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 January 21, 2003, 52-year-old Ontario Conservation Officer Walter Ceolin was working as a member of a crew conducting aerial moose surveys in a remote Ontario location when their helicopter encountered mechanical difficulties. The pilot attempted to make an emergency landing, however the helicopter rolled over and crashed into the bush a short distance from a railroad siding.

Loggers working nearby witnessed the accident and were on the scene almost immediately, but there were no survivors. Also killed in the crash were two Resource Management technicians, Bruce Stubbs (39) and Chantelle Walkey (27), and the chief helicopter pilot Michael Maguire (50); all were from the Ontario Ministry of Resources. Officer Ceolin had come in to work on his day off to fly that day. He had 25+ years with the Ontario Ministry of Resources and is survived by his companion and a son.

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

POLICE FRIEND NOT A LAWYER: RIGHT TO COUNSEL RESPECTED

R. v. Webber, 2002 BCCA 692

As a result of being stopped at a roadside check, the accused was required to provide a breath sample and was advised of his right to a lawyer. He requested to speak to his friend, a police sergeant. The officer attempted to persuade him to try and call a lawyer, but the accused would only blow if he could call his sergeant friend. The officer declined to facilitate the call and the accused was charged and convicted of refusing to provide a breath sample.

The accused appealed to the British Columbia Court of Appeal arguing his right to counsel protected under s.10(b) of the *Charter* had been violated when the police failed to provide him with a reasonable opportunity to consult counsel. He suggested they did not facilitate his request in obtaining the legal advice he wanted before they accepted his refusal. This, he contended, afforded a reasonable excuse not to provide a breath sample and he should have been acquitted. In dismissing the appeal, Justice Huddart for British Columbia's top court concluded that the sergeant friend was not a lawyer and consequently there was no need for the officer to permit the contact the accused sought.

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

ACCUSED NOT RESPONSIBLE FOR TOW BILL

R. v. Wellington, 2003 ABQB 12

An Alberta Court of Queen's Bench justice ruled that a tow company has no right to collect an outstanding storage bill from an accused after his vehicle was seized by police and stored at a private compound. The vehicle was seized on the basis that it was purchased with funds fraudulently obtained from a bank. The accused had plead guilty to the fraud and his motor home was eventually returned to him. At the sentencing hearing, the prosecutor asked the

judge to order that the accused pay $11,497 in compensation to the tow company for the outstanding storage bill. The accused argued that the police seized the motor home and they should pay the cost of storage.

In dismissing the claim for compensation, Justice Sanderman concluded the tow company would have to seek relief elsewhere, such as a civil claim against the police or otherwise negotiate a settlement. The police department entered into a private contract with the tow company for the storage of the motor home and the accused was not a party to that contract. Furthermore, there were no *Criminal Code* provisions that would permit the relief the tow company was seeking. For example, the requirements of s.489.1 (1) were ignored. Therefore, the accused was not responsible for the bill.

Complete case available at www.albertacourts.ab.ca

WARRANTLESS VEHICLE SEARCH VALID AS AN INCIDENT TO ARREST

R. v. Power,
[2002] No. 1302A-00513 (NfldPC)

The accused was observed by a police officer pulling a trailer without any lights, an offence under highway traffic legislation. After stopping the vehicle, the officer smelled a fairly strong, fresh odour of marihuana coming from it. He concluded the marihuana had been recently smoked and arrested the accused for possession of a controlled substance, advised him of his right to counsel, and placed him in the rear of the police cruiser. The officer then searched the accused's vehicle and found 2 grams of marihuana in a "kit bag" behind the driver's seat. He was subsequently charged with possession of a controlled substances.

In a pre-trial application the accused sought to have the evidence excluded under s.24(2) of the *Charter* on the basis that the arrest was unlawful and the warrantless vehicle search that followed was unreasonable. He argued that an arrest based solely on the odour of marihuana was improper because the "olfactory observation" alone could not provide reasonable grounds.

The Arrest

A warrantless arrest under s.495 of the *Criminal Code* requires that the arresting officer possess the requisite reasonable grounds. This imports a subjective belief (the officer's perspective) justified from objective criteria based on the circumstances, including an officer's training and experience. In finding the arrest lawful, Justice Gorman of the Newfoundland and Labrador Provincial Court stated:

> In this case, I conclude that a reasonable person placed in the position of [the officer] would have concluded that reasonable and probable grounds existed for [the accused] to be arrested. If [the officer] had failed to do so after smelling what he genuinely believed to be freshly burnt marihuana, he would have been seriously derelict in his duties and in his obligation to investigate possible breaches of the law.

The Search

Although a warrant is generally a precondition to a constitutional search, there are exceptions to this rule including warrantless searches incidental to arrest. This search power, although requiring reasonable grounds to make the arrest, "does not require that the officer has reasonable grounds to believe that the search will result in the seizure of evidence". However, the search must be undertaken for a legitimate purpose connected to the circumstances of the arrest. Valid reasons include searching for safety or to find evidence. In concluding that the search of the accused's vehicle was justified as an incident to arrest, Justice Gorman stated:

> In this case, [the officer's] search of the vehicle was conducted for a valid reason which was connected to the arrest. He was searching for

> evidence connected directly to the reason for the arrest. It must be recalled that [the accused] was arrested because of the officer's belief that he had possession of a prohibited substance. This is not for instance, a case in which a search for drugs occurred in relation to an arrest for an unrelated matter…The search was not conducted in an abusive fashion nor was the purpose of the search related to any improper motives.

The evidence was untainted and could be used at trial.

Complete case available at www.canlii.org

HIGHWAY SAFETY INCLUDES QUESTIONING ABOUT ALCOHOL CONSUMPTION

R. v. Peterson, 2002 SKQB 489

The police stopped the accused to determine if he was licensed, his vehicle was registered, and to check his sobriety. He produced his licence and vehicle registration on request. A passenger was also observed trying to hide a bottle of beer under his foot. When asked, the accused acknowledged he had been drinking. The officer made a roadside screening device demand and the accused failed. He was arrested, read his right to counsel and police warning, and given the breathalyzer demand. He subsequently provided breath samples over the legal limit.

He was convicted at trial, but appealed to the Saskatchewan Court of Queen's Bench arguing that the certificate of breath analysis was inadmissible under s.24(2) of the *Charter* because it was the product of an arbitrary detention contrary to s.9. He suggested that the officer was initially entitled to stop him under Saskatchewan's motor vehicle legislation, but the continuation of the detention became arbitrary once he produced the requested documents. Thus, at the time the officer asked the question about alcohol consumption the accused was unlawfully detained and the officer could not rely on Saskatchewan's *Highway Traffic Act* (*HTA*) for justification.

After reviewing current case law, Justice Smith concluded that random vehicle stops pursuant to the *HTA* for highway safety are arbitrary under the *Charter*, but saved by s.1. Highway safety "includes determination of the sobriety of the driver". This extends to requests of the driver to perform sobriety tests as well as asking a driver if they have consumed alcohol. The appeal was dismissed.

Complete case available at www.canlii.org

$500 REMEDY FOR NON-DISCLOSURE OF POLICE NOTES

R. v. Kelln, 2003 SKPC 1

A Saskatchewan Provincial Court Judge awarded an accused person $500 because the Crown failed to provide a police officer's notes in a timely manner, breaching the prosecution's obligation of full disclosure. The accused was charged with impaired driving and his lawyer wrote Crown requesting disclosure. The police report was provided, but not the officer's notes. During a subsequent conversation with the Crown his lawyer asked for any police officer's notes, which were ultimately provided 11 months after initial disclosure was requested.

In the Court's ruling, Justice Snell noted that the "Crown has an obligation to disclose all relevant information that may be helpful to the defence, whether inculpatory or exculpatory, in order to ensure that the accused may make full answer and defence, as guaranteed by section 7 of the *Charter*". Justice Snell stated:

> The Crown acknowledged that in many cases the investigating officers are the only witnesses and therefore their notes are the only "statements" which are available. The police report is prepared from those notes. According to the authorities the notes are considered part of the Crown file and

> are subject to disclosure whether the police have provided them to the prosecutor or not.

The Crown argued that the notes need only be disclosed if the defence asks for them. In rejecting this submission, the Court held:

> In my view the practice of the Regina Prosecution Office of failing to provide police officers' notes upon receipt of an initial request for disclosure and requiring the defence to subsequently request such notes specifically constitutes a failure to comply with its disclosure obligations. The Crown agreed that the notes are relevant and would be of assistance in making full answer and defence. Accordingly, in order to fulfill its obligation to provide full disclosure the Crown should be obtaining those notes from the police with the police report as a matter of routine, so that they can be provided to the defence in all cases where a request is made for disclosure.

As a result of his s.7 *Charter* breach, the accused requested a judicial stay of proceedings as an appropriate remedy under s.24(1). Justice Snell found a stay would be too extreme under the circumstances but awarded the accused $500 because of the extra expense suffered when he had to make additional court appearances to deal with the Crown's breach of disclosure.

Complete case available at www.canlii.org

DESTRUCTION OF EVIDENCE DOES NOT WARRANT STAY

R. v. Larsen, 2003 BCCA 18

In 1978, the partially nude body of a 16-year-old deceased female was found after she had disappeared from a party held in a farmer's field. She had a clump of human hairs in her hand and semen in her mouth, larynx, and on her sweater. At the time, an expert in hair and fibre analysis concluded the hairs were inconsistent with belonging to either the victim or the accused. Twenty years later with the emergence of DNA testing as a reliable investigative tool, the police re-examined the homicide. They obtained DNA samples of men who had attended the party. The semen was found to match the accused's DNA, but the hairs found in the victim's hand had already been destroyed because the police had concluded they were of no value as evidence at this time; there was no scientific methods of proving positive identification. The accused was charged with murder.

At his trial the accused argued that he had consentual sex with the victim before her death and she must have died from accidentally choking on his semen or was strangled by another unknown person(s). He further submitted that the destruction of the hair denied him the opportunity to prove his innocence. The hairs may have provided DNA evidence exonerating him and he was therefore denied his *Charter* right under s.7 to make full answer and defence as well as his right to a fair trial under s.11(d). As a remedy under s.24(1) of the *Charter* he asked for a judicial stay of proceedings or, at minimum, a specific direction that the hairs found in the victim's hand were neither his nor the victim's.

The trial judge refused both requests. First, he concluded that the destruction of the hairs was not malevolent. It was made out of an honest and reasonable belief that they were worthless as evidence and the police did not deliberately attempt to undermine the accused's defence or the trial fairness. Secondly, although a DNA analysis of the hairs might have assisted the accused, it was just as likely the results may have been neutral or adverse to him. Any prejudice to the accused making full answer and defence could be mitigated by considering the frailties in the investigation when weighing the reliability of the evidence or by the accused calling the expert who initially examined the hairs. Finally, the trial judge held that directing himself that the missing hairs were neither the accused's nor the victim's was treading into the area of evidentiary weight, as opposed to admissibility. He was not prepared to accede to this request because it was not his role to make the most favourable finding for the accused to the exclusion of all other possibilities.

The accused appealed his conviction for first-degree murder to the British Columbia Court of Appeal arguing, among other grounds, that the trial judge erred in failing to grant a remedy for the police destruction of the hairs. In rejecting this ground of appeal, Justice Smith writing for the Court stated:

> The Crown's duty to disclose all relevant material in its possession or control to the defence is imposed because an accused has a right to make full answer and defence, which is one of the principles of fundamental justice guaranteed by s. 7 of the *Charter*…. The duty includes a duty to preserve relevant evidence. Nevertheless, when evidence is lost or destroyed, there is no breach of the s. 7 disclosure obligations if the Crown satisfies the trial judge that the loss or destruction was not due to unacceptable negligence. Whether there has been unacceptable negligence is a factual inquiry that depends upon the degree of relevance of the evidence and the reasonableness of the police conduct that resulted in its destruction or loss. Moreover, even where the Crown has satisfactorily explained the loss of evidence, in the extraordinary case where the loss is so prejudicial to the accused that it impairs his right to a fair trial, a judicial stay of proceedings may be granted. However, in such extraordinary cases, the accused must demonstrate actual prejudice to his fair trial right. (emphasis added, references omitted)

The trial judge had properly considered in his *Charter* analysis whether the prejudice to the accused's defence was irreparably damaged or could otherwise be remedied. Furthermore, the British Columbia Court of Appeal agreed that the self-direction concerning the origin of the hairs was not appropriate in the circumstances. The appeal was dismissed.

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

Note-able Quote

"People may not remember what you did, or what you said, but they will always remember how you made them feel". Author unknown

CLASS 89 GRADUATES

The Police Academy is pleased to announce the successful graduation of recruit Class 89 as qualified municipal constables on February 7, 2003.

ABBOTSFORD
Cst. Martin Ellis-White
Cst. Shaun Nagel
Cst. Ian Uhryn

DELTA
Cst. Dennis Mah

NEW WESTMINSTER
Cst. John Grantham

VANCOUVER
Cst. Derek Cain
Cst. Jeffrey Campbell
Cst. Helder Confeiteiro
Cst. Andrew Copus
Cst. Kathy Crowther
Cst. Calvin Davis
Cst. Calvin Ewer
Cst. Martin Formanek
Cst. Adam King
Cst. Justin Leung
Cst. Rebecca Matson
Cst. Dirk Odendaal
Cst. Gregory Paxton
Cst. Gerald Proctor

Congratulations to Cst. Ian Uhryn (Abbotsford), who was the recipient of the British Columbia Association of Chiefs of Police Shield of Merit for best all around recruit performance in basic training. Cst. Gerald Proctor (Vancouver) received the Abbotsford Police Association Oliver Thomson Trophy for outstanding physical fitness. Cst. Rebecca Matson (Vancouver) received the Vancouver Police Union Excellence in Academics award for best academic test results in all disciplines. Cst. Adam King (Vancouver) received the British Columbia Federation of Police Officers Valedictorian award for being selected by his peers to represent his class at the graduation ceremony. Cst. Calvin Ewer (Vancouver) was the recipient of the Abbotsford Police Recruit Marksmanship award for highest qualification score during Block 3 training (50/50). Mr. Phil Crosby Jones, former Police Academy Director and current Director of the British Columbia Special Olympics Law Enforcement Torch Run, was the keynote speaker at the ceremony.

NO CHARTER BREACH RESULTING FROM IN HOME ARREST

R. v. Petri, 2003 MBCA 1

Police officers responded to a citizen's 911 call of a vehicle being driven erratically. The caller was able to provide a detailed vehicle description including a licence plate number, but was unable to describe the driver. Two officers attended the registered owner's address and found a vehicle matching the description parked in the driveway. The officers walked onto the driveway and touched the warm hood of the vehicle suggesting it had been driven recently. They proceeded to the primary entrance of the residence and knocked on the door. The accused, dressed in his nightclothes, answered the door, confirmed he was the registered owner of the truck, and stepped back allowing the police to step inside.

While speaking to the accused the police observed symptoms of impairment including blood shot eyes, a strong odour of liquor, leaning against the wall for support, and stumbling on one of the stairs. An officer formed the opinion the accused was impaired and asked him if he had been the operator of the vehicle. The accused responded that he had and was then arrested. He was permitted to get dressed while accompanied by the officers and was transported to the police station for breathalyser samples, which were over the legal limit.

At trial[1], Manitoba Provincial Court Justice Harvie concluded the initial police entry onto the property was proper under the implied licence doctrine because they entered onto the property for the purpose of communicating with the occupant(s), not for the purpose of securing evidence against the homeowner. At the time the police knocked on the door they did not know the identity of the driver nor whether alcohol was even involved. She found that "while the officers acknowledged that the driver's actions were consistent with that of an impaired driver, there were a number of other rational explanations for the manner of driving observed".

However, the trial judge found that the police violated the accused's s.8 rights when they made their warrantless entry into the dwelling house "without invitation or real consent". She did not think "that it is acceptable or sufficient for the police to rely upon an 'implied consent' to enter a dwelling house". Furthermore, they arrested him inside his home without a specialized warrant as required by *R. v. Feeney*, [1997] 2 S.C.R. 13. As a result of the s.8 *Charter* breach, Justice Harvie excluded the breathalyser readings under s.24(2).

The Crown appealed directly to the Manitoba Court of Appeal under s.830 of the *Criminal Code* arguing, in part, that the trial judge erred in finding that the police violated the accused's s.8 rights when they entered his home and arrested him without the appropriate warrant. Justice Kroft, writing for the unanimous Manitoba Court of Appeal agreed with Justice Harvie that the initial police entry onto the property and up to the door to knock was proper and did not exceed the common law implied licence rule. He stated:

> I begin my substantive comments by emphasizing the limited amount of information that the two officers had when they first arrived at the address of the registered owner. They had no description whatsoever of the person who had been driving the truck; did not know if the house was the driver's home; and had no idea whether the erratic driver was the truck owner, a family member or an unrelated third person. Furthermore, they had no way of knowing if the driver was even in the house and did not know anything about his state of sobriety. They were in fact just beginning the investigation of a reported offence.

With respect to the entry into the residence, Manitoba's top court reversed the trial judge's findings. In Justice Kroft's view the lower court

[1] See R. v. Petri, (2001) 22 M.V.R. (4th) 108 (ManProvCt)

judge erred when she concluded the police violated the accused's rights by entering his home with his implicit consent and by arresting him without a specialized entry warrant. The Appeal Court held:

> Once the officers had passed through the door and onto the stair landing, the evaluation of their conduct must be addressed, while keeping in mind that they were police officers within a private dwelling and had no warrant. We must also recognize, however, that at this point in time, the police had absolutely no more information about the identity of the erratic driver than they had when they first approached the house and the person who met them at the door was certainly not an accused. There was no reasonable ground on which to charge or arrest him. What the trial judge described as taking place inside the door was still nothing more than part of the continuing investigation conducted without coercion…
>
> Once the police officers spoke to the person that met them at the door, received his confirmation that he had, in fact, been the driver and observed his physical appearance and unsteady gait, they had sufficient evidence to conclude that he had indeed been the driver of the truck that had been reported as driving erratically and that he was likely impaired. He was thereupon charged and arrested for impaired driving. He was allowed to dress, escorted to the cruiser car and transported to the police station for a breathalyzer test.
>
> The evidence shows that the police respected the accused's privacy in his dwelling by knocking on the door and waiting for him to answer. Their tentative entry into the interior landing followed the implicit consent from the accused as he backed away from the open door and talked to them.
>
> It is true that any implied invitation may be negated where the police enter the residence without the express or reasonably assumed consent of the occupant. However, there is nothing to nullify consent in the evidence that was before the court in this case. If the police are present for the lawful purpose of conducting an investigation by communicating with the occupant, they can continue the communication unless and until the occupant makes known that his cooperation has been withdrawn.
>
> In the case at bar, the accused never did change his reaction. To the contrary, he permitted the police officers to enter the landing and responded to their questions with informative answers. (references omitted)

And further:

> I must repeat that when the police officers first entered the accused's home, they were still engaged in an open-ended investigation based on the apparent invitation that had been given to them. They had no grounds for an arrest (warrantless or otherwise), and did not obtain reasonable grounds until they had observed the condition of the accused and until he had voluntarily acknowledged that he had just been the driver of the truck. Thus, the implied consent asserted by the Crown was simply the accused's consent for the police to enter his residence in the course of conducting an investigation, not for the purpose of making an arrest.
>
> In any event, had the entire conversation occurred outside the doorway rather than a step or two inside, the grounds for arrest would still have crystallized only after the accused confirmed that he was the driver and the police had made note of his impaired condition.
>
> The officers could have made the arrest just as easily outside the doorway as inside on the landing. Thus, far from being the pivotal factual component in this case, the entry of the police onto the landing was quite incidental to the legal issues at play. The ultimate arrest was justifiable as a reasonably associated purpose arising out of the communications between the accused and the police in the course of an investigation conducted pursuant to an implied invitation and without suggestion of coercion.

Although the accused did not expressly invite the police inside, such as asking them to "Come in", he did step back allowing the police to enter and continue their investigation. This was valid implicit consent. Justice Kroft stated:

> If there was consensual entry into the dwelling of the accused as part of the police investigation, and if the subsequent arrest was based upon the acknowledgment made by the accused on the

landing and on the obvious signs of impairment, then R. v. Feeney has no application and there is no issue of warrantless arrest. In our case, there was no reasonable ground for arrest until after entry had been granted and the investigation had been completed.

The entry and arrest was ruled lawful.

Complete case available at www.canlii.org

EXIGENT CIRCUMSTANCES JUSTIFY WARRANTLESS DRUG ENTRY

R. v. Phommaviset, 2003 BCSC 81

A police officer received information from an unknown informer that he had observed marihuana plants and grow lights in the basement of a house rented by the accused. The officer believed he had reasonable grounds and began to prepare an information to obtain (ITO) a search warrant while three other plainclothes officers in unmarked police cars were sent to secure the perimeter and conduct surveillance of the home. These officers were unaware of the specifics of the information but knew that the residence was the site of a suspected marihuana grow operation. About half an hour after their arrival the police observed three men, including the accused, exit the house carrying six large, full garbage bags to a van parked in the driveway and enter it.

Believing the bags contained marihuana, the men were arrested by police for production of a controlled substance. The accused was searched and a set of keys was found in his pocket. Thinking it was prudent to clear the residence for persons and eliminate potential threats and prevent the loss or destruction of evidence, the police entered using the keys. They announced their presence and conducted a cursory search of the residence. In the basement they observed ballasts, transformers, capacitors, and venting hose in a laundry room, could smell marihuana, and found a locked room from which they could hear the sound of fans. The police were satisfied that no one was in the locked room and therefore did not enter it. They exited the house and re-established surveillance. These observations were reported to the investigating officer who included them in his ITO, which at the time was still unfinished. As it turned out, the garbage bags only contained household trash. A search warrant was subsequently obtained and a grow operation was found in the locked room as well as documents in the name of the accused in the house.

During the *voire dire* to determine the admissibility of evidence on charges of unlawful production and possession for the purpose of trafficking, the accused argued that there were insufficient grounds to justify his arrest. Furthermore, the warrantless search of his residence was made to gather more incriminating information to support the ITO the police knew would not be enough to satisfy a justice. Finally, he suggested that if the police were really looking for people in the house they would have entered the locked room to search it. Thus, he maintained the search was not incidental to a lawful arrest, was unreasonably conducted, and was an infringement of his s.8 *Charter* rights.

On the other hand, the Crown claimed that there were reasonable grounds to make the arrest. The attending officers believed the investigator preparing the ITO had reasonable grounds and their observations of the three men carrying the garbage bags enhanced this. Their decision to enter the home was to protect officers at the scene and to preserve evidence, both exigent circumstances justifying a warrantless search under s.11(7) of the *Controlled Drugs and Substances Act* (CDSA).

Reasonable Grounds to Arrest

Although it was agreed upon at trial by both the Crown and the accused that the information of the unknown informant was insufficient by itself to provide reasonable grounds, British Columbia

Supreme Court Justice Dillon noted an arresting officer need only have a subjective belief that is objectively justifiable. The test is one of "reasonable probability". In this case, Justice Dillon accepted that the arresting officer's testimony that he subjectively believed reasonable grounds existed. Although he did not know the specific information provided by the informant, the arresting officer assumed the investigator had reasonable grounds to swear a warrant. This, along with the three men exiting the target residence with garbage bags the officer concluded contained marihuana, provided the officer's subjective belief.

These grounds were also reasonable from an objective point of view. In finding the arrest proper, Justice Dillon stated:

> Objective reasonable and probable grounds also existed. Reliance can be placed on the informant's information in the circumstances where the information is compelling and corroborated by police investigation prior to arrest…. Here, although the informant was unknown to police, the information was compelling in that it identified a specific street address and renter. The report of the informant was corroborated by the observation of the garbage bags reasonably believed to contain marijuana. This gave credibility to the tip. In these circumstances, the tip of the informer is sufficiently reliable to form part of the reasonable and probable grounds for arrest. Accordingly, the arrest of the accused was lawful. (references omitted)

The Entry

Section 11(7) of the *CDSA* allows the police to search a residence without a warrant if the conditions for obtaining a warrant exist but it would be impracticable to obtain one because of exigent circumstances. Having already concluded there were reasonable grounds, Justice Dillon examined whether exigent circumstances existed. She described such circumstances as follows:

> "Exigent circumstances" exist if immediate action is required for the safety of the police or if there is an immediate danger of the loss, removal, destruction or disappearance of the evidence if the search is delayed … Exigent circumstances involve the subjective belief of the police as well as an objective basis for the belief…. The exigent circumstances asserted by police must be objectively reasonable…. In *R. v. McCormack* [143 C.C.C. (3d) 260], exigent circumstances were established because the police had a reasonable basis to believe that a female seen in an automobile was the accused's girlfriend, that she had access to his apartment, and that there was evidence in the apartment that could be destroyed. In *R. v. Feeney* [[1997] 2 S.C.R. 13], however, exigent circumstances did not exist when there was no apparent jeopardy to safety of the police and when police had no knowledge of evidence at the premises but only suspected or had a hunch that evidence might be found.
>
> In this case, there were not exigent circumstances arising from a concern for safety of the police or the public. Although [one of the attending officers] testified that weapons are often found at marijuana grow operations, he did not suggest that he believed that weapons were present at [the accused's residence]. If any safety concerns existed, the officers falling back away from the house and maintaining a watch over the premises could have met them. With respect to a concern for the destruction of evidence, it was reasonable to assume that there would be documents and other evidence at the location based upon the information from the informant and the observation of the garbage bags. It was also reasonable to assume that there could be others in the house when there was no information on the number of suspects, the element of surprise was gone, and the officer had been unable to determine that there were no others in the house. … [The attending officer's] expectation of documentary evidence to link the accused or others to the residence and to the grow operation was realistic and not just based upon a hunch or suspicion given all of the circumstances. There were exigent circumstances arising from concern for the destruction of evidence. (references omitted)

Section 11(7) of the *CDSA* justified the warrantless police entry and the accused's s.8 *Charter* rights were not violated.

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

BEHIND THE EIGHT BALL[2]: *CHARTER* PROOFING YOUR SEARCHES

Sgt. Mike Novakowski

Canadian jurisprudence has recognized the underlying purpose of s.8 is "to secure the citizen's right to a reasonable expectation of privacy against government encroachments[3]". This privacy guarantee may be expressed in two ways. It can be expressed as a freedom from 'unreasonable' search and seizure, or alternatively, as an entitlement to a 'reasonable' expectation of privacy[4].

Privacy, in the constitutional context, relates to privacy interests of persons, not of places[5]. In this sense, the privacy interest of an individual and protection provided by s.8 is not triggered unless the individual can establish a personal expectation of privacy in the area intruded upon by the state. For example, two people could be afforded different protections by s.8 even though they were both found in the same car searched by police[6].

The personal right to be secure from unreasonable search or seizure may not be asserted vicariously and a person may not rely on the violation of a third party's rights to benefit themselves. A person who is aggrieved by an unreasonable search through the introduction of evidence obtained from the search of a third party's premises or property has not had their personal s.8 right violated unless they themselves can establish a reasonable expectation of privacy in relation to the place searched or thing seized. Generally, a third party may not claim prejudice as a consequence of a search or seizure directed at another person.

What is a reasonable expectation?

What will constitute a "reasonable" expectation of privacy depends on the totality of the circumstances and fluctuates with the context[7]. For example, at border crossings the reasonable expectation of privacy is lower than otherwise available in a wholly domestic setting[8]. In assessing whether a person has a reasonable expectation of privacy, many factors will be considered. These include[9]:

- the person's presence at the time of the search;
- possession or control of the property or place;
- ownership of the property or place;
- historical use of the property or item;
- the ability to regulate access, including the right to admit or exclude others from the place;
- the existence of a subjective expectation of privacy;
- the objective reasonableness of the subjective expectation.

How far does privacy extend?

There are essentially three privacy zones recognized under s.8 of the *Charter*[10]:

- personal;
- spatial; and
- informational.

Personal privacy zones involve the expectation of privacy in the bodily integrity of a person. When the search or seizure "relates to the body, rather than the home, for example, the standard [warranting state intrusion] is even higher than usual[11]". The more serious an affront to a person's dignity, the greater their privacy interest.

[2] Webster's New World Dictionary (1995) defines "behind the eight ball" as "in a very unfavourable position"
[3] R. v. Dyment [1988] 2 S.C.R. 417 (S.C.C.).
[4] Hunter v. Southam Inc. (1984), 14 C.C.C. (3d) 97 (S.C.C.) at p.108.
[5] See Hunter v. Southam Inc. (1984), 14 C.C.C. (3d) 97 (S.C.C.), Edwards v. the Queen (1996), 104 C.C.C. (3d) 136 (S.C.C.).
[6] R. v. Belnavis [1997] 3 S.C.R. 341
[7] R. v. Briggs (2001) Docket:C34813 (Ont.C.A.)
[8] R. v. Simmons [1988] 2 S.C.R. 495.
[9] R. v. Edwards (1996) 1 S.C.R. 128 (S.C.C.)
[10] R. v. Dyment [1988] 2 S.C.R. 417 per La Forest.
[11] R. v. Dyment [1988] 2 S.C.R. 417 per La Forest at para.35.

Similarly, the more invasive the search, such as a body cavity search, the greater the assault on a person's dignity[12], thus the greater the justification required. Personal searches may vary in degrees of intrusiveness:

- frisk or pat down;
- strip or skin;
- body cavity; or
- bodily substance (biological samples/body tissue)

A person's reasonable expectation of privacy relative to their person will be assessed in context. For example, a person who has been convicted and sentenced to a custodial term of incarceration will expect a reduced privacy interest in comparison to a person who is a suspect but has not yet been charged. The inmate is no longer presumed innocent, is subject to strip searches, body cavity searches, and constant supervision, and thus has a lesser expectation of privacy than others not in that circumstance[13].

Spatial, territorial, or geographical privacy zones involve a person's expectation of privacy in a place or surroundings such as a home, vehicle, or business. Like personal privacy zones, an arrest significantly reduces the expectation of privacy and the search of a motor vehicle, for example, is less an affront to a person's liberty, dignity, and bodily integrity than a minimally intrusive frisk search authorized incidental to arrest[14].

People have a reasonable expectation of privacy within the sanctity of their dwelling house, whether it is an apartment unit, a detached home, or a hotel room[15]. The principle that "a man's home is his castle" is a bulwark for the protection of the individual and the sanctity of the home affords the individual a measure of privacy and tranquility against the state[16]. There is no place where persons can have a greater expectation of privacy than within their dwelling house and the unauthorized presence of agents of the state in a home is the ultimate invasion of privacy[17]. This includes a reasonable expectation of privacy in the approach to their home[18]. Thus, when the object of an unreasonable search is a dwelling house, any violation of the *Charter* will be rendered all the more serious[19]. However, there will be occasions where the principle of inviolability of the home will yield to the legitimate requirements of law enforcement.

A person may have a reasonable expectation of privacy in a premise other than a dwelling house such as a business. For example, the area of a business establishment open to the public would not be protected by s.8 of the *Charter* during regular business hours. A business "that is open to the public with an implied invitation to all members of the public to enter has no reasonable expectation of privacy from having a police officer enter the area of the premises to which the public are impliedly invited"[20]. However, private or non-public areas such as an office in the back of the same establishment would be afforded some protection under the *Charter*[21].

An individual has a reasonable expectation of privacy when driving a vehicle on a public roadway, but this interest is lesser than one would be afforded in their dwelling house or office[22]. Operating a vehicle is a highly licensed, regulated, and inspected activity. Vehicles operate on public roadways, are parked and serviced in public places, and their interiors are highly visible. However, the driver of a vehicle, either as the owner or with the permission of the owner to drive it, has a reasonable expectation of privacy with respect to the vehicle and its contents. A passenger may or may not have a reasonable expectation of privacy

[12] R. v. Debot [1989] 2 S.C.R. 1140 per Lamer J.
[13] R. v. Briggs (2001) Docket:C34813 (Ont.C.A.)
[14] Caslake v. the Queen [1998] 1 S.C.R. 51 per Bastarache J.
[15] R. v. Love (1995) 102 C.C.C. (3d) 393 (Alta. C.A.)
[16] R. v. Silveira [1995] 2 S.C.R. 297 per La Forest at para.41.
[17] R. v. Silveira [1995] 2 S.C.R. 297 per Cory J. at para. 140 and 148.
[18] R. v. Evans (1996) 104 C.C.C (3d) 23 (S.C.C.)
[19] R. v. Lamy (1993) 80 C.C.C. (3d) 558 (Man.C.A.) at p.570.
[20] R. v. Fitt (1995) 96 C.C.C. (3d) 341 affirmed (1996) 103 C.C.C. (3d) 224 (S.C.C.), R. v. Spindloe 2001 SKCA 58.
[21] R. v. Kouyas (1994) 136 N.S.R. (2d) 195 (N.S.C.A.)
[22] R. v. Higgins and Higgins (1996) 111 C.C.C. (3d) 206 (Que.C.A.) at p.212.

in a vehicle, depending on the relevant facts surrounding their presence in it[23].

Informational privacy zones involve the expectation of privacy in confidential personal information retained by others. The use of such information is restricted to the purpose for which it was initially divulged. For example, a person who provides personal information to a physician for medical purposes has a privacy interest in that information. The personal medical information may not be freely provided to the police by medical staff. Similarly, where the police unreasonably seize hair and blood samples, the accused maintains a privacy interest in the information pertaining to these bodily samples[24]. In considering whether a person has a reasonable expectation of privacy in information, many factors must be assessed in balancing societal interests in protecting individual dignity, integrity, and autonomy with the government's interest in advancing its goals, notably those of effective law enforcement[25].

How is a s.8 breach proven?

In establishing a s.8 *Charter* infringement, the person alleging the breach must satisfy the court on a balance of probabilities that their personal right to be secure against unreasonable search or seizure was violated. There is no obligation on the Crown to establish that the search and seizure did not violate s.8[26]. Although the onus is on the individual to prove the breach, they need not necessarily give evidence. In some cases a breach will be readily established on the basis of evidence led by the Crown[27]. In proving their personal right was violated, a person must demonstrate the following three elements:

1. **the search and/or seizure was conducted by a government agent (the police).** The *Charter* controls state action, not the behaviour of persons in the private sphere[28]. However, private persons may be converted into actors of the state when they take an active role by performing a function at the direction of the police.

2. **the person had a reasonable expectation of privacy.** The accused must show that their personal reasonable expectation of privacy was breached by the state conduct[29].

3. **the search was unreasonable.** Simply demonstrating a warrantless search or seizure occurred satisfies this requirement. The police will then be required to rebut this presumption. Alternatively, the accused may choose to challenge the law, the manner of the search, or that police failed to comply with the substantive or procedural requirements of the authorizing law.

Rebutting the warrantless presumption?

Although there is no constitutional warrant requirement, all warrantless searches are prima facie unreasonable[30]. Rather than justify a search after it occurs (subsequent validation), the warrant requirement serves as a means of preventing unjustified searches before they occur (prior authorization). When a warrantless search occurs, the police (Crown) bear the burden of justifying the search[31]. The warrantless/ unreasonable presumption may be rebutted provided the search was conducted in a reasonable manner pursuant to a constitutionally valid statutory or common law rule[32]. This reasonableness test acts as a template for assessing whether a search runs afoul of s.8 of the *Charter*.

[23] R v. Belnavis [1997] 3 S.C.R. 341
[24] R. v. Borden (1994) 92 C.C.C. (3d) 404 (S.C.C.)
[25] R. v. Plant [1993] 3 S.C.R. 281 (S.C.C.)
[26] R. v. Hammil (1984) 14 C.C.C. (3d) 338 (B.C.C.A.) leave to appeal to S.C.C. dismissed [1987] 1 S.C.R. 265 (S.C.C.), also R. v. Feldman (1994) 91 C.C.C. (3d) 256 (B.C.C.A.) per Hinkson J.A. leave to appeal to S.C.C. dismissed 93 C.C.C. (3d) 575 (S.C.C.)
[27] R. v. Butler (1995) 104 C.C.C. (3d) 198 (B.C.C.A.) leave to appeal to Supreme Court of Canada refused 105 C.C.C. (3d) vi..
[28] R. v. Fitch (1994) 93 C.C.C. (3d) 185 (B.C.C.A.) at p.189.
[29] R. v. Belnavis (1996) 107 C.C.C. (3d) 195 (Ont.C.A.) at p.207.
[30] Hunter v. Southam (1984) 14 C.C.C. (3d) 97 (S.C.C.)
[31] R. v. Lamy (1993) 80 C.C.C. (3d) 558 (Man.C.A.) at p.562.
[32] R. v. Collins (1987) 33 C.C.C. (3d) 1 (S.C.C.)

Authorized by Law

Under both the *Charter* and the common law, police "can only enter onto or confiscate someone's property when the law specifically permits them to do so[33]". The right of the police to search, without a warrant, is subordinated to the existence of a rule of law[34]. If a search is to be authorized by law, the following three elements must be met[35]:

1. The police officer conducting the search must resort to a specific statute or common law rule that authorizes the search. For instance, if the police enter a house without the authority of statute or common law, they commit a trespass[36]. A departmental policy itself does not have the force of law[37]. However, a policy may be written in accord with the law and by satisfying policy requirements police will also be complying with the law. The true source of authority is the law, not policy.

2. The search must be carried out in accordance with the procedural and substantive requirements of the authorizing law. The provisions of the statute or the requirements of the common law must be satisfied. A search not in compliance with the requirements is not a search authorized by law.

3. The scope of the search must be limited to the area and those items for which the law has granted authority to search. For example, if the police are executing a search warrant they must only act within the scope and ambit of the warrant having regard to the description of the premises and the range and type of items listed in the warrant. The police may only search those areas that might reasonably contain the items specified in the warrant. If a search exceeds the boundaries recognized under the authorizing law, it is not valid to the extent that the search exceeds the limits.

[33] Caslake v. the Queen [1998] 1 S.C.R. 51 (S.C.C.) at para. 12.
[34] R. v. Higgins and Higgins (1996) 111 C.C.C. (3d) 206 (Que.C.A.) at p.211.
[35] Caslake v. the Queen [1998] 1 S.C.R. 51 (S.C.C.)
[36] R. v. Silveria [1995] 2 S.C.R. 297 (S.C.C.) per La Forest at para. 50.
[37] R. v. Flintoff (1998) 126 C.C.C. (3d) 321 (OntC.A.), R. v. Nicolosi (1998) 127 C.C.C. (3d) 176 (Ont.C.A.), Caslake v. the Queen [1998] 1 S.C.R. 51 (S.C.C.), R. v. Kalin [1987] B.C.J. No.2580 (B.C.Co.Ct.)

Constitutionally Valid Law

If the law authorizing a search is itself unreasonable, any resultant search from that unreasonable law will also be unreasonable. The courts must determine if the authorizing law complies with the *Charter*. If the court concludes that the law violates the *Charter,* the law will be ruled unconstitutional and will be of no force or effect.

Reasonable Manner

Legality alone will not save a search that is excessive in its execution[38]. A search authorized by a reasonable law may be rendered unreasonable by the manner in which the police physically conduct themselves during the search[39]. Generally, the police maintain exclusive control of how a search is conducted. Manner includes the nature of the search, the scope of the intrusion, the place in which the search was conducted, or whether it was abusive. The extent or intrusiveness of a search must be proportionate to the underlying objectives served by the search and the relevant circumstances of the situation. In contrast however, an unlawful search will not be retroactively rendered reasonable even though the search is conducted in an inoffensive fashion[40].

Abandonment[41]

Another person's garbage can be an evidentiary treasure.

When a person voluntarily discards an item they relinquish their privacy interest in it; therefore s.8 is not triggered and police may gather the item without a warrant. However, caution must be taken when the person is in custody, as they have no choice but to discard property into the exclusive control of the police. Therefore, such disposal in police custody may not be true abandonment.

[38] R. v. Greffe (1988) 41 C.C.C. (3d) 257 (Alta.C.A.) per McClung J.A. at p.267 reversed [1990] 1 S.C.R. 755.
[39] R. v. Debot [1989] 2 S.C.R. 1140 (S.C.C.) per Lamer J.
[40] R. v. Moran (1987) 36 C.C.C. (3d) 225 (Ont.C.A.) at p.241.
[41] see Volume 1 Issue 13 for a detailed review.

COMMON LAW INTRUSIONS INTO PRIVACY

Implied Licence[42]

I can walk to the door, knock, and talk to the occupant.

Unless revoked by signage, words or otherwise, a person waives their privacy interest in the approach to their home for the purpose of persons, including the police, coming on to the property to communicate with them. Implied licence gets the officer from the sidewalk to the doorstep to talk to a home's occupants. However, it does not allow the officer to engage in an affirmative search for evidence (eg. a sniff) if that is why they entered in the first place. Conversely, if the officer entered to communicate and inadvertently gathers evidence, that is OK.

Search Incident to Investigative Detention[43]

I can search a detainee for weapons if I have a reasonable (subjective/objective) safety concern.

Under the common law the police are entitled to search persons they detain for investigative purposes provided the detention is initially justified (articulable cause and reasonably necessary) and the search itself is limited in scope to a search for weapons upon a specific, real, and legitimate safety concern to protect the officer during the spontaneous, unplanned street investigation. For the most part, these types of searches will involve the minimally intrusive pat down or protective frisk. Since the generally accepted constitutional standard for searches is reasonable grounds, searches for evidence under this authority are not permissible.

Search Incident to Arrest[44]

I can search an arrestee and their immediate surroundings for safety and/or evidence related to my arrest.

Under the common law a police officer has the right to search an arrested person and their immediate surroundings as an incident to their arrest. This power is first predicated on a lawful arrest (eg. s.495 *Criminal Code*). Further, the search must be incidental, or connected, to the arrest for safety concerns (weapons/escape aids) or evidence related to the reason of the arrest. Finally, the search must be physically conducted in a reasonable manner. For the most part, an independent belief the person has weapons or evidence on or about them is not required. However, in the case of strip searches, the officer requires reasonable grounds that the person has secreted a weapon or evidence on them.

Plain View Seizure[45]

Since I am already here lawfully, I can take what I see without leaving to get a warrant.

The common law plain view seizure doctrine allows the police to seize items they visually observe from a position they are legally entitled to be. This power is a seizure authority only and does not authorize an affirmative search. In other words, the police cannot go looking for things and then claim they were in plain view. There are generally three prerequisites for this rule. First, there must be a lawful intrusion into the privacy area in question. The officer must be legally entitled to be where they were when they saw the item. Second, the officer generally must find the item through inadvertence. Finally, it must be readily apparent, or immediately obvious, the item is subject to seizure. The officer needs reasonable grounds the item is contraband or evidence before they can seize it. Mere suspicion is insufficient.

[42] See Volume 1 Issue 1 for a detailed review
[43] See Volume 1 Issue 7 for a detailed review.
[44] See Volume 2 Issue 3 for a detailed review.
[45] See Volume 1 Issue 1 for a detailed review.

Consent[46]

I can search a person or their property with their voluntary and informed permission.

A person can waive the protection afforded them by the *Charter* under s.8. In essence, the person is telling the police they are giving permission for an intrusion into their reasonable expectation of privacy. The legal test for consent is two-fold. First, the consent must be given freely and voluntary. This includes an awareness of the right to refuse a search, which can most easily be satisfied if the police inform the person of this fact. Secondly, the consent must be informed. This means the person must have sufficient knowledge to make their choice on whether to allow the police to search meaningful. This includes an awareness of the police conduct the person is consenting to (the scope of the search) and an awareness of the potential consequences of giving consent. They must have an appreciation of their position in respect of the investigation (eg. anything found may be used as evidence if that is the purpose of the search). Of course, the refusal or withdrawing of consent cannot by itself provide reasonable grounds to search without permission. To hold otherwise would be to allow the state to use a person's exercise of their constitutionally protected right to privacy against them.

Protection of Life[47]

I can enter private property if I reasonably believe it is necessary to protect people from death or injury

Where the state's interest in effective law enforcement is so compelling that it outweighs an individuals right to privacy, such as saving a life or protecting someone from serious injury, the police are permitted to enter a premise to check on the welfare of the person, provided they first give proper announcement if appropriate under the circumstances. Proper announcement includes giving notice of presence, purpose, and authority. The focus of this search is on the endangered or injured person and does not permit entry simply to investigate an offence. Reasonable grounds for belief must be established.

Similarly, in 911 hang up calls the police may enter to ascertain the welfare of the caller, provided some preliminary investigative steps are taken prior to entry. The focus is on the caller (possible victim/injured person) and the police may enter to ascertain the nature of the emergency, which could be criminal, medical, or a cry for help in another non-police related emergent situation. The fact is, the police are the first responders to enter these types of emergencies and once the crisis has been assessed, they will ensure the appropriate resources are summoned (eg. EHS, fire). Of course, if the police determine there is no emergency, their right to remain on the property ceases and they must leave or risk becoming a trespasser.

Entry to Effect Arrest[48]

Because I know the person I have the power to arrest is in the non-dwelling, I can enter without a warrant if I first announce. In the case of a dwelling I must be in hot pursuit or have other compelling exigencies.

The legal authority to arrest a person does not, by itself, justify an entry into a <u>private premise</u> to carry out the arrest. There is a recognized distinction between the police power to arrest and the police power to enter to effect it. At common law, the police may make a warrantless and non-consensual forced entry into <u>private property other than a dwelling house</u>, such as a business, detached garage, barn, non-dwelling out building, land, or vehicle, to make an arrest provided the police officer has the authority to arrest, the officer has reasonable grounds to believe the person sought is within the premise to be entered, and proper announcement is made prior to entry[49].

[46] See Volume 2 Issue 4 for a detailed review.
[47] See Volume 1 Issue 11 for a detailed review.
[48] See Volume 1 Issue 6 for a detailed review.
[49] R. v. Feeney [1997] 2 S.C.R. 13 at para. 24, R. v. Haglof 2000 BCCA 604.

This includes notice of presence, purpose, and authority. However, forced entry without a warrant into dwelling houses to effect arrests is generally prohibited unless the interests of law enforcement outweigh the privacy interest in the home[50]. One exception to this rule is cases of hot pursuit[51] (other circumstances include the suspect posing an immediate threat to arresting officers or the public, or immediate police action is necessary to prevent the loss of evidence[52]).

OVERHEARD CONVERSATION BETWEEN PRISONERS ADMISSIBLE

R. v. A.D., 2003 BCCA 106

Following the robbery of a 7-11 store by four females, the accused, a young offender, was arrested by police. On the first day of the trial the accused, along with two co-accused, was transported from the youth detention centre to the courthouse. During the drive the transporting deputy sheriff overheard the accused tell another prisoner, "You should have seen the look on the guy's face when we went into the store". When asked why they committed the robbery the accused told the prisoner they "needed the money". Furthermore, she responded that "cigarettes and a small amount of cash" were taken. While in cells a second deputy sheriff overheard the accused tell her co-accused, "let's hire a hit man".

At trial, the inculpatory statements made by the accused and overheard by the deputy sheriffs were admitted at trial. These statements, along with other evidence, were sufficient to satisfy the judge beyond a reasonable doubt that the accused was guilty of robbery. She was convicted of the offence in Youth Court, but appealed to the British Columbia Court of Appeal arguing, among other grounds, that the statements were inadmissible. She claimed that the "covertly intercepted" statements were obtained following breaches of her s.7 and s.10(b) *Charter* rights and that the requirements of s.56 of the *Young Offenders Act* (*YOA*) were not satisfied. Further, she contended that a youth must knowingly accept the risk of making statements to the police and since she was unaware she was being overheard she could not accept the risk.

On the other hand, the Crown suggested that the statements were not made to a person in authority, but were voluntarily made to another prisoner. Moreover, the statements were spontaneous utterances made at a time where the deputy sheriff's could not reasonably comply with warning requirements of the *YOA*.

In a unanimous judgment, Chief Justice Finch for the British Columbia Court of Appeal rejected the accused's appeal. He concluded that the statements were spontaneous conversations unintentionally overheard by the deputy sheriffs. They were voluntary statements made to a fellow prisoner obtained by authorities through passive surveillance and were therefore admissible.

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

ADEQUATE OBJECTIVE FACTORS PROVIDE ARTICULABLE CAUSE TO JUSTIFY DETENTION

R. v. Hyatt & Pawlak, 2003 BCCA 27

In the early morning hours two masked men, one armed with a rifle, entered a convenience store and threatened the clerk with death while stealing money and cigarettes. The two men fled and the clerk immediately called 911, providing a suspect and clothing description. Two police officers were dispatched to the scene and were relayed the description provided by the clerk. After searching the immediate area of the robbery, the officers

[50] R. v. Feeney [1997] 2 S.C.R. 13, R. v. Golub (1997) 117 C.C.C. (3d) 193 (Ont.C.A.)
[51] R. v. Feeney [1997] 2 S.C.R. 13.
[52] See s.529.3 Criminal Code.

broadened their search to a logging road and stopped a vehicle occupied by the two accused and a female driver, Ms. Bennett. After ordering them out, the police obtained statements from the three occupants without informing them of the reasons for the detention or of their right to counsel. Despite Ms. Bennett's request to speak to a lawyer before answering questions, the police persisted. While searching the vehicle the police found coins and cigarettes in the glove box. This discovery, in conjunction with some of Ms. Bennett's responses, provided reasonable grounds to arrest the occupants. Following the arrest, the police found several bills in the accused's pockets.

At the police station Ms. Bennett spoke to a lawyer and told the police she did not wish to talk until her lawyer could attend to see her. Ignoring her request, the police attempted to press and manipulate her to talk. Even against her wishes, the police called her mother to the police station to help make her cooperate. After 12 hours in custody and continually refusing to cooperate, Ms. Bennett succumbed to the pressure and provided a recorded statement where she confessed to her involvement with the accused and the robbery.

The police subsequently obtained a search warrant for Ms. Bennett's vehicle and seized the coins and cigarettes from the glove compartment and a shotgun and clothing from the trunk. All three vehicle occupants were charged with the robbery, but the charges against Ms. Bennett were stayed and she was subpoenaed to testify for the Crown. At the trial the accused were convicted on the evidence of Ms. Bennett as well as the real evidence discovered during the police investigation.

Although they did not dispute their involvement in the offences, the accused appealed to the British Columbia Court of Appeal arguing they were entitled to an acquittal, or at least a new trial, because evidence was improperly ruled admissible. Among other arguments, they suggested that because they and Ms. Bennett were arbitrarily detained (s.9 *Charter*), unreasonably searched (s.8 *Charter*), and had their right to counsel violated (s.10(b) *Charter*), the evidence should have been excluded under s.24(2).

Arbitrary Detention

At their trial, the accused Hyatt submitted that the initial vehicle stop was arbitrary and all the evidence flowing from the stop should be inadmissible under s.24(2). He pointed out that the officer agreed with defence suggestions on cross-examination she was only acting on a "hunch" or "suspicion", therefore no articulable cause existed. However, in rejecting this argument, the trial judge found that the police had an objectively based "articulable cause" to justify an investigative detention. The investigation involved a serious crime occurring in a town of 30,000. The police had a limited description matching two of the vehicle occupants in age, gender, and race. The vehicle was found on a logging road, unusual at that time in the morning, and the time and location of the stop were close in proximity to the robbery. In the trial judge's view, these factors were in the mind of the officer at the time of the stop and provided adequate objective grounds; a decision supported by the British Columbia Court of Appeal. This ground of appeal was rejected.

Unreasonable Search

In his appeal arguments, the accused Pawlak submitted that the trial judge erred when she concluded that he had no reasonable expectation of privacy in Ms. Bennett's vehicle or in the glove box and its contents. He argued that the judge gave insufficient consideration to his subjective expectation of privacy. He hid the items from the police in the glove box, he "owned" the items seized, and the location of the glove box was within his reach immediately in front of his seat. The Court of Appeal refused to interfere with the trial judge's findings of fact and held that she had properly applied the relevant legal principles, including the totality of the circumstances test, when she found the accused

failed to establish a reasonable expectation of privacy.

Right to Counsel

Although the accused's statements at the scene were ruled inadmissible by the trial judge because the police questioned them without advising them why they were detained or of their right to counsel under s.10 of the *Charter*, the accused Hyatt further suggested that both the evidence seized from the glove box and Ms. Bennett's testimony also resulted from those violations. Thus, both the glove box items and the testimony was derivative evidence, undiscoverable but for the constitutional breaches and therefore inadmissible under s.24(2).

The trial judge rejected this submission. She held that the police officer's decision to search the vehicle was independent of the accused's statements. There was no evidence that the interviewing officer told the searching officer of his conversation with the accused. Although the accused's rights under s.10 were breached, these breaches did not lead to the discovery of the items in the glove box and the search was not an inevitable consequence of the s.10 violations. Furthermore, the trial judge ruled that Ms. Bennett's testimony was not derivative evidence. Her discovery as a potential witness occurred when she was found in the company of the two accused and preceded any *Charter* violations. Thus, her testimonial evidence was available under subpoena and was not obtained in a manner infringing the accused's *Charter* rights. The British Columbia Court of Appeal also rejected this ground of appeal.

Third Party *Charter* Breaches

The trial judge was critical of police investigative tactics, particularly those employed against Ms. Bennett, and would have ruled her statements and the glove box evidence inadmissible against her. The police blatantly disregarded her rights, relentlessly pressured her to give a statement, and searched her vehicle with a defective warrant; defective because it was supported by information obtained in violation of her rights. The accused contended that since the glove box evidence and Ms. Bennett's testimony were obtained from an unbroken chain of *Charter* breaches, they should also be allowed to rely on these violations to have the evidence ruled inadmissible against them under s.24(2). However, the trial judge concluded that the accused could not argue exclusion based on the breaches to Ms. Bennett's rights; thus they had no standing to challenge admissibility. As Justice Smith of the Appeal Court noted, "*Charter* rights are personal and cannot be asserted by anyone except the person whose rights are violated". In short, the accused could not benefit from the breaches to a third party's (Ms. Bennett) rights.

The accused's appeal was dismissed and their convictions upheld.

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

REMOVING THE CONFUSION FROM STRIP SEARCHES

Sgt. Mike Novakowski

Personal searches vary in degree of intrusiveness. Strip or skin searches requiring the removal of an arrestee's clothing is greater an affront to human dignity than a frisk or pat-down search. As such, a greater justification will be required. In addition, the manner in which the search is carried out will be critically examined[53]. In *R. v. Golden* 2001 SCC 83, the Court adopted the following definition of a 'strip search':

> [T]he removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas,

[53] R. v. Morrison (1987) 35 *C.C.C.* (3d) 187 (*Ont.C.A.*), R. v. Bedford (2000) 143 *C.C.C.* (3d) 311 (*Ont.C.A.*)

namely genitals, buttocks, breasts (in the case of female), or undergarments.

Although a search incidental to arrest does not generally require reasonable grounds beyond the grounds necessary to support the arrest, a strip search is an exemption to this common law rule. Strip searches represent a significant invasion of privacy, and are often humiliating, degrading, and traumatic experiences. Before undertaking this type of intrusive search, the officer must possess reasonable grounds justifying the strip search independent from grounds justifying the arrest. Strip searches carried out as a matter of routine or policy, abusively, or for the purpose of humiliating or punishing the arrestee will be unreasonable. Furthermore, strip searches should be conducted at the police station unless there are exigencies requiring the search be conducted in the field.

The following are a number of important points concerning strip searches:

- The common law power to search incidental to arrest does include the power to strip search.
- Although permissible as an incident to arrest, strip searches are presumptively unreasonable and the onus lies on the police to justify the strip search.
- Strip searches must be conducted in a reasonable manner. The physical manner or method of the search must be carried out in a just and proper fashion. The search must not be abusive and the scope of the intrusion must be proportionate to the objectives of the search and other circumstances of the situation. In deciding whether the manner in which a strip search was conducted meets the constitutional requirements of s.8 of the *Charter*, the following questions provide guidance[54]:
  - Was the search conducted at the police station, if not, why?
  - Was the health and safety of all involved ensured?
  - Was the search authorized by a supervisor?
  - Was the officer the same gender as the arrestee?
  - Was the number of officers involved in the search reasonable?
  - Was the minimum force necessary used?
  - Was the search conducted in private so others could not observe?
  - Was the search conducted as quickly as possible?
  - Was the search conducted in a fashion that ensures a person is not completely undressed at any one time?
  - Was the search only a visual inspection or was there physical contact?
  - Was the arrestee provided the option of self-removal or medical assistance if a weapon or evidence is observed in a body cavity?
  - Was a proper record of the reasons and manner of search kept?
- Strip searches are inherently humiliating and degrading regardless of the manner in which they are conducted and therefore cannot be carried out as a matter of routine or policy. Strip searches performed routinely or under policy will not be rendered reasonable unless there is a compelling reason justified in the circumstances.
- There is a distinction between strip searches on arrest and strip searches related to safety in full custodial settings such as a prison. The appropriateness of routine strip searches of individuals integrated into a prison population cannot be used to justify strip searches of individuals briefly detained by police or held overnight in cells. Although police officers have legitimate concerns that short term detainees may conceal weapons, these concerns cannot justify routine strip searches of all arrestees regardless of the particular

[54] see R. v. Golden 2001 SCC 83

circumstances surrounding the arrest and must be addressed on a case-by-case basis.

- Strip searches are to be generally conducted at a police station except in cases of exigent circumstances where the police have reasonable grounds to believe that the search is necessary in the field such as an urgency to search for weapons that could be used to harm the officer, others, or the arrestee.
- A person should be provided the opportunity to remove items themselves or the assistance or advice of trained medical professionals should be sought to ensure material can be safely removed.
- When the reasonableness of a strip search is challenged, the Crown (police) bears the onus of proving on a balance of probabilities that it was warranted:
  - In the case of strip searches in the field, the police must demonstrate reasonable grounds justifying the strip search, exigent circumstances, and that the search was conducted in a reasonable manner.
  - In the case of strip searches at the police station, the police must demonstrate reasonable grounds justifying the strip search and that the search was conducted in a reasonable manner. Exigent circumstances need not be proven.

WARRANTLESS SEARCH FOR MISSING GIRL ON ANONYMOUS TIP UNREASONABLE

R. v. Tymensen, 2002 ABPC 164

The Alberta Provincial Court has ruled that the search of a residence for a missing girl based on an anonymous tip violated the accused's *Charter* right to be secure against unreasonable search and seizure. Five days after a 5-year-old girl went missing from her home the police received an anonymous tip recommending that they search an old school house, which had been converted into an eight-room rental premise, because the missing girl might be hidden there.

With the assistance of the building owner/landlord and his keys, the police systematically searched each room to look for the girl. The last premises to be searched was rented by the accused. After receiving no response to their knocking, the landlord unlocked the door and the police entered, detecting an overwhelming odour of marihuana. In plain view they noted illicit drug items, firearms and ammunition. They also found two bedrooms. One was unlocked and contained approximately 120 small marihuana plants under lights. The other room was locked and the landlord did not have a key to open it. The police did not enter this room, choosing instead to apply for a search warrant.

A search warrant was obtained and police entered the room and found a grow operation with an estimated value of $131,800. The missing girl was not located at the old schoolhouse, but the accused was subsequently charged with production, possession for the purpose of trafficking, and a firearms offence. Tragically, the missing girl was later found dead and her killer convicted of murder.

Police Entry

During the *voire dire* to determine the admissibility of evidence, Justice Jacobson noted that in this case there were two competing interests; the accused's right to privacy and society's interest in effective law enforcement. In most cases, individual rights outweigh society's except in compelling circumstances. In *Charter* jurisprudence however, there is a presumption that all warrantless searches are unreasonable and the Crown bears the burden of justifying a warrantless search. In concluding that the search

in this case was unreasonable, Justice Jacobson stated:

> Up to and at the time of entry into the residence, none of the four factors [justifying warrantless searches: exigent circumstances, indictable offence being committed in the dwelling, danger of imminent loss or destruction of evidence, or impracticability in obtaining a warrant] were known to or even in the minds of the police. The accused was not suspected of, nor were there any allegations of wrong doing of any kind on his part, or in relation to his premises. The sole focus of the police was to fulfill their duties in the comprehensive police and public search for the missing girl. They were doing so on their supervisor's instructions, which were based on an anonymous, vague, and unfounded public tip.
>
> It was urgent that the girl be found. In that sense, exigent circumstances did exist in relation to finding the missing girl. She had been missing for five days, under what the officer said were "suspicious circumstances". This vague comment is open to conjecture and speculation. Nevertheless, the girl's unexplained disappearance created an urgent and demanding situation. Responsible law enforcement necessitated, as a part of their official obligations and duties, that the police carry out a rapid, thorough, and systematic investigation including appropriate searches for the missing girl. However, the evidence does not convey any sense of actual urgency or necessity on the part of [the officers]. After they received their instructions at 2:00 p.m., four hours elapsed before their search commenced at 6:00 p.m. They didn't try to search the locked bedroom until approximately 8½ hours later. Their final focus was on drugs, not the missing girl.

And further:

> The police ought to have known that their initial entry and search of the residence was beyond their investigative powers. At the relevant time there were no grounds to justify a warrantless entry under exigent circumstances to search for the missing girl. They were not acting in an appropriate manner and did not comply with the law relating to searches. This conduct goes to both the reasonableness and the seriousness of a breach of s.8 of the Charter. The Crown has not met the Collins criteria of reasonableness.

After rejecting various authorities such as consent (by the landlord), the investigation of recent or in progress crimes, and emergency 911 calls, Justice Jacobson held:

> The public expects, and the law mandates that the police act on reasonable and probable grounds before invading the sanctity of the home of any member of society.
>
> The entry by the police was not a valid intrusion. Notwithstanding their valid motive, the nature of their purpose was a fishing expedition in relation to a missing child. They did not make any proper inquiries of the landlord to confirm what authority, if any, he had to allow them to enter locked premises of his tenants. The police officers must have subjectively believed, and it must be established objectively, that they had reasonable and probable grounds to make the warrantless entry. Without reasonable cause, in the absence of exigent circumstances, the police engaged in a warrantless exploratory search without reasonable subjective or objective grounds.
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> The police search did circumvent the law when the importance of finding the girl was improperly relied upon as the basis for creating self-serving exigent circumstances.
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> There were no exigent circumstances in relation to the search itself, nor the accused himself, nor to his residence. The police had no reasonable grounds to enter the residence for any purpose, but did so without the consent or permission of the accused. The search warrant was based solely on the information obtained from the warrantless entry, the two matters are completely intertwined.
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> If as a result of their investigations and their thoughts had turned to suspicion, then there were other investigatory techniques available, such as surveillance.
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> In accordance with public policy, *ab initio* the police had the authority and the duty to investigate the tip " but whether they may enter dwelling houses in the course of such an investigation depends on the circumstances of each case… The lawful police authority at the accused's

residence ended at the front door. There was no response. There were no reasonable grounds to enter the accused's residence. There was no nexus. The landlord did not have the authority to consent to the police entry. The police entered the residence in order to assist them in their search for the missing girl as a part of the overall police service investigation. The accused's s.8 Charter right to privacy and to be free from unreasonable search and seizure was violated by the entry. That breach tainted the subsequent acts of the police, including their obtaining the search warrant and the search itself.

As a result, the evidence was excluded under s.24(2) of the *Charter*.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

"[T]he state of the law in Canada [is] that a warrantless search is prima facie unreasonable. No professional police officer can now claim to be ignorant of this fact….[T]he Supreme Court of Canada has made it quite clear that it is incumbent upon police officers to be familiar with decisions defining their powers[55]*"*. Justice Godin

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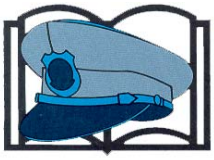
Canadian Legal Information Institute
ww.canlii.org

[55] R. v. Roberts, [1992] NBJ No. 241 (NBQB)

2003 UPCOMING POLICE ACADEMY COURSES



The Police Academy is pleased to announce that the following courses are now available for 2003. Police members wishing to attend any of these courses should first contact their departmental training officer to determine if they are eligible to register. A complete downloadable copy of the Police academy Training Calendar is available on-line at http://www.jibc.bc.ca/police/f-police.html.

BAC Datamaster C Certification (POLADV604)

June 2-6
October 6-10 (Island)
Length: 5 days

This course provides support with alcohol-related investigations through the use of the BAC Datamaster C instrument. Topics include breath-testing theory, pharmacology, physiology, BAC Datamaster C functional overview, court simulations, breath-testing, impaired driving law, and legal procedures.

Persons applying for this course should be a member of a recognized police agency, have two years investigative experience, including impaired investigations. Members should be in a position to utilize the training and not likely to be transferred to a specialty squad in the near future. A mature approach to law enforcement, an interest in and aptitude for technical aspects of law enforcement, and an ability to be an effective witness are also recommended.

Members previously designated in British Columbia who have not conducted a breath test in three years should consider taking this course.

Tactical Surveillance (POLADV646)

March 31-April 4 (Island)
September 8-12
Length: 5 days

This course provides plainclothes police officers who are assigned surveillance duties with the knowledge, skills, and procedures needed to conduct surveillance. Topics include communications, equipment, operational planning, surveillance techniques and practical exercises.

Persons applying for this course should be a member of a recognized police agency assigned to a specialty unit and required to conduct surveillance as part of their daily operational assignment.

Field Trainers (POLADV 661)

April TBA
October TBA
Length: 4 days

This course provides police officers who are assigned field training duties with the knowledge and skills required to train a recruit constable during the Block II field training period. Topics include block training overview, performance evaluation report summary, traffic studies and impaired investigations, legal update, personal style and leadership, coaching and counselling skills, training management plans, tips/ tactics/ techniques, progressive documentation, and correcting performance problems.

Persons applying for this course should be "certified" municipal constables of a recognized police agency and currently or about to be assigned field training duties.

Effective Presentations (POLADV 657)

April 28-May 2
September 22-26
Length: 5 days

Search & Seizure (POLADV 645)

May 5-9
October 20-23
November 17-20
Length: 4 days

This course is for members of a recognized police agency who require additional training pertaining to the search warrant process. The course is designed to provide police officers with the knowledge and skills essential to conducting a lawful search or seizure. Topics include introduction to search and seizure, s.487(1) *Criminal Code* warrants, firearms and other weapons, warrants to enter a dwelling house, general warrants for unusual procedures, special warrantss, intercepting private communications, *Controlled Drugs and Substances Act searches*, provincial statutes, and the search warrant application process.

Persons applying for this course should be a member of a recognized police agency, have relevant investigative experience, and conduct searches and seizures as part of their daily operational assignment.

Firearms Instructor (POLADV 624)

May 12-16
Length: 5 days

Admin Skills (POLADV652)

November 3-7 (Island)
Length: 5 days

This five-day course is for law enforcement personnel who are seeking promotion or who have recently been promoted to a supervisory position. The course is based on the knowledge, skills, and abilities related to the successful management of administrative tasks and activities. Much of the content covers "in-basket" style functions. The course has been identified as an elective for the Police Supervisors Certificate Program.

COURT UPHOLDS FIRST DEGREE P.O. MURDER PROVISIONS

R. v. Sand & Bell, 2003 MBQB 45

The accused were charged with committing the murder of RCMP Constable Dennis Strongquill. They brought a motion in the Manitoba Court of Queen's Bench arguing that the provisions of s.231(4) of the *Criminal Code* automatically making the murder of a police officer acting in the course of their duties first degree regardless of whether it is planned or deliberate contravened s.7 (principles of fundamental justice) and s.9 (arbitrary detention/imprisonment) of the *Charter*. Thus, in their view it is of no force or effect and the Crown cannot rely on this presumptive provision in their case. After reviewing the statutory provision and case law from other provincial appellate courts, Justice Menzies concluded that the section did not violate the principles of fundamental justice nor would it subject the accused to arbitrary detention or imprisonment if convicted. The court held:

> In legislating section 231(4)(a) of the Code, Parliament has chosen to elevate murder of police officers to that of first degree murder. Police officers are the front line of society's defence against crime. I agree with the comment of counsel for the Crown that an attack on a police officer is an attack on society itself. Parliament has deemed it necessary to clearly denounce the murder of a police officer.

The constitutional challenge to the provision was dismissed.

Complete case available at www.canlii.org

"PRICE OF BUSINESS" MORE COSTLY FOR DRUG DEALERS

R. v. Tammark, 2003 BCPC 006

The accused was involved in a "dial a dope" scheme throughout the lower mainland. An undercover officer called the accused on his cell phone and arranged a meet to purchase drugs. The accused drove to the meeting place and a small amount of ecstasy was sold to the undercover officer. The accused was not arrested at that time but a few months later at which time he was again in possession of ecstasy.

At the time of the accused's arrest he was driving his 1990 Honda Civic, valued at approximately $4,000. In addition to his arrest, the vehicle was seized as offence-related property.

The accused plead guilty to the charge of trafficking in a controlled substance contrary to s.5(1) of the *Controlled Drugs & Substance Act* (*CDSA*). During sentencing Crown submitted an order of forfeiture, under s.16(1) *CDSA*, for the accused's vehicle as the Crown contended it was utilized to facilitate the accused's drug trafficking. Under s.16(1) *CDSA* a judge is permitted to order the forfeiture of offence related property when a person is convicted of a designated substance offence and the Crown applies for a forfeiture order and satisfies the court on a balance of probabilities that the property is offence related and the designated substance offence was committed in relation to that property.

In order for the vehicle to be forfeited under s.16(1) *CDSA*, the court first had to consider whether the vehicle used by the accused satisfied the definition of "*offence related property*" found in s.2(1) of the *Controlled Drugs & Substance Act*.

s.2(1) *Controlled Drugs and Substances Act*
"Offence-Related Property" means any property, within or outside Canada,
(a) by means of which or in respect of which a designated offence is committed,
(b) that is used in any manner in connection with the commission of a designated offence,
(c) that is intended for use for the purpose of committing a designated offence,
but does not include a controlled substance or real

property other than real property built or significantly modified for the purpose of facilitating the commission of a designated offence.

In finding that the vehicle was "offence related property", the court stated:

> It is hard to imagine a "dial-a-dope" operation such as this taking place without being facilitated by the use of a motor vehicle. The vehicle was, I conclude, on the balance of probabilities, instrumental to the commission of the designated offence. It is personal as opposed to real property.

And further:

> Clearly the motor vehicle involved has not been altered or modified. Can it be considered merely incidental to the offence? I think not. Without the motor vehicle being utilized, the drug trafficker would be greatly restricted in his mobility. Sales would obviously be adversely affected.

The court sentenced the accused to a $500 fine as well as the forfeiture of his vehicle

Editor's comments: "*In Service: 10-8*" would like to thank Sannich Police Constable Andy Stewart for this contribution to the newsletter.

AERIAL 'FLIR' FLY-OVER REQUIRES WARRANT

R. v. Tessling,
(2003) Docket:C36111 (OntCA)

The Ontario court of Appeal has ruled that an infrared flyover of a targeted residence violated the occupant's s.8 *Charter* rights. The police began an investigation concerning the accused, and another man, after they had received source information that he was involved in the production and trafficking of marihuana. The police contacted the hydro authorities, but learned the power usage was normal. Suspecting the accused may have been bypassing the hydro meters, the police continued their investigation using visual surveillance, but again nothing was revealed supporting the presence of a grow operation.

It was decided the police would use an airplane equipped with a forward looking infra-red (FLIR) camera capable of detecting heat emanating from the exterior of a residence. Because marihuana grow lights give off an unusual amount of heat, the FLIR would be able to assist the police in determining whether there was a marihuana grow present. As a result of the fly-over, the FLIR pattern indicated heat emanations consistent with a grow operation. This information, in addition to the source information, was used to obtain a search warrant for the accused's residence. As a result of executing the warrant, the police found a large quantity of marihuana, scales, bags, and weapons.

At his trial the accused argued the use of the FLIR technology was an unlawful search and could not be used to support the warrant. Without the heat readings, the unreliable information from the sources was insufficient to justify the warrant. He suggested that since the warrant was invalid, the search was unreasonable and the evidence should be excluded. On the other hand, the Crown contended that the use of the FLIR was not a search, but an acceptable police surveillance tool. Ruling against the accused, Justice Thomson concluded that using the FLIR was not a search and the warrant was valid. Thus, the evidence was admissible.

The accused appealed to the Ontario Court of Appeal arguing that the trial judge erred. He maintained that the FLIR examination was a search that breached his reasonably held expectation of privacy in his home. Since the police did not have a warrant to conduct the FLIR, there were insufficient grounds remaining to properly support the issuance of a search warrant. Hence, the search was unreasonable and the evidence ought to have been excluded. Again, the Crown argued that the use of the FLIR was simply surveillance, not a search. Further, they suggested that the heat detected did not reveal

any intimate details about the occupants and therefore there was no privacy, or at most only a trivial interest, in the heat emanations.

Unreasonable Search

Justice Abella, writing for the unanimous Ontario Court of Appeal, held "the use of FLIR technology to detect heat emanations from a private home constitutes a search and requires, absent exigent circumstances, prior judicial authorization". In recognizing that the accused had a reasonable expectation of privacy in the activities he carried on in his residence, Justice Abella found the use of FLIR unreasonably intruded on that privacy interest. He wrote:

> First, the FLIR technology reveals information about activities that are carried on inside the home. While the technology measures heat emanating from the outer walls of the house, the source of those emanations is located inside. Moreover, the sole reason that police photograph the heat emanations is to attempt to determine what is happening inside the house. The fact that it is necessary for the police to draw inferences from the heat emanating from the external walls in order to deduce what those internal activities are, does not change the nature of what is taking place. The use of the FLIR technology was an integral step in ascertaining what was occurring inside the appellant's home.
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> ……
>
> Secondly, I am satisfied that the FLIR technology discloses more information about what goes on inside a house than is detectable by normal observation or surveillance. In my view, there is an important distinction between observations that are made by the naked eye or even by the use of enhanced aids, such as binoculars, which are in common use, and observations which are the product of technology.
>
> ……
>
> In any event, I do not share the Crown's view that the FLIR reveals information that is in plain view and easily observable. A member of the public can walk by a house and observe the snow melting on the roof, or look at the house with binoculars, or see steam rising from the vents. Without FLIR technology, however, that person cannot know that it is hotter than other houses in the area or that one room in particular reveals a very high energy consumption. FLIR technology, in other words, goes beyond observation, disclosing information that would not otherwise be available and tracking the external reflections of what is happening internally.
>
> It is, it seems to me, overly simplistic to characterize the constitutional issue in this case as whether there is a reasonable expectation of privacy in heat emanating from a home. The surface emanations are, on their own, meaningless. But to treat them as having no relationship to what is taking place inside the home, is to ignore the stated purpose of their being photographed, that is, to attempt to determine what is happening inside that home. It would, I think, directly contradict the reasonable privacy expectations of most members of the public to permit the state, without prior judicial authorization, to use infrared aerial cameras to measure heat coming from activities inside private homes as a way of trying to figure out what is going on inside.
>
> ……
>
> The FLIR represents a search because it reveals what cannot otherwise be seen and detects activities inside the home that would be undetectable without the aid of sophisticated technology. Since what is being technologically tracked is the heat generated by activity inside the home, albeit reflected externally, tracking information through FLIR technology is a search within the meaning of s. 8 of the Charter.

The Court further went on to add that they were not prohibiting the use of FLIR technology for enforcing marihuana offences. However, any use absent exigent circumstances will require prior judicial authorization. Since the police did not have a warrant to conduct the electronic surveillance in this case, the accused's s.8 *Charter* right to be secure against unreasonable search was infringed.

Admissibility

In holding the breach serious and excluding the evidence under s.24(2) of the *Charter*, the Court stated:

> The heat emanations measured by the FLIR are not visible to the ordinary viewer and cannot be quantified without the technology. The nature of the intrusiveness is subtle but almost Orwellian in its theoretical capacity. Because the FLIR's sensor cannot penetrate walls, it is true that a clear image of what actually transpires inside the home is not made available by the FLIR device. However, it is not the clarity or precision of the image which dictates the potency of the intrusiveness: rather, it is the capacity to obtain information and draw public inferences about private activities originating inside the home based on the heat patterns they externally generate, that renders the breach serious.

Complete case available at www.ontariocourts.on.ca

PROPERTY LINE DOES NOT PROVIDE IMPAIRED DRIVER WITH A "HOME FREE" ZONE

R. v. Maciel,
[2003] O.J. No. 126 (OntCJ)

A police officer attended the registered owner's address after receiving a complaint about a possible impaired driver. While waiting outside the residence the officer observed the suspect vehicle approach the house and pull into the driveway and stop. The officer parked behind the vehicle and approached the accused as he got out of the driver's seat. After noting physical symptoms of impairment and receiving an admission of the consumption of beer, the officer formed the opinion the accused was impaired and arrested him. He subsequently provided breath samples in excess of the legal limit.

At his trial the accused argued that the police entry onto his private property and physical observations made constituted a warrantless search for investigative purposes under s.8 of the *Charter* and were therefore presumptively unreasonable. Thus, he suggested the evidence should be excluded and an acquittal should follow. Justice Duncan of Ontario's Court of Justice disagreed. He summarized the argument presented as "based solely on the legal and constitutional significance of the officer going a few feet onto the [accused's] property to conduct an investigation that he was otherwise fully entitled to conduct". Justice Duncan concluded the accused's driveway was not a "home free" zone giving refuge from police investigation into his conduct immediately prior to entry. In ruling that no s.8 search occurred he stated:

> In my opinion, it is not reasonable to regard the edge of one's property as a moat that gives sanctuary from the type of interaction with the police that occurred here. The intrusion or entry onto the property was very minimal and was of the type that every homeowner expects to routinely occur.

And further:

> [T]he police officer in the present case was not "taking a flyer" or acting on a mere whim or a hunch. He had solid information, that he confirmed, that gave him ample reason - and indeed imposed a duty on him - to investigate further. He had articulable cause, at least, and maybe more. This was sufficient to give the officer common-law authority to take investigative steps, although prima facie involving interference with a person's liberty or property, provided those steps were justifiable under the circumstances. In my view, the boundary of the officer's authority was not drawn by the defendant's property line but by the sliding scale of "justification" enunciated in the Waterfield test of common-law police authority.
>
> The innocuous entry onto the defendant's driveway and the non-intrusive investigation (observation of the defendant's condition and speaking to him) were plainly justifiable, particularly having regard to the absence of any practical alternative by way of warrant. … No one could reasonably expect that a police officer with grounds to investigate a contemporaneous impaired driving allegation would not come onto the driveway to observe the driver's condition as he stepped from his vehicle. There was no reasonable expectation of privacy, and therefore no search within the meaning of section 8 of the Charter. (references omitted)

Even if he were wrong in holding that there was no search within the meaning of s.8, Justice Duncan said it would have nonetheless been reasonable. In this case, it would not have been feasible for the police to obtain a warrant to enter onto the property. He found "the exigent circumstances inherent in an impaired driving investigation fully justified the minor encroachment on the [accused's] property". The evidence was admissible and the accused was convicted.

BCSC EXAMINES PHOTGRAPHIC LINE-UPS

R. v. Miller, 2003 BCSC 118

An undercover officer attended the residence of the accused, knocked on the door, and purchased $40 worth of cocaine from him. The officer did not know the accused and the transaction took less than a minute. About 30 minutes after the buy the officer picked the accused from a photo line-up consisting of eight photos on a single sheet. At his trial in British Columbia Supreme Court the officer also pointed the accused out as being the person who sold her the cocaine and based this identification partly on a small mole on his face.

The accused testified he did not sell drugs to the officer. Further, although he does have a mole on his face, he claimed he has a more obvious scar on his forehead, which was not referred to by the officer. Supreme Court Justice Romilly examined identification evidence, in particularly the use of the photo line-up, and identified three prerequisites for a valid line-up:

- The police must not indicate to the witness which person in the line-up is the suspect;
- The selection of the other photos in the line-up should be fair in terms of physical appearance (age, build, colour, complexion, costume, or any other particular) and the suspect should not look conspicuously different from the others; and
- The procedure must be fair in testing the ability of the witness to recognize the suspect.

Justice Romilly also examined the enquiry report authored by retired Supreme Court of Canada Justice Cory in the wrongful conviction of Thomas Sophonow. In that 2001 report, Commissioner Cory recommended the following photo line-up procedure, which Justice Romilly noted had been referred to with approval by Justice Arbour of the Supreme Court of Canada in *R. v. Hibbert* (2002) 163 CCC (3d) 129 (SCC):

- The line-up must contain at least ten subjects;
- The photos should resemble as close as possible the witness' description;
- An officer not involved in the investigation should conduct the line-up;
- The entire photo line-up procedure should be recorded on videotape, or at minimum audiotape, from the time the investigator meets the witness until the completion of the interview;
- The photos must be presented sequentially, not as a group;
- In addition to the audio or videotape, a form recording the witness' and officer's signature as well as any verbatim comments should be used; and
- The police should not speak with the witness after the line-up about their identification or lack thereof.

Justice Romilly was of the opinion that the 8 picture photo line-up used in this case was "no longer acceptable". He recommended that the police adopt the procedures outlined in the Sophonow report or risk their photo line-up evidence being excluded. Since this case preceded the Sophonow report and its recommendations, Justice Romilly did not throw out the line-up. However, the accused was nevertheless acquitted. Justice Romilly stated:

> … I have to warn myself on the frailties of the eyewitness evidence of [the officer]. The accused was an absolute stranger to her at the time she made this buy; she had less than a minute to note his appearance; she was unable to identify a major scar on the forehead of the accused as being present when she made the buy; and in-court dock identification is always considered to be very unreliable evidence.
>
> Apart from all of that, I have evidence from the accused that the Constable is mistaken about him being the person who sold her the drugs…

He concluded there was a reasonable doubt as to whether the accused was the one who committed the offence and was left with no option but to acquit.

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

DISCRETE RIGHT TO DISCLOSURE PROTECTED UNDER THE *CHARTER*

R. v. Henkel, Guertin, & Scott, 2003 ABCA 23

The Alberta Court of Appeal has held that there is a distinct s.7 *Charter* right to disclosure and establishing that a person's right to full answer and defence was compromised is not necessary. The three accused were charged with impaired driving offences and made early requests for Crown disclosure, which did not occur to their satisfaction. As a result, they brought applications before a provincial court judge for an order staying the charges.

The original lawyer handling the cases testified to the problems with disclosure from Crown he was experiencing. A Chief Crown Counsel testified that only certain information was disclosed at the first court appearance, regardless of the information possessed by the Crown, and the remainder was only provided if the person plead not guilty. The provincial court judge concluded that the Crown had an obligation to disclose all information available to it before the accused was called upon to make a plea. Although he did not order a stay, the judge found the accused's disclosure rights protected under s.7 were breached and ordered the Crown pay costs.

The Crown appealed to the Alberta Court of Queen's Bench arguing there was no *Charter* breach and consequently that the provincial court could not award costs. The appeal was dismissed and the Crown appealed further to the Alberta Court of Appeal arguing, among other issues, that the accused's s.7 rights were not violated. The Crown suggested that a breach of the right to disclosure only amounts to a *Charter* violation if it is so serious that it impairs the accused's ability to make full answer and defence to the charges.

In the Appeal Court's opinion, there was a two-step process. The first stage was determining whether there was a breach of disclosure. If there was, a second step involved assessing what remedy, if any, was appropriate. Remedies could range from nothing at all to include a stay of proceedings, a court order requiring disclosure, an adjournment, or an award of costs. If the remedy sought is a stay of proceedings, it will not be granted unless the disclosure breach was so serious as to impair the right to full answer and defence or resulted from serious Crown misconduct (which was not in issue).

The appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

THEORETICAL POSSIBILITY INSUFFICIENT TO RENDER *CHARTER* BREACH

R. v. O'Donnell, 2003 NBQB 61

Following his arrest for impaired driving, the accused was transported to the police station where he was placed in a small room with the door partially open and spoke to his

lawyer. The accused testified he could hear police officers' voices outside the room, but not their words. An officer testified he could not hear the accused's conversation with his lawyer. The accused agreed to provide a breath sample and his readings were over the legal limit. At his trial he successfully argued that his right to counsel had been violated. The Provincial Court judge ruled that since it was theoretically possible that the police could have heard what was being said, the accused's s.10(b) *Charter* right to counsel was breached. However, the trial judge admitted the evidence of the breathalyzer certificate under s.24(2).

The accused appealed to the New Brunswick Court of Queen's Bench arguing that the judge erred in admitting the evidence. In his view, the certificate should have been inadmissible under s.24(2). Although the Crown did not cross appeal the finding of a s.10 *Charter* breach, Queens' Bench Justice Garnett agreed with Crown that "the theoretical possibility of…being overheard did not amount to a breach of his right to counsel". In any event, the trial judge did not err in admitting the evidence of the certificate. Excluding it would more likely discredit the justice system than its admission.

Complete case available at www.canlii.org

APPEALS TO CONSCIENCE OR MORALITY ARE NOT INDUCEMENTS

R. v. Crockett, 2002 BCCA 658

The accused was arrested for the sexual assault and confinement of a 16 year old girl as she was walking at school. At the police station he spoke to a lawyer and was advised not to talk to the police nor provide any samples to them. As his clothing was removed and seized, a sergeant and a constable had a conversation with him. This interaction was recorded, but the accused refused to answer any questions. A second conversation subsequently followed, however it was not recorded. The police felt that the presence of a tape recorder would interfere with the rapport building they sought with the accused.

The sergeant told the accused he understood his lawyer's advice in not talking to the police, but that was something a lot of lawyers say and a lawyer cannot see into a person's heart. With that, the sergeant told the accused to think long and hard about the truth. When asked what sentence he would receive, the police said they could not speculate and it was for the courts to decide. In an attempt to appeal to the accused's conscience and values, an officer told the accused at the end of the unrecorded conversation, "The truth is important and goes a long ways". The accused agreed to provide a statement during the unrecorded conversation and he subsequently confessed during a recorded interview. The accused was convicted by a Supreme Court judge of sexual assault causing bodily harm and unlawful confinement.

The accused appealed to the British Columbia Court of Appeal arguing that his statement was not voluntary because it was induced by an offer of leniency, some of his statements were not recorded, and that the police attempted to persuade him to disregard his lawyer's advice.

Inducement

Although the accused insisted his main motive for confessing was to obtain a lesser sentence, Justice Levine, writing for the unanimous British Columbia Court of Appeal, agreed with the trial judge's conclusion that there was no *quid pro quo* offer made to the accused by the police to get a confession. The officers made no suggestion they could intervene on his behalf or had any control over sentencing. Furthermore, the accused never requested them to help, generally or specifically. The accused felt remorseful, guilty, and disgusted with himself. In citing Supreme Court

of Canada Justice Iacobucci in *R. v. Oickle* (2000) 147 C.C.C. (3d) 321 (S.C.C.), Justice Levine stated:

> [S]uspects confess to crimes for a variety of motives, one of which might be the hope of a lesser sentence. Other motives are guilt, which the [accused] stated to police was the reason for his confession, and the relief that one feels from telling the truth. The question is whether the confession was induced by a promise or threat by a person in authority. Appeals to conscience and morality are neither promises nor inducements that, in the absence of other circumstances, will result in the inadmissibility of a confession.

Unrecorded Statements

In some cases, the absence of a statement recording can raise a reasonable doubt about its voluntariness. Although a recording can assist a judge is assessing whether a confession is voluntary, there is no absolute rule requiring that a statement be recorded. In this case there was little dispute about the surrounding circumstances of the unrecorded interview, the words used, or their context. Here, the credibility and reliability of the statement could be assessed in the traditional way without the necessity of a recording.

Persuasion to Disregard Lawyer's Advice

After facilitating consultation with counsel the police are entitled to question an accused provided they do not denigrate the integrity of the lawyer. In this case the police only suggested to the accused "that the advice he was given was general advice" while appealing to his conscience and the stress he was under. The accused understood he had a choice in speaking or not and did so because of guilt.

The appeal was dismissed.

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

Note-able Quote

"*Fight the good fight*" 1 Timothy 1:18

DETENTION OF UNNANOUNCED ARRIVAL NOT ARBITRARY

R. v. Nguyen, 2003 BCPC 0021

Police obtained a search warrant for a residence with respect to theft of electricity. Upon attendance at the house a police officer observed a grey minivan parked directly in front registered to a person wanted on an outstanding arrest warrant for possession of marihuana for the purpose of trafficking. The police entered the home to conduct their search, but there were no occupants. A four room, 153 plant marihuana grow operation was found in the basement. Shortly thereafter, the accused arrived in a vehicle and parked in the garage at the back of the home. He then walked to the front door. An officer suspected he was the person wanted on the warrant, stated "Police", and asked for identification. The accused produced a driver's licence with information matching the wanted party and was arrested and handcuffed. He was searched and a set of keys found in his pants pocket unlocked the door to the residence. He was then informed of his *Charter* rights.

During a *voire dire*, the accused argued that he was arbitrarily detained (s.9 *Charter*) and unreasonably searched (s.8 *Charter*). Justice Maughan of the British Columbia Provincial Court disagreed. Not every encounter between a citizen and a police officer is a detention. In this case there was no detention when the officer stated "Police" and asked for the production of identification. In Justice Maughan's view the officer properly arrested the accused on the outstanding warrant after his identification as the wanted person was confirmed. Moreover, the arresting officer "had concerns about an unknown individual arriving unannounced at the residence at a time when a search warrant was being executed". Together with the knowledge of the

outstanding warrant and the van parked in front of the house, articulable cause existed for the officer to ask the accused to identify himself. In finding no *Charter* infringements, Justice Maughan stated:

> I find once [the officer] determined the identity and date of birth of Mr. Nguyen from his driver's license, he then had reasonable grounds to arrest him on the outstanding warrant. Thereafter, he was entitled to search him subsequent to that lawful arrest and upon finding keys in his possession, it was reasonable for him to pass them onto his fellow officer for the purpose of furthering their investigation at the premises being searched. The evidence found by the officers, to wit the keys, were found subsequent to a lawful arrest and consisted of real evidence. The accused was given his s.10 *Charter Rights*, which is his right to contact and instruct a lawyer and it was intended that he would be allowed to pursue that a short time later when he was at the police station. There was no attempt to obtain any statement from him at any time.

Complete case available at www.provincialcourt.bc.ca

INTERCEPT UNLAWFUL: USE OF ROOM DIRECTED BY POLICE

R. v. Mojtahedpour, 2003 BCCA 22

Following a fatal shooting at a movie theatre the police interviewed the accused who was an acquaintance of the suspect in the homicide. The accused lied to police and told them he was at another location with the suspect when the shooting occurred. After more investigation including an undercover operation, the suspect was subsequently arrested for the murder. In an effort to establish the truth from the accused and use him as a witness, the police re-interviewed him. The police attended his home to persuade him to come to the police detachment voluntarily. He agreed and was transported to the detachment by police. His parents also drove to the detachment but were advised to return home by the accused. The accused was then interrogated and reiterated that he and the murder suspect had been elsewhere at the time of the shooting.

During the homicide investigation the police had obtained a judicial authorization to intercept private communications, including those between the accused and his parents. Both were named parties in the authorization. These interceptions were permitted at various locations including the accused's home. In the early morning following his arrest the police contacted the accused's parents and suggested they attend the detachment. At the same time, the accused was told his parents were attending the detachment and he would be provided the opportunity to speak to them in a room. However, unbeknownst to the accused or his parents the police had wired the room so the conversation could be intercepted and tape recorded. While speaking to his parents, the accused admitted he had been with the murder suspect at the homicide scene and that he had lied to the police. He was charged with attempting to obstruct, pervert, or defeat the course of justice by making false statements to the police during the investigation. The trial judge found the intercepted communication lawful and convicted the accused.

The accused appealed to the British Columbia Court of Appeal arguing, among other grounds, that the conversation with his parents was unlawfully intercepted. Although the authorization allowed the police to intercept communications "at any other premises, either mobile or stationary…resorted to or used by the persons [listed]", the accused submitted he was "brought to" the room in the detachment. It was suggested that this was not within the parameters of "resorted to" or "used by". Thus the evidence should be excluded under s.24(2). On the other hand, the Crown argued the conversation was lawfully intercepted and even if it was not it should nonetheless be admissible under s.24(2).

Justice Hall, writing the majority judgment, concluded that the interception went beyond the parameters of the authorization. Although the authorization itself was facially valid and not overly broad, it could not be interpreted to cover this circumstance. Justice Hall stated:

> The [accused], who was acknowledged to be detained, was placed in the room to talk to the parents. I think it would be a linguistic stretch to say that in these circumstances, the site of the interception was a place being "resorted to" or "used by" the targets of the authorization.

The majority ordered a new trial, leaving it for the new trial judge to consider admissibility under s.24(2) of the *Charter*.

Although agreeing with the majority that the intercept was unlawful, Justice Newbury did so for a different reason. In her view, the police must have reasonable grounds to believe that the room would be used by a targeted person at the time they activated the listening device; the fact the person(s) did resort to or use the facility in question is not sufficient. The police only knew the accused and his parents would be using the room because they directed them to do so. Except for this suggestion, there were no reasonable grounds to believe they would use it. Justice Newbury concluded that if "the police manoeuvre suspects into places or facilities for the express purpose of intercepting statements, without any evidence justifying an expectation that the target would otherwise have used or resorted to the location or facility", an "unreasonable delegation of authority to law enforcement officers and an unacceptable violation of privacy" results. Justice Newbury also ordered a new trial.

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

Note-able Quote

"*If you really enjoy your job you'll never work a day in your life*". Author unknown.

YOUTH CRIMINAL JUSTICE ACT ARRIVING SOON

Sgt. Mike Novakowski

April 1, 2003 is the date on which the new *Youth Criminal Justice Act* (*YCJA*) is scheduled to become law and replace the *Young Offenders Act* (*YOA*). This article will examine the operational impact of the new legislation on the front line officer and provide supplemental information of interest to law enforcement, such as sentencing procedures.

Definitions

Under the new *YCJA* the age of a youth remains unchanged. A young person remains a person between the ages of twelve (12) and seventeen (17) inclusive. A child is under twelve (12) while an adult is a person who is neither a young person nor a child (eighteen (18) years of age and older).

Child:	**< 12 years**
Young person:	**12-17 years**
Adult:	**18 + years**

RIGHT TO COUNSEL

Further to the right to counsel afforded all persons arrested or detained under s.10(b) of the *Charter*, young persons continue to have the additional right to retain and instruct counsel without delay and to exercise that right personally at any stage of proceedings (s.25(1) *YCJA*). This includes during any consideration to use an extrajudicial sanction. Furthermore, s.25(2) also requires every youth upon arrest or detention to be advised by the police without delay of the right to retain and instruct counsel and to be provided an opportunity to obtain counsel.

STATEMENTS

Obtaining admissible statements is a cornerstone of a good police investigation. Properly gathered statements, including confessions from youth, may make the difference between a conviction and an acquittal. The following is a summary of the new provisions under the *YCJA* highlighting the evidentiary rules when obtaining statements from a youth.

Admissibility

Many of the rules under the *YOA* concerning the taking of statements remain unchanged, although the wording is slightly different. Under s.56 of the *YOA* special rules governed the taking of statements by a person in authority from a youth. These conditions were in addition to any rules relating to the taking of statements from accused persons in general. In short, the rules concerning statements from adults plus the added protections provided youth must be adhered to. Section 146 of the new *YCJA* is the s.56 *YOA* counterpart. Under s.146, a police officer taking a statement (oral or written) from an arrested or detained youth, or from a youth the officer has reasonable grounds to believe committed an offence, must:

- Clearly explain to the youth in age/understanding appropriate language that:
    - the youth is under no obligation to provide a statement;
    - any statement made by the youth may be used as evidence against them ;
    - the youth has the right to consult counsel and a parent, an adult relative, or any other appropriate adult they choose (except a co-accused or other person being investigated for the same offence); and
    - any statement made by the youth must be made in the presence of the person(s) they consult unless they desire otherwise.
- If the youth chooses to give a statement, they must be provided a reasonable opportunity to make it in the presence of the person they consult.

Spontaneous Utterances

If a police officer receives a statement made spontaneously by a youth when the officer did not have a reasonable opportunity to comply with the requirements outlined above, failure to fulfill these requirements does not render the statement inadmissible (s.146(3) *YCJA*).

Waiver

If a youth waives their right to consult a lawyer or other adult, the waiver must be recorded on video tape, audio tape, or in writing (signed by the youth) (s.146(4) *YCJA*). Section 56 of the *YOA* did not allow audio taped waivers and is new to the *YCJA*. Also new to the *YCJA* is a provision that allows a youth court judge to exercise discretion in admitting a youth's statement where there is a technical irregularity in complying with the waiver requirements and the judge is nonetheless satisfied the youth voluntarily waived their rights (after being properly informed of them) and the admission of the statement would not bring the principle that a youth is entitled to enhanced procedural protections into disrepute (ss.146(5) & (6) *YCJA*). This allows for voluntary statements to be ruled admissible as evidence despite a minor legal technicality, something that was not available under the rigid technical rules of the *YOA*.

Duress

Like the *YOA*, statements made under duress to persons who are not persons in authority may be ruled inadmissible by the court (s.146(7) *YCJA*).

FINGERPRINTS AND PHOTOGRAPHS

Section 113 of the *YCJA* allows the application of the *Identification of Criminals Act* (*ICA*) to youth, provided an adult could be fingerprinted and photographed under the same circumstances. Operationally this means that a youth may be treated the same way as an adult for the purposes of the *ICA* and the accompanying fingerprinting and photographing procedures apply. This remains unchanged from the *YOA*.

EXTRAJUDICIAL (non-court) MEASURES

NEW

Part 1 of the *YCJA* outlines a framework for the imposition of alternative approaches in addressing less serious youth crime by providing meaningful consequences other than court proceedings. These alternative approaches are called "extrajudicial measures" and reflect the basic premise that crimes are different and should be addressed differently, including responses that do not engage court proceedings. Extrajudicial measures are founded on the following principles:

- they are often the most appropriate/ effective way to address youth crime;
- they allow for effective/timely behavioural corrective interventions; and
- they are presumed to adequately hold the youth accountable for their non-violent, first time offending behaviour and may be adequate in other circumstances.

Extrajudicial measures include alternatives such as taking no further action, informal warnings, formal police or Crown cautions, a notice to parents, informing victims, referrals to community programs, or referral to extrajudicial sanctions (formal measures authorized by the Attorney General or other designated government official). The objectives of these measures are to provide an effective/timely response, encourage the repair of harm to and the involvement of the victim, the community, and the youth's family. At the same time, the rights of the youth must be respected and the measures must be proportionate to the seriousness of the crime.

Extrajudicial Measures Used by the Police

Police officers are often the first to encounter a young offender. Bearing in mind the principles of extrajudicial measures, under s.6(1) of the *YCJA* a police officer is obligated to consider whether it would be appropriate to:

- take no further action;
- informally warn the youth;
- administer a formal caution; or
- refer the youth to a community program or agency.

These options must be considered in all cases where a charge could be laid. The officer must have reasonable grounds to believe an offence has been committed. This framework supports the police in the use of their discretion when imposing extrajudicial measures.

No Further Action

In the case of minor offences, a simple warning to the youth may be the most appropriate action to take and avoid the need to use police or court resources. Other persons like parents or school officials may have already taken adequate measures to hold the youth accountable for their actions.

Informal Warning

Police have always used informal warnings and the *YCJA* supports their continued use in appropriate instances. Letting the youth know that their offending behaviour is unacceptable and could result in further formal action may be a

sufficient deterrent and adequately deal with the offence. "Warning" is not defined in the *YCJA;* thus any such warning may be oral or in writing.

Formal Caution

Formal police cautions, in the form of a letter, bridge the gap between an informal warning and a charge. These cautions make it clear to the youth of the seriousness of their behaviour. However, they must not be used in cases where taking no further action or an informal warning would be sufficient. Unlike informal warnings, police cautions can only be given if the respective province establishes a police caution program.

Sample:

Form 1
Sections 6 and 7

Youth Criminal Justice Act

Police Caution to a Young Person

To: {name of young person}

When I have reasonable grounds to believe that you have committed a criminal offence, the *Youth Criminal Justice Act* requires me, before starting judicial proceedings, to consider taking measures other than going to court.

Since I have reasonable grounds to believe you have committed a criminal offence, under section 6 of the *Youth Criminal Justice Act* I am giving you a formal caution.

If you break the law in the future there may be more serious consequences, including charges, going to court, and the possibility of serious penalties.

{date}

{place}

{name of police officer}

{police department}

Contact # for further information_____

Referral

The police may also refer the youth to a community program or agency that may help them not commit offences. However, in these circumstances the consent of the youth is mandatory.

Extrajudicial Sanctions

Extrajudicial sanctions, a form of extrajudicial measures, may be used if the youth cannot be adequately dealt with by taking no further action, using an informal police warning, a police or Crown caution, or a referral. However, extrajudicial sanctions may not be used unless:

- they are authorized by the Attorney General or other designated government official;
- the sanction would be appropriate under the circumstances;
- the youth consents to it and has been advised of their right to counsel;
- the youth accepts responsibility for the offence; and
- there is sufficient evidence to proceed with a prosecution which is not in any way barred at law.

Where a youth denies participation in the crime or desires the charge be heard in Youth Court, an extrajudicial sanction may not be used.

Failure of Police to Consider Extrajudicial Measures

The failure of a police officer to consider the options of extrajudicial measures does not render any subsequent charges against the youth invalid (s.6(2) *YCJA*).

Admissions in Extrajudicial Measures

Any admission, confession, or statement by a youth accepting responsibility for an offence as a condition of being dealt with by extrajudicial measures is inadmissible as evidence against the youth in any civil or criminal proceeding (s.10(4) *YCJA*).

YCJA POLICE FLOW CHART

Police officer investigates and forms reasonable grounds to believe youth committed an offence

Police officer must consider the following extrajudicial measures:

- taking NO FURTHER ACTION
- WARNING the youth
- police CAUTION
- REFERRAL to community program or agency

No further action
END

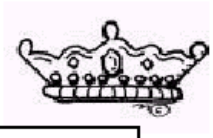
Warning the youth
END

Police caution
END

Referral
END

Police may convene a conference to assist in deciding on an appropriate extrajudicial measure

If above extrajudicial measures not adequate, police consider EXTRAJUDICIAL SANCTIONS or recommending CHARGES to Crown



Extrajudicial sanctions

File forwarded to Crown

This does not end the matter. Crown may also caution the accused and consider extrajudicial sanctions. If extrajudicial sanctions are applied and the youth satisfactorily complies, the matter comes to an end. If there is non-compliance or unsatisfactory compliance with the extrajudicial measures, charges may proceed. However, if a charge is laid after an extrajudicial sanction has been applied, the judge may dismiss the charge if the sanction has been partly complied with and continuing to prosecute would be unfair in the circumstances.

CONFERENCES NEW

Under s.19 of the *YCJA* a police officer may convene or cause to be convened a conference for the purpose of making a decision required under the *Act*, including the need to obtain advice on appropriate extrajudicial measures. The Attorney General or other designated government official is responsible for establishing the rules for convening and conducting these conferences.

PARENTAL NOTICE OF ARREST

When a youth is arrested and detained in custody for court, the police must, as soon as possible, notify the parent orally or in writing of the arrest, the place of detention, and the reason thereof (s.26(1) *YCJA*). If the youth is released and issued an appearance notice, promise to appear, undertaking, or recognizance, the police must give or cause to be given to the parent notice in writing (s.26(2) *YCJA*). If the whereabouts of the parent is unknown or no parent is available, notice may be given to an adult relative or other appropriate adult likely to assist the youth.

"Parent" is defined in the *YCJA* as any person who is under a legal duty to provide for the youth, or who in law or fact has the custody or control of the youth, but does not include persons who have custody or control by reason only of proceedings under the *YCJA*, such as a police officer or jail guard. All notices must include the name of the youth, the charge, the time and place of appearance, and a statement that the youth has the right to be represented by counsel.

Warrants

Warrants issued by a Youth Justice continue to be executable anywhere in Canada (s.145 *YCJA*).

SENTENCES

Under the *YOA* an adult court transfer hearing would occur before the trial and any determination of guilt. These hearings were often complex and once it was decided that the youth would be "raised" to adult court, they lost the protections available to youth. Under the new *YCJA*, all cases are heard in Youth Court and it is not until after a conviction that an adult sentence eligibility hearing will occur. This allows the Youth Court to make a decision on an adult sentence after hearing the case at trial.

Under the *YCJA*, there are a number of offences known as presumptive offences where an adult sentence will be given to a youth 14 years or older, unless the youth applies for a youth sentence. These presumptive offences include murder, attempt murder, manslaughter, or aggravated sexual assault. In cases of youth who are repeat, serious, and violent offenders, the Crown may give notice to the youth that they are seeking an adult sentence on conviction. Upon a finding of guilt, the Crown must establish that there were at least two prior serious, violent offences. If this is proven, the youth will be presumed eligible for an adult sentence unless they apply for a youth sentence. In other non-presumptive offence cases, the Crown must give notice to the youth and the court before a plea. An adult sentencing eligibility hearing will then occur after a finding of guilt.

If a guilty youth does not receive an adult sentence, s.42 of the *YCJA* provides that the following sanctions may be imposed:

- NEW reprimand;
- absolute discharge;
- conditional discharge;
- fine not exceeding $1000;
- monetary compensation for loss, damage, injury;
- restitution;

- compensation through personal service;
- any prohibition, seizure, or forfeiture order (other than s.161 *Criminal Code*) under any federal statute (eg. driving prohibition, weapons prohibition);
- probation not exceeding 2 years;
-  intensive support and supervision program order;
-  approved non-residential program not exceeding 240 hours over 6 months;
- custody and supervision not exceeding 2 years; if offence is one with a life sentence-custody and supervision not exceeding 3 years; if offence is a presumptive offence-custody and supervision not exceeding 3 years;
-  intensive rehabilitative custody order not exceeding 2 years; if offence is one with a life sentence-intensive rehabilitative order not exceeding 3 years;
-  deferred custody and supervision order not exceeding 6 months;
- if offence is first degree murder-10 years (maximum 6 years custody or intensive rehabilitative custody plus conditional supervision); if offence is second degree murder- 7 years (maximum 4 years custody or intensive rehabilitative custody plus conditional supervision);
- any other reasonable and ancillary conditions the court deems advisable and in the best interests of the youth and the public.

OFFENCES

Section 137 *YCJA* creates a summary conviction offence for a youth who willfully fails or refuses to comply with a sentence or disposition under the *Act* (such as probation). Section 136 also creates hybrid offences with a maximum 2 years imprisonment for a person who:

- induces or assists a youth to unlawfully leave a place of custody;
- unlawfully removes a youth from a place of custody;
- knowingly harbours or conceals a youth who has unlawfully left a place of custody;
- willfully induces or assists a youth to breach or disobey a condition of their sentence or disposition; or
- willfully prevents or interferes with a youth in the performance of a condition of a disposition.

RECORDS

Under the *YCJA* youth records are divided into 3 categories, each with their own retention, access, and disclosure provisions:

- Court records
- Police records
- Government or other records

Court Records

Courts or review boards may keep a record of any case coming before it or arising under the *Act* (s.114 *YCJA*). Under s.119(1)(a) a peace officer shall be given access to these records for law enforcement purposes or any other purpose related to the administration of the case to which the record relates, unless a youth court judge withholds all or part of a report.

Police Records

The police force participating in the investigation of an offence alleged to be committed by a youth may keep any related record, fingerprints, or photographs (s.115 *YCJA*). When the youth is charged with an indictable offence, the police may provide a record to the RCMP central repository; if convicted the police must provide a copy. On request, a police officer may then be given access to police records for law enforcement purposes or any other purpose related to the administration of a case to which the record relates (s.119(1) *YCJA*). Records in respect to extrajudicial measures (except extrajudicial sanctions) shall only be given to

police officers to assist with making a decision on appropriate extrajudicial measures, to administer the case, or for the purpose of investigating an offence (s.119(4) *YCJA*).

Government or Other Records

Governmental departments or agencies may keep records obtained from youth investigations or proceedings under the *YCJA*, when administering sentences or court orders, and when considering extrajudicial measures, or resulting from the application of extrajudicial measures. Similarly, other persons or agencies may also keep records on youth obtained as a result of extrajudicial measures or in administering a youth sentence (s.116 *YCJA*). Peace officers have the same right of access to these records as they do to police records.

Disclosure

A police officer may disclose information contained in a court or police record if disclosure is necessary while conducting an investigation of an offence (s.125(1) *YCJA*). Court and police records may also be disclosed by the police to a foreign state for the purposes of extradition (s.125(3) *YCJA*). A police officer may also disclose court or police record information to an insurance company for the purpose of investigating a claim arising from an offence committed or alleged to have been committed by the youth (s.125(4) *YCJA*). Similarly, a police officer may disclose information to any professional or other person engaged in the supervision or care of a youth, including a school representative, to ensure compliance with an order of the court, to ensure the safety of staff, students, or other persons, or to facilitate the youth's rehabilitation.

Publication

The *YCJA* continues to prohibit the publication of a young offender's name or information that may identify them, save special circumstances. In one such circumstance, a police officer may appear *ex parte* before a youth court to get judicial permission for the publication of a youth's identity if there is reason to believe they are a danger to others or it will assist in their apprehension.

Record Offences

Persons who contravene publication, access, or disclosure provisions commit a hybrid offence punishable by up to two years in prison (s.138 *YCJA*).

Summary

The above information is by no means intended to be an exhaustive review of the *YCJA*. For more information on the *Act*, go to the Justice Department of Canada's website "*YCJA* Explained" at:

http://canada.justice.gc.ca/en/ps/yj/repository/index.html

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