cause. In this case, the actions of the police in opening the door, touching the accused, waking him to make enquiries, requesting identification, and asking him to exit the vehicle were justified on the basis of articulable cause. Justice MacDonald stated:

> Clearly, [the officers] were acting in the course of their duties as police officers at the relevant time. This is a necessary finding in this specific context. The detention of the accused and the resulting inquiries and requests made of him, including the request that he exit the vehicle, all arose from [the officer] having reasonable cause to suspect that the accused was engaging in criminal conduct which police had a duty to prevent and to investigate. In making this finding respecting reasonable cause to suspect that the accused was engaging in criminal conduct, I refer firstly to the smell of alcohol emanating from the person occupying the driver's seat of a running vehicle who was asleep therein, in unusual circumstances, and the odour of alcohol emanating from the vehicle in which the accused, alone, was enclosed.
>
> The steps [the officer] took and demands or requests of the accused resulted in some intrusion upon the accused's liberty interests, but these intrusions were necessary for [the officer] to perform his duty of investigating and preventing criminal conduct, here

> consisting of possible impaired care and control of a motor vehicle. The interference with the accused's liberty interests was minor, particularly given the reduced privacy interest of any person who chooses to sleep in a running motor vehicle parked on a public street, in the plain view of passers by. In short, in my view, there is a very reduced privacy interest when a person chooses to act in public in a way which reasonably may be expected to attract public scrutiny.

Furthermore, the police had a legitimate safety concern with respect to the accused's hand movements. The accused had already produced his wallet to the police, but continued to fumble around his rear pants pocket. The Court stated:

> In my opinion, to the extent that [the officer's] requests of the accused to exit the vehicle were based on safety concerns resulting from the accused's hand movements, these requests were necessary for [the officer] to resolve safety concerns, so that [the police] could proceed effectively with the ongoing, law investigation of the accused. Resolving these justified safety concerns facilitated the completion of the investigation for which there was articulable cause. Resolving the justified safety concerns also permitted that investigation to be completed in an expeditious and effective and minimally intensive manner, as is required when an investigation is based on articulable cause.
>
> In my opinion, reasonable steps to ensure reasonable safety are part of the powers of police who have articulable cause for an investigative detention. I note that if addressing such safety issues is not regarded as a power ancillary to investigative steps properly undertaken, the safety issues themselves may readily provide articulable cause for investigating a reasonable and justified apprehension of impending or planned criminal conduct directed towards police, for the purpose of preventing police from serving the public interest by completing the investigations which they initially undertook.

In this case, the accused appeared to be hiding something. The request to exit the vehicle was partially intended to address a legitimate safety concern. Once the accused exited the vehicle, the gun was in plain view and the police were entitled to seize it under s.489(2) of the *Criminal Code* or by operation of the plain view doctrine. The subsequent grabbing of the accused was to arrest him, which became a search incident to arrest. This search and the subsequent seizure of the gun from the accused's jacket, along with a magazine containing ammunition from his pants pocket, was lawful. The police conduct was authorized by statute and under the common law. The accused's rights under the *Charter* were not infringed and all the evidence was admissible in the trial.

OUTSIDE 911 CALL, BY ITSELF, DOES NOT JUSTIFY ENTRY

R. v. Vickers, 2002 BCPC 0389

A complainant, who could hear yelling, screaming, and door slamming at a residence called 911 to report a domestic dispute. Police responded and saw the accused on the front lawn yelling into a cellular telephone. No yelling, screaming, or door slamming could be heard coming from the house. The accused was told to stop his call and two officers entered the home to "clear" it. After a recruit police officer found what was believed to be a grow operation in a bedroom of the home, the accused was arrested for production of marihuana by a more senior member. The more senior member then entered the house to confirm the recruit's observations and did observe a marihuana grow operation. It was later determined that there was not a domestic dispute at the home.

A search warrant was subsequently obtained by fax under the *Controlled Drugs and Substances Act* and executed at the home. During the voire dire to determine the admissibility of evidence, the accused argued, in part, that the search warrant was issued on the basis of two unreasonable searches, the initial entry into the home as well as the second confirmatory search by the more senior officer. The Crown submitted that the first entry and search was authorized by the common law duty of the police in protecting life and property, while the second search was incidental to the arrest of the accused.

Common Law Search to Protect Life

Although the common law justifies forced entry into dwellings to protect life and property, the police must make some enquiry or take other investigative steps before entering. The 911 caller did not make the call from within the house on this occasion, therefore the police did not need to enter to check on their welfare. They did not hear any screaming, yelling, or door slamming while they were at the house, nor did they make any inquiries with anyone about the complaint. Furthermore, even though the police testified that

domestics disputes pose safety risks and are unpredictable and emotional, there was nothing to support the need for immediate entry in this case. British Columbia Provincial Court Justice Bennett stated:

> [The police entered the accused's] house solely on the basis of information supplied by an unknown complainant of unknown reliability. In my view, the constables' common law duty does not extend so far as to make the 911 call, in and of itself, an opportunity to enter the house. [The initial] search of the house [was] unauthorized and unreasonable within the meaning of s.8 of the Charter.

Moreover, the second search of the home was not authorized by the duty to protect life. This search was made to confirm the observations of the marihuana grow operation made by the recruit officer.

Search Incident to Arrest

The common law allows a police officer to search a lawfully arrested person and the area within their immediate surroundings. Since the accused was arrested on his front lawn, the house could not be properly characterized as immediate surroundings on these facts. Furthermore, there were no exceptional circumstances warranting the second search. The house had already been cleared and preservation of evidence was not a concern. Thus, this second search was also unreasonable and a violation of the accused's rights under s.8. In excluding the evidence under s.24(2) of the *Charter*, Justice Bennett held:

> There is no doubt that police officers face numerous obstacles, legal and otherwise, in the course of their investigations of these operations. However, in this case, the end does not justify the means. Given the importance placed on the sanctity of a person's home, the admission of the evidence would in my view bring the administration of justice into disrepute.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

"Most of our faults are more pardonable than the means we use to conceal them". Josephson Institue

HANDCUFFING HISTORY: JUSTIFYING WRIST RESTRAINT

Police in Canada are authorized to exercise reasonable and necessary force over persons under arrest or in lawful custody. When the police make an arrest, it is not uncommon for them to exercise control of the subject by using physical restraints in the interests of safety, to prevent escape, and/or prevent the destruction of evidence. The most common form of physical restraint is the use of handcuffs. This right to exercise control over a person in custody is not an unqualified right to use handcuffs on every occasion under any circumstance. Their application is subject to limits, which relates to the intended purpose of the handcuffs and the manner in which they are applied.

Section 25 of the *Criminal Code* protects the police, among other persons, in using reasonable force when administering or enforcing the law.

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

This would include custodial care of persons arrested. There are two issues arising when considering the application and use of handcuffs; permissible application (why and when) and appropriate application (how). These aspects are commonly intertwined.

Permissible Application: Why & When?

Early Canadian jurisprudence reasoned that the use of handcuffs was permissible where a prisoner had attempted or was likely to attempt escape. In *Fraser v. Soy* (1918) 30 C.C.C. 367 (N.S.C.A.), a civil case where the plaintiff was suing the police for false arrest and trespass in handcuffing, Justice Longley of the Nova Scotia Court of Appeal stated:

> If the [police officer] believed that it was necessary to handcuff them, I think that pretty nearly ended the matter. A policeman has always a right to judge of the circumstances attending a case, in the matter of a sudden arrest, and if he makes up his mind one way or the other it should be conclusive, only excepting one thing,

> that is, if the circumstances under which the handcuffing is done were needless and gave reason to suspect that there was a particular desire to administer harshness in it, then it would probably be open to question; but usually a policeman is the sole judge of the circumstances under which he is to arrest, and the fact that there were 3 [suspects] to 2 [policemen] seems to me sufficient authority.

Sixty-one years later, in *R. v. Cunningham* (1979) 49 C.C.C. (2d) 390 (Man.Co.Ct.), the court considered the use of physical restraint in the securing of a prisoner on board a ship following his arrest by the captain. The Court held:

> A peace officer or person affecting an arrest is legally entitled to secure his prisoner, such as by handcuffing him or binding him, if he does so reasonably and if he has good reason for doing so.

The Court in *Cunningham* condoned the use of physical restraints despite the fact they were applied without the belief the prisoner may escape. This judgment justifies the use of handcuffs beyond the necessity to prevent foreseeable likelihood of escape to include application for "good reason". "Good reason" for handcuffing could include the protection of the police from the prisoner, protection of the prisoner from self-abuse, and limiting the actions of the prisoner from destroying evidence. Police, by securing the prisoner, may then transport to a secure facility to perform a thorough search of the prisoner without fear evidence may be destroyed or rendered useless.

Why handcuff?

PROTECTION
- ☞ Public
- ☞ Police
- ☞ Prisoner

PREVENTION
- ☞ Escape

PRESERVATION
- ☞ Evidence

Appropriate Application: How?

Handcuffs, like any police "tool", requires skill and basic knowledge in their use and application. The skill level required under ideal conditions to apply handcuffs is minimal. However, the consequences of improperly applied handcuffs can result in injury. Handcuffs applied too loosely can be removed by the arrestee. Handcuffs applied too tightly can result in decreased blood flow through the area of restriction resulting in discomfort and/or injury to the wearer.

In *Carr v. Gauthier* (1992) 97 D.L.R. (4th) 651, the Alberta Court of Queen's bench, among other pleadings, examined the police use of handcuffs applied by the police on the plaintiff. The plaintiff brought an action against the defendant police officers for assault. Justice Cooke, in finding in favour of the plaintiff, stated:

> Two aspects however do trouble the court. First, the handcuffs were…far tighter than required. Secondly, and more important by reason of the intent manifested by it, the plaintiff was left in the police station for some extended period of time with his hands tightly cuffed behind his back because [the officer] could not find the keys to release him….I find that the plaintiff was deliberately left in this state as punishment for the verbal abuse and intimidation the [police] believed they suffered from the plaintiff.

The Court found the retributive motivation was an inappropriate application of the handcuffs and constituted an assault on the plaintiff. The plaintiff was awarded $2500 in damages for humiliation, discomfort, soreness, and bruising.

In *Showler v. Shipley* [1989] O.J. No. 2360 (Ont.Dist.Crt.), the plaintiff brought an action against the police for assault and battery resulting from his arrest. The plaintiff was arrested at the site of a union strike in which the situation was described as " volatile and potentially violent". When examining the application of handcuffs on the plaintiff by the police, Justice McDermid stated, at page 16:

> The handcuffs were applied very quickly to immobilize the plaintiff and to prevent him from re-entering the fray. In the heat of the moment, they were applied incorrectly. In the circumstances, I cannot say that either Sergeant Carson or Constable Keutsch acted negligently in doing so or with any intention of harming the plaintiff or causing him discomfort. It must be emphasized that all of these events involving the plaintiff occurred within a matter of seconds in a hostile environment.

Clearly, the motivation for and the situational application of the handcuffs are significant factors in assessing the appropriateness of handcuff use. As in *Showler*, it was recognized that the circumstances of the situation had bearing on the manner in which the handcuffs were applied. Under ideal handcuffing conditions, that of a submissive and cooperative prisoner, there would be no justifiable reason for improper application. However, with the introduction of external influences like a combative and resistive

individual, the "text book" application of the handcuffs is, in some cases, unlikely.

In a more recent case, *Gregory v. Canada* 2002 CFT 420, the plaintiff brought an action against the government in federal court alleging that her rights under the *Charter* were violated when she was arrested and handcuffed by a Customs officer. Federal Court Justice Lafreniere held that a peace officer must establish a reasonable basis for justifying the use of restraints. In this case, the officer testified that he was attempting to eliminate any possibility of escape or injury. Even though the possibility of escape is difficult to gauge, the Court refused to second-guess the officer and found it "was reasonable in concluding that the handcuffs were required". Furthermore, "the interests of enforcement officers in ensuring their personal safety and that of the detained person and the public must be taken into account". However, the Court made the following caution:

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

Police Accountability and Handcuffing

If a person believes they are subject to an improper use or application of handcuffs, there are several avenues for redress. Although the police are lawfully entitled to exercise reasonable and necessary force in effecting an arrest, the police are criminally responsible if the force is excessive. If a court finds that the application of handcuffs was excessive, an officer could be found guilty of assault or subject to the findings of a civil court and found liable for negligence or assault and/or battery.

Furthermore, the aggrieved party may apply to a court for remedy under the *Charter* if it can be established that the person's rights had been infringed. The court may award financial compensation or another appropriate remedy under s.24. The police may also be subject to internal disciplinary proceedings, a public hearing, or intense media attention for the misuse or misapplication of handcuffs.

Summary

The law authorizes the police to use necessary and reasonable force when making an arrest. One such example of force is the application of physical restraints, or handcuffs. Handcuffs must be applied for a legitimate purpose and in a reasonable manner. Handcuffs are not an instrument intended to be used for the purposes of humiliating or punishing the arrestee. Handcuffs are however, when used for a bone fide purpose, an invaluable tool for protecting the police, protecting the prisoner, preventing escape, and preserving evidence.

LACK OF RECORDING PRODUCES 'CREDIBILITY CONTEST' BETWEEN POLICE & SUSPECT

R. v. Francis,
(2002) Docket:C35342 (OntCA)

The accused appealed his convictions for three bank robberies. In allowing the appeal, quashing the convictions, and ordering a new trial, the Ontario Court of Appeal considered the failure of the police to tape record their interview with the accused and the impact this has in assessing whether the statement was voluntary. It is the role of the Court to scrutinize all of the circumstances surrounding the taking of a statement and determine whether the statement is admissible under the common law confessions rule, which requires the Crown prove beyond a reasonable doubt that the statement was voluntary. At para. 8, the Court stated:

> [W]e also think that in admitting the [accused's] statement, the trial judge failed to give adequate consideration to the investigating officer's failure, in the circumstances, to tape record the conversation, thereby setting up a credibility contest between himself and the [accused].

This case underscores the importance of recording statements of accused's persons.

Complete case available at www.ontariocourts.on

Editor's Note: In *Francis*, the Ontario Court of Appeal referred to an earlier decision of the Court (*R. v. Moore-McFarlane* (2001) Docket: (OntCA). In that case the Court thoroughly reviewed the confessions rule and made the following comment:

> However, the Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. That onus may be readily satisfied by the use of audio, or better still, video recording. Indeed, it is my view that where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation suspect. In such cases, it will be a matter for the trier of fact to determine whether or not a sufficient substitute for an audio or video tape record has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt.

Thus, it would appear that although there is no affirmative duty on the police to record interviews, where recording equipment is available but the police fail to use it, the voluntariness of the non-recorded interview will be inherently suspect because of the absence of a recording. Of course, non-recording of a statement does not automatically render it inadmissible. It will be the role of the Crown to nonetheless prove the statement voluntary beyond a reasonable doubt, even without a recording.

OFFICER NOT QUALIFIED TO GIVE EVIDENCE OF HGA SOBRIETY TEST

R. v. Badry, 2002 BCPC 353

A police officer stopped the accused for an obscured licence plate and asked for his driver's licence and registration. The officer detected a moderate odour of alcohol and was told that the accused had recently consumed liquor. The officer then asked the accused to perform sobriety tests: the walk and turn test, the one leg stand test, and the Horizontal Gaze Astigmas (HGA) test. As a result, the officer formed reasonable grounds to make the breathalyser demand and the accused subsequently failed the breathalyser tests. At trial, British Columbia Provincial Court Justice Tweedale found the officer did not have reasonable grounds to make the demand.

In concluding that the accused performed the walk and turn test and one leg stand test "very well", Justice Tweedale held that the officer was not qualified to give the expert opinion evidence necessary to use the HGA test. Although the officer believed (subjectively) that the accused's eyes, which exhibited lack of smooth pursuit, involuntary deviation to the side, and involuntary jerking provided clues of impairment, these test results must also provide an objective basis for such a belief. Even though the officer testified he acquired the knowledge and skill to conduct HGA tests during his training, the Crown did not attempt to qualify him as an expert. In finding a breach of the accused's right to be secure against unreasonable search and seizure, Justice Tweedale stated:

> The constable's HGA test evidence is not admissible to support his conclusion that the accused was impaired, on the objective branch of the test. Even if it were admitted, [the constable] failed to make clear in an understandable and meaningful way how the three failures by the accused in both eyes was used to support the constable's conclusion of those failures being clues of impairment, nor what importance he gave to the failure in each instance. In other words, the constable's conclusion of HGA test failure amounts to little more than a bare statement of failure without reasons. [The constable] was taught that certain signs mean failure or impairment, but he could not or did not articulate the reasons how or why, and of course he was not entitled to do so without a declaration that he is an expert.
>
> The only evidence of impairment that remains then is a moderate smell of liquor, an admission to drinking a very modest amount of liquor, and two physical tests which the accused substantially passed. The constable did not have reasonable and probable grounds objectively for believing the accused's ability to drive was impaired by alcohol. This is a breach of Section 8 of the Charter.

The certificate of breath results was excluded and the accused was found not guilty.

Complete case available at www.provincialcourt.bc.ca

NON-OFFENSIVE 'PROFILING' BOLSTERS GROUNDS FOR DETENTION

R. v. Villatoro, 2002 BCPC 0431

A police officer on patrol observed the accused, in company of two known Hispanic drug traffickers, walking in the downtown eastside of Vancouver. About a half hour earlier, the officer had observed the two known traffickers circle the block apparently to avoid police observation. Because the accused was unknown to the officer, he decided to stop

and identify him. The officer pulled his vehicle in front of the men and asked them to stop. The two known males stopped, but the accused continued walking. The officer again requested the accused stop, but he continued walking and the officer noticed he was swallowing something. Believing he may be swallowing drugs, the officer told the accused to open his mouth and stick out his tongue. Because the accused continued swallowing, the officer took hold of one of the accused's arms and also applied a pressure hold to either side of his neck to prevent him from swallowing. The officer observed numerous white rocks, or cubes, wrapped in cellophane at the front of his mouth. The accused was taken to the ground, handcuffed and searched. In the small of his back police found a golf club as well as 30 rocks of cocaine in his pants pocket. On the ground near the accused's head police found a small plastic wrapped rock of cocaine. He had swallowed most of what was in his mouth.

The accused argued that the officer did not have reasonable grounds to arrest him when he squeezed his neck to prevent him from swallowing. This, it was suggested, amounted to a violation of the right to be secure against unreasonable search or seizure. The Crown contended that there was no violation and the search was reasonable. All warrantless searches are presumptively unreasonable and the Crown bears the burden of proving that the search was nonetheless reasonable. In addressing whether the police have the power to detain persons for investigative purposes, Justice Maughan stated:

> There is no dispute police officers are entitled to stop and question people on the street and detain them momentarily for investigation, but unless there are reasonable and probable grounds for their arrest, police officers must allow them to proceed.

In this case the officer was about to stop the accused to identify him, but his attention was diverted to a narcotics investigation when he observed what he believed to be an attempt to swallow drugs. This was observed before the accused was physically detained and along with other factors provided the officer with articulable cause to physically stop and search him. Jusitice Maughan held:

> It is clear the officer had articulable cause to detain and search the accused's mouth for the drugs he believed he was swallowing. In coming to this conclusion the officer relied on the fact that [the accused] was with two known Hispanic drug traffickers, the accused appeared to be Hispanic, the fact that in his experience known drug dealers tend to recruit others in the trade, the area of town being commonly known as a high area for drug trafficking, the apparently evasive actions taken by the two known drug traffickers a half hour earlier close to that area, the accused's body language and behaviour as well as the officer's extensive experience in seeing drug dealers hold drugs in their mouths and attempt to swallow them when confronted by the police.
>
> This is not a case where a police officer has stopped an accused and impeded his progress prior to seeing any indication of behaviour associated with drug trafficking.
>
> In my view, it is an error to say that the officer is guilty of inappropriate racial profiling since his experience is that Hispanic males tend to stay together and recruit other Hispanic males into the drug trafficking milieu. In my view this is not offensive profiling but rather simply a reflection of an unhappy reality in the drug infested area in the 400 block of Columbia Street. There is no evidence [the officer] would have prevented [the accused] from walking away had he not seen any familiar inculpatory body language and the typical swallowing motion of a drug trafficker. Although it is possible the accused was simply swallowing food, he had no food in his hands and the surrounding circumstances make such an inference unreasonable and unlikely.

The court concluded that the police did not violate the accused's rights under the *Charter* and the evidence was admitted.

Complete case available at www.provincialcourt.bc.ca

TRAFFIC STOP & SUBSEQUENT SEARCH JUSTIFIED: DRUG EVIDENCE ADMISSIBLE

R. v. Casselman, 2002 MBQB 247

An experienced police officer and his recruit were on general patrol in a high crime area when they encountered a vehicle in which the driver appeared to be surprised at their presence. The licence plate was queried by computer and the officers learned the vehicle was rented. Despite no traffic violations being observed, the police stopped the car. The experienced officer testified that he had a number of concerns including (1) that the vehicle may have been stolen but not yet

reported because it was a holiday (Canada Day), (2) the driver might be a drug "dial-a-dealer" based on his experience with traffickers using rental vehicles to avoid confiscation of their own property, and (3) the driver's licence status could not be confirmed by computer from the rental vehicle information. Relying on motor vehicle legislation, the accused was stopped and questioned about the rental vehicle and his driver's licence. While waiting for the production of the rental agreement and drivers licence, the officer noted that the driver was very nervous and trembling and that there were two cell phones and a pager on the front seat. The rental agreement that was subsequently produced named an individual (not the accused) who was the only person permitted to drive the vehicle and who was associated to an address connected to the Hell's Angels.

When the accused produced his driver's licence, which was expired, the officer observed a large number of bills in the accused's wallet. Furthermore, the accused moved his jacket from the front floor of the vehicle and covered the cell phones and pager. The accused was asked to step from the vehicle. After asking whether he had any weapons or drugs on him, the officer conducted a quick pat-down search and found a "Kinder Surprise egg" in his sock containing drugs. As a result of the stop and search, the accused was charged with possession of cocaine for the purpose of trafficking and possession of proceeds of crime. At trial, the accused argued, among other grounds, that the police used the *Highway Traffic Act* as a ruse to justify pulling the vehicle over and conduct an unauthorized investigation, which amounted to an arbitrary detention. Further, even if the initial stopping of the accused was lawful, the continued detention was arbitrary and the resultant search was unreasonable since there was insufficient grounds to arrest the accused for anything.

The Stop

In concluding that the actions of the police were justified, Manitoba Court of Queen's Bench Justice Keyser first examined the legitimacy of the initial stop. The officer stated he was relying on motor vehicle legislation to stop the vehicle and the court found that it was "neither sinister nor surprising that a veteran officer would appreciate that his authority to stop a vehicle is derived from a section of the Highway Traffic Act". Although the Highway Traffic Act did not explicitly require a driver to produce a rental agreement, Justice Keyser found this similar to asking for insurance. The officer did not ask any questions about drugs nor did he search the vehicle. It was at this time that further observations made by the officer justified continued detention outside the scope of motor vehicle concerns:

> The combination of observations by [the officer] as to the rolled bills, the pager and cell phones, along with the accused's extreme nervousness, met the standard of articulable cause in my view and allowed further investigation.

The Search

Incident to an investigative detention, the police are entitled to search the detainee provided it is minimally intrusive under the circumstances. Justice Keyser stated:

> The search of the accused was a quick pat-down search, above the clothing, that was not invasive. It was at this time that the drugs were discovered in a Kinder Surprise egg in his sock. Prior to the pat-down, the accused was asked by [the officer] whether he had any weapons or drugs on him. Counsel for the accused cross-examined [the officer] closely as to how drugs could be used as a weapon and argued that it was not a bona fide search for weapons, but a fishing expedition for drugs. [The officer] replied that he always asked the question that way, but in my view nothing turned on that. If [the officer] was entitled to search pursuant to the detention of the accused for security reasons, then he could do so, and the drugs were easily discoverable.

In this case, "there existed very real indicators of criminal activity that, at the very least, permitted a further detention to investigate and corresponding right to search in a reasonable and unobtrusive manner before placing [the accused] in a police car".

Complete case available at www.canlii.org

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