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JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

2004 POLICE LEADERSHIP CONFERENCE APRIL 5-7, 2004

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The conference will emphasize leadership as an activity, not a position, and provide an opportunity for participants of all ranks from police agencies across Canada, the United States, and beyond to involve themselves in leadership initiatives. A carefully chosen list of speakers will provide a first class opportunity to hear some of the world's outstanding authorities on leadership.

For more updates on this conference as they develop, please bookmark:

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The Justice Institute of British Columbia has updated its website. Included on this site is a new Police Academy link providing access to the "**In Service: 10-8**" Newsletter, training bulletins, course information, private security programs, and other related information. Log on at **www.jibc.bc.ca** and enjoy the surf.

UNNECESSARY DETENTION RESULTS IN UNREASONABLE STRIP SEARCH

R. v. S.F. & J.L., [2003] O.J. No. 92

The police contacted the two young offender females (17 years and 15 years old with no prior criminal history) at their homes, informed them that they were suspects in a robbery that occurred about a month earlier, and asked that they turn themselves in. The girls attended the police station with their parents and were subsequently arrested for the robbery. Following arrest, both girls were separated from their parents and taken before the officer in charge. The police had decided that the girls should appear for a show cause hearing to be released on bail with conditions. As a consequence, booking protocol required the girls be lodged in station cells before being transported to the courthouse for the hearing.

As part of the booking procedure, each girl was strip searched to determine whether they were secreting weapons or contraband on their person. Up until this point, no search, including a minimally intrusive frisk search, had been conducted. The strip search was overseen by a female officer in an area designed to provide a measure of privacy and only lasted about 5 minutes. The booking procedure was captured on surveillance videotape while the strip search was only partially shielded. The search screen intended to afford privacy was not high enough and the girls' breasts and upper bodies were caught on tape. Nothing was found during the search and the girls were lodged in separate cells.

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The girls brought an application under s.24(1) of the *Charter* seeking a stay of proceedings on the basis that the strip search violated their *Charter* rights including the right to be secure against unreasonable search and seizure under s.8. The Crown argued that there were no *Charter* breaches and the application should be dismissed.

Unreasonable Search and Seizure

Since there was no warrant for the strip searches, the Crown bore the burden of satisfying the court that the search was nonetheless reasonable. Justice Katarynych of the Ontario Court of Justice recognized that at common law the police may strip search a person incidental to an arrest if the following criteria are met:

- there was a lawful arrest (the police had reasonable grounds);
- the search is truly incidental (or connected) to the arrest;
- the police have reasonable grounds to justify the strip search; and
- the strip search is conducted in a reasonable manner.

Lawful Arrest

The accused conceded that the arrest was proper.

Search Incidental to Arrest

The police may only search as an incident to arrest if the search is connected to the reason of the arrest for the purpose of discovering and recovering evidence or weapons. Furthermore, the officer need not have an independent reasonable belief that weapons or evidence will be found. Instead, the search power derives from the fact of arrest. In this case, the search was not made to find evidence connected to the robbery. The robbery had occurred almost a month earlier. However, the police were concerned with safety. Justice Katarynych wrote:

> It was, in short, a concern about safety; safety of the girls themselves while they were in detention, safety of others with whom they might come into contact, and the safety of the police themselves. It is obviously in the interests of police and of society as a whole to ensure that persons who are detained are not armed with items that can be used to harm themselves or others.
>
> The information in the hands of the investigating officer bearing on the alleged robbery included allegations that the complainant had been injured in the robbery, that she had had lotion sprayed in her hair when her CD player was forcibly taken from her, that she was afraid of these girls, that the incident had occurred near a high school, that it had "gang" overtones, although it was not known definitively whether these two girls were members of a gang. If that information proved true, there was reason for the police to believe that each girl presented a risk of harm to the complainant and potentially to others in the community. That potential risk was, in fact, the reason underlying the decision of the investigating officer, accepted by the arresting officers and not questioned by the officer in charge, to seek a surety bail for each girl, one with a hefty penal sum and conditions governing them pending trial or other resolution of the charge.
>
> In that sense, the objective of the search (discovery of weapons) was connected to the reason for the arrest (a violent crime).

Grounds Justifying a Strip Search

Justice Katarynych was very critical of the police decision to detain the girls that triggered the policy on strip searches. In his view, there was no justification for the detention to show cause and therefore no justification for the strip search. He held:

> This strip search was inextricably bound up with the decision of the officers to lodge these girls in the cells.
>
> The single focus on the charge unleashed a chain of thinking that went something like this: - robbery charge means no release without a show cause hearing; no release means detention in the station cells; any person detained presents a risk that can only be contained by a strip search;

> therefore, lodging in the station cells requires strip search.
>
> I accept, as a matter of common sense, that police cells and police paddy wagon transport are environments that need to be kept freed of weapons or contraband for the safety of those imprisoned, and those coming in contact with them, and that the safety issues are no less for a person detained waiting a bail hearing than they are for any other person in custody.
>
> The difficulty in this case is that these two young girls were swept into a policy and attitude that took no meaningful account of whether their particular circumstances presented a level of risk at all.
>
> On the evidence in this voire dire, I could find no justification for lodging these girls in the cells at all, and since it was that particular lodging that triggered the "need" for a strip search, nothing with which to reasonably ground a belief that a strip search needed of either girl to guarantee the safety of the police, the two girls themselves or others detained in the station or at the courthouse.
>
> I was frankly puzzled that the police officers detained these two girls in the station pending their court appearance on this charge. No authority was cited for the proposition that the charge of robbery created some sort of "reverse onus" situation for these youths that required them to displace a presumption that they would be detained.

In the judge's opinion, the two girls could have been released to their parents and remained with them in the station conference room or the reception area to pass the time until the afternoon sitting of the court. Thus, the strip search could have been avoided altogether. Justice Katarynych continued:

> In choosing the more onerous manner of detention, the officers knew that they had activated both the need to keep the cells safe from these girls and all the "rules" governing safety in custodial facilities. This was a safety issue that the police officers themselves created by their choice to bypass any less onerous method of bringing these girls before the court.
>
> In sum, there was no justification for the strip search in this case because there was no justification for the detention that triggered it.
>
> Even if there had been, this search veered outside the boundaries required by the common law for searches of this level of intrusion.
>
> The common law requires reasonable and probable grounds for the level of search selected by the police. The more intrusive the search, the greater the degree of justification needed to hold it within the scope of s. 8 of the Charter.
>
> The choice of strip search emerged from a deeply rooted belief on the part of all the station officers involved with these girls, including the officer in charge who had responsibility for the search decision, that it is the only reasonable and effective way to uncover weapons and contraband concealed on the person of detainees.
>
> It was "red alert" and "worst case scenario" philosophy that fed the decision with regard to this particular search. The thoroughness of a search mattered to these officers. All of them acted in a genuinely held belief that a strip search was the only meaningful and responsible way to ensure their own safety, the safety of the girls themselves and others in custody with whom they would come in contact until their release.

And further

> There is no doubt, as all of the officers testified, that a strip search is far more effective in locating weapons and contraband than a frisk or pat-down of the person's clothed body. Effectiveness is not, however, the only consideration that can be permitted to drive police thinking, when the issue is an intrusion of a person's privacy.
>
> The nature of the offence with which an accused is charged is an important consideration, as the Crown properly points out. Safety in custodial facilities, whether station cell, transport wagon or courthouse cell is also an important consideration.
>
> Yet an informed exercise of discretion cannot end there. A spectre of foreboding and fear cannot be allowed to overwhelm both the ability and the motivation of the officers to fix their attention on factors specific to the person upon whom their decision is to be visited.

In the Court's opinion, there were no reasonable grounds to believe that either accused posed a safety concern. The police response did not reflect the specific circumstances that existed and the strip search was completely unnecessary. Thus, the search was unreasonable.

Reasonable Manner

Justice Katarynych also found that the manner in which the search was conducted unreasonable. Firstly, no pat-down search was conducted prior to the strip search. This left the girls more vulnerable than necessary because a frisk search may have been sufficient to address police concerns. Without it, the means to ascertain whether there was in fact a need for a more intrusive search was bypassed. Secondly, a portion of their naked body was captured on videotape, which resulted in "excruciating embarrassment".

The Court granted the application and the robbery charges were stayed.

ROADSIDE DETENTION & VEHICLE SEARCH LAWFUL

R. v. Hunter, 2003 SKPC 18

A police investigator received confidential information from a reliable source that the accused would be driving a 4-door Ford Tempo from Prince Albert to Saskatoon to pick up a large quantity of marihuana. Surveillance was established on the accused and he was observed driving into Saskatoon, attend a residence empty-handed, exit with a white bag, and then enter his car and leave the city. The police investigator wanted uniformed officers to stop the accused, and either attempt to gather more grounds to search or obtain his consent.

A check-stop program in operation was moved onto the highway where he could be intercepted. The accused, operating a vehicle with one burnt out headlight, was waved over to the side of the road after he arrived at the check-stop. He was asked for his driver's licence and vehicle registration. An exterior and interior vehicle standards check was conducted and at one point the accused was asked to exit his vehicle to allow the officer to get inside. Immediately upon entering the car, the officer smelled an odour of marihuana.

The emergency break was found to be broken and the officer continued his check through the remainder of the vehicle for about five minutes. The officer concluded he could smell unburned marihuana and told the accused. He was arrested and a police dog searched the car. Police found 636 grams of marihuana in a bag behind the passenger seat. At his trial in Saskatchewan Provincial Court on a charge of possession of marihuana for the purpose of trafficking the accused argued, in part, that his right to be secure from unreasonable search and seizure under s.8 of the *Charter* had been violated and the evidence should be excluded under s.24(2).

The Detention

Although the accused did not argue that his right under s.9 of the *Charter* to be free from arbitrary detention had been violated, Justice Carter nonetheless addressed the issue. Under s.40(8) of Saskatchewan's *Highway Traffic Act*, identifiable police officers are entitled to stop drivers of motor vehicles while in the lawful execution of their duties. If the stop in this case had been truly random, the officer at the check-stop would only be entitled to investigate things related to highway traffic safety; investigative purposes or searches unrelated to traffic safety would not be allowed.

However, the stop in this case was not random. The entire check-stop had been moved "to set a net to catch" the accused. The check-stop officer was part of a criminal investigation and he had an articulable cause (unrelated to highway safety) based on information he received from the investigator. As a result, the stop (detention) was not arbitrary.

The Search

Although every warrantless search is prima facie unreasonable, the Crown successfully rebutted the presumption in this case. Justice Carter, relying on previous Saskatchewan case law[1], noted the following prerequisites of a lawful search absent a warrant:

- a lawful detention;
- reasonable grounds to believe an offence has been, is being, or is about to be committed and that the search will disclose evidence relevant to that offence;
- exigent circumstances render a warrant unfeasible; and
- the scope of the search is reasonable with respect to the offence suspected and the evidence sought.

Having already found the detention lawful, Justice Carter examined whether the check-stop officer had the required reasonable grounds. In his view the officer had the necessary reasonable grounds based on information provided to him by the investigating officer. He simply could have waived the accused over at the moment he saw him and began a search. However, he instead chose to do what he normally does at a check-stop. Once he was certain he smelled unburned marihuana, he arrested and searched. With respect to exigent circumstances, the Court stated:

> Exigent circumstances did exist in this case. The evidence before this court is that telewarrants are not available for searches of this nature. Requiring [the investigating officer] to obtain a written warrant to search the accused in these circumstances would have taken amazing logistical gymnastics and might very well have resulted in the evidence being removed from the car and distributed amongst others or hidden.

The scope of the search was also reasonable. It "was quick and efficient." A police dog was used and the car was not dismantled. As well, "the accused was [not] strip searched or otherwise publicly degraded on the highway."

Complete case available at www.canlii.org

RIGHT TO COUNSEL IN REVIEW

Sgt. Mike Novakowski

Section 10(b) of the *Charter* provides persons arrested or detained with the right to retain and instruct counsel without delay and to be informed of that right. The police obligations imposed by s.10(b)[2] include clearly and properly informing the person by a method of communication and in terms the person can understand at a time they are capable of understanding that they have the right to retain and instruct (obtain) counsel of without delay and of the existence and availability of Legal Aid and duty counsel. If there are special circumstances suggesting a diminished capacity or lack of understanding, such as shock, drunkenness, or mental deficiency, further explanation is required.

If the person chooses to exercise their right to counsel they must be provided the opportunity to exercise the right without delay and to retain counsel of their choice. This may require assisting the person in their efforts to obtain a lawyer and includes ensuring privacy. Furthermore, the police must stop eliciting evidence prior to affording them the reasonable opportunity to retain and instruct counsel. If the person is not diligent, this "holding off" obligation is waived

The Crown has the burden of establishing that the person who invoked their right to counsel was provided with a reasonable opportunity to contact counsel. The person has the burden of establishing that they were reasonably diligent in the exercise of their right. If the person was not reasonably diligent then the implementational duties of s.10(b) do not arise or will be suspended[3] and the police may continue with their investigation.

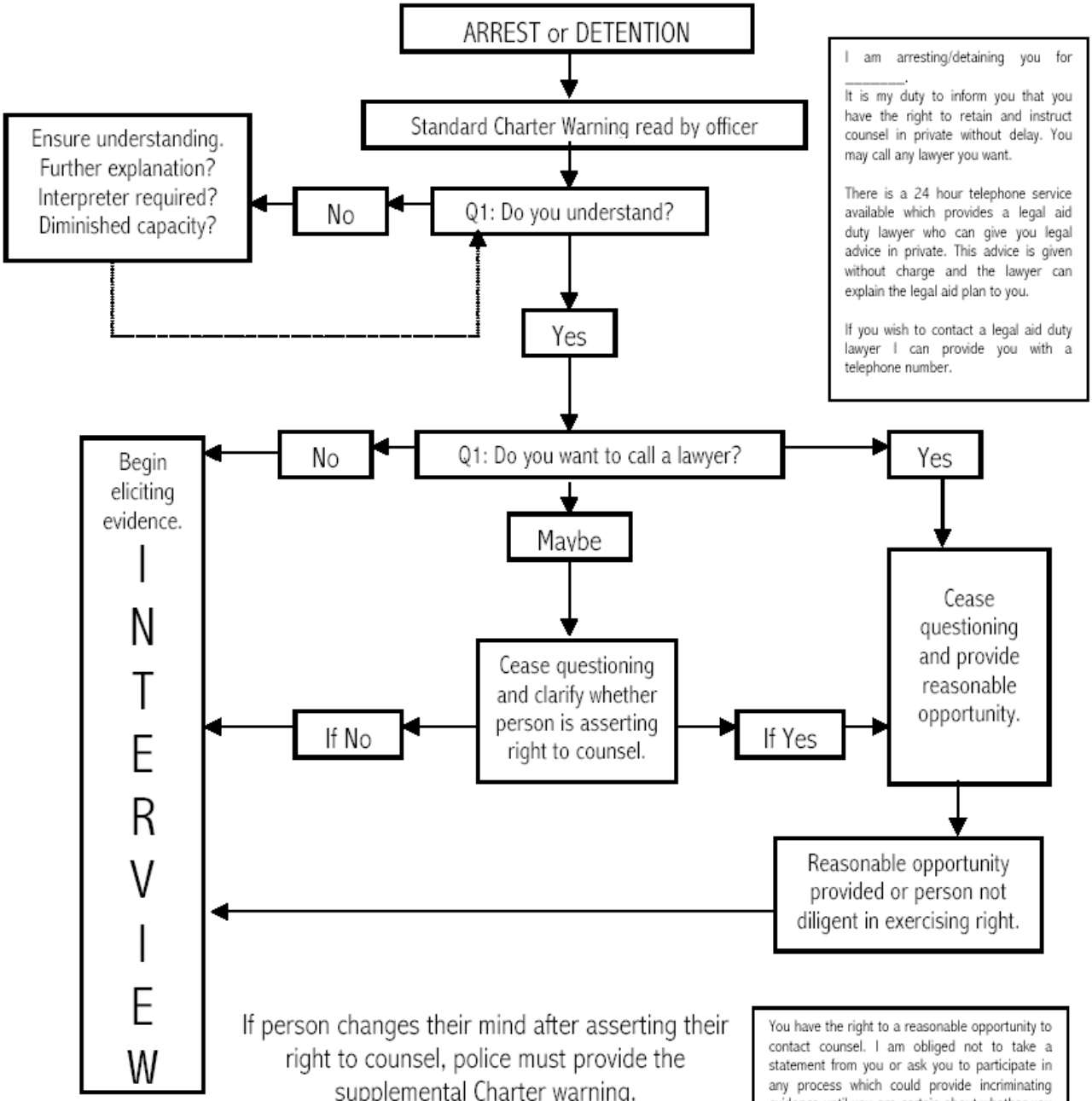
[1] R. v. D.(I.D.) (1987) 38 *C.C.C.* (3d) 289 (S.K.C.A.)

[2] See for example R. v. Luong (2000) 149 *C.C.C.* (3d) 571 (Alta.C.A.) at p.574-575.

[3] R. v. Luong (2000) 149 *C.C.C.* (3d) 571 (Alta.C.A.) at p.575.

SUMMARY OF RIGHT TO COUNSEL

s.10 Charter
Everyone has the right on arrest or detention…(b) to retain and instruct counsel without delay and to be informed of that right



CONSENT SEARCH REQUIRES MORE THAN COMPLIANCE WITH DEMAND

R. v. Ciancio, 2003 BCPC 0023

A police officer pulled over an out of province vehicle to check if the accused had a valid driver's licence and whether the vehicle was properly insured. At the time of the stop there were no reasonable grounds to believe any offence had been committed. The accused produced a valid Alberta driver's licence but the vehicle, registered to a limited company, had insurance which expired four days earlier. The vehicle was not reported stolen and the officer called for back-up, wrote an insurance offence ticket, and called for a tow truck.

Expressing a concern over responses provided to his questions that the accused was not in lawful possession of the vehicle, the officer asked if he could conduct a "voluntary search" of the trunk to look for papers or documents related to the accused's possession of the vehicle. Upon demand, the accused opened the trunk with a key. Clothing, a framed print, and cellular telephone equipment were noted in the trunk, but not searched. However, the officer opened a latched compartment and saw what appeared to be a daytimer in a zipped case.

The accused stated it was his, said "You don't need to see that. I don't like this", and reached for it. He was stopped and the police found a pistol and magazine with rounds in the daytimer. The accused was arrested, the items were placed back in the trunk, the vehicle was towed to the police detachment, and a warrant was obtained for the vehicle.

During the *voire dire* to determine the admissibility of the pistol, magazine, and rounds, the accused argued that his rights under s.8 of the *Charter* to be secure against unreasonable search and seizure were breached. Conversely, the Crown submitted that the initial search was lawful because it was consentual. Moreover, once the consent was withdrawn the continued search was justified for officer safety when the accused's demeanour changed in reaction to the unlatching and opening of the compartment.

British Columbia Provincial Court Justice Gove found the initial stopping of the vehicle authorized under British Columbia's *Motor Vehicle Act* to determine whether the driver had a valid licence and also to check if the driver was properly insured. The expired insurance also justified the impounding of the car until valid insurance could be obtained. However, the search that followed was unreasonable. Justice Gove was not satisfied that the officer was able to articulate why he wanted to legally search the vehicle. His reasons, to search for other insurance documents or any papers with the accused's name connecting him to the car, were speculative at best. The vehicle was not reported stolen and it was going to be impounded. A telephone call to the registered owner was the "simplest solution" to resolve the officer's concern.

Nor was consent to search valid. For a consent search to be lawful the consent must be voluntary and the person must be aware of the consequences in giving it. In this case the accused was not told he had a choice in allowing the search nor was he informed of the possible consequences. Further, Justice Gove stated:

> [The officer] told the accused to unlock the trunk. Compliance with a demand cannot be taken as consent. Inside the constable saw clothing, a framed print and cellular telephone equipment. If the police constable was looking for evidence tying the accused to the motor vehicle, I would have thought that he would have searched through some of these items, in particular the clothes. He did not. Instead, he seems to have gone almost immediately to the latched door to the compartment on the side of the trunk. Inside he found the zipped daytimer. Any belief on behalf of

> the officer that the search was by consent was clearly withdrawn when the accused asserted his right to privacy of the contents of the daytimer.

Officer safety concerns were also insufficient to justify the search. The Court held:

> [The constable] testified that he took the daytimer and opened it due to his concern for his safety, and safety of the other officer…. This was due to the accused's change of demeanour. He said that the accused went from somewhat compliant and cooperative to now asserting his rights to privacy.
>
> The Crown submits that officer safety from this point on justified the continued search. It is not for the court to second-guess as to whether [the constable] was justified, from a safety point of view, in taking and opening the daytimer due to his concerns about safety. Police officers often face dangers and are given latitude in recognition of this.
>
> The constable's determination that there was a safety issue due to the accused's change in demeanour, cannot and does make a search that was otherwise not lawful into one that is now justified, such that property found as a result of the search becomes not the result of an illegal search, but somehow the result of searching for officer safety.
>
> At the time that [the constable] was searching the trunk of the motor vehicle, he had no articulable reason to do so. He did not have lawful consent from the accused, and he was violating the accused's rights to be free from an arbitrary search. He is not to be criticized for seizing the daytimer once he came upon it, if he felt that his safety was at risk, but the officer safety concerns cannot convert the non-consensual and unlawful search into a lawful one. There is a distinction between what the officer did for safety and whether the accused's rights were violated.

As a result of this serious violation to the accused's s.8 rights, the evidence was ruled inadmissible under s.24(2) of the *Charter*.

Complete case available at www.provinicalcourt.bc.ca

'PRIORITY ONE' CALL JUSTIFIES WARRANTLESS ENTRY

R. v. Brown, 2003 BCCA 141

The police received a 911 "priority one" call from a payphone located across the street from a hotel that a man had been stabbed and that there was a man with a gun in either room 201 or 202. However, the information could not be confirmed. Two police officers responded and were told by the hotel desk clerk that room 201 was occupied, but room 202 was vacant.

With handguns drawn, the officers attended room 201, knocked, and announced their presence. The accused opened the door and was taken into custody. Although the room was small and the police could see no one else in the room that constituted a threat, they testified they entered to check for injured persons, look for weapons, signs of struggle, blood, or other evidence of a crime. Once inside, an officer saw drugs on a bed. Continuing his search, the officer found more drugs in a partially open dresser drawer.

The accused was subsequently charged with possession of a controlled substance for the purpose of trafficking. The trial judge concluded that the "police would have been remiss in their duty had they not entered the room to look for someone who may have been stabbed and whose life might have been in jeopardy". A warrant was not necessary to enter and the 52 flaps of heroin and 150 flaps of cocaine were found in plain view. His submission that his s.8 *Charter* right to be secure from unreasonable search was breached was rejected and he was convicted.

The accused appealed to the British Columbia Court of Appeal arguing, in part, that the trial judge erred in finding the entry and search of the room lawful. Although the accused conceded that the police were acting in the course of their

general duty to protect life, that duty was discharged when they looked into the room and determined there was no one else present. He contended that when the police discovered the drugs they were exceeding the scope of their protective duty and were then engaged in a secondary search for evidence, which required a warrant.

In rejecting the accused's submission, Justice Smith writing for the unanimous British Columbia Court of Appeal stated:

> I am not persuaded that the trial judge misapprehended the evidence or that he erred in failing to treat these events as two discrete searches of the room for different purposes. The dispatch call upon which the police officers were acting suggested that the reported activity was occurring in either Room 201 or 202. I do not think that it can reasonably said in the circumstances that the officers had completed the execution of their general duty to protect life until they had satisfied themselves that there was no potentially dangerous assailant nor any injured victim in either of the rooms or in any place nearby to which their investigation of the two rooms might have led them. In my view, the evidence supports the trial judge's conclusion that the officers were justified in entering Room 201 for the purposes that they described in their testimony. Those purposes were within the scope of their general duty to protect life and their actions were, accordingly, authorized by law. The suggestion that there were two separate searches for different purposes is an artificial one in the circumstances.

The accused's conviction was upheld and the appeal was dismissed.

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

Note-able Quote

" *There are not enough jails, not enough policemen, not enough courts to enforce a law not supported by the people.*" Hubert H. Humphrey

'JUST'ICE OR NOT? IT'S ALL IN THE MEANING OF A WORD

R. v. Polischuk, 2003 BCPC 0076

A police officer following a pickup truck at 1:00 am from one trailer park to another noted it did not signal at an intersection. He lost sight of it but found it parked in a driveway at the second trailer park 12 minutes later. The officer stayed in the area and 5 minutes later the truck left the trailer park and drove past the police car. The officer again followed and observed the truck being driven below the speed limit and swaying in its lane. The truck was stopped and the police officer dealt with the accused driver.

The accused told the officer, "I have a dying sister and I've <u>just</u> had a couple of drinks". The officer did not ask when the accused had his last drink, although he knew that he must wait 10 to 15 minutes after someone's last drink before administering a test or otherwise a false failure would occur as a result of residual mouth alcohol. The roadside screening test was administered and the accused failed. This provided reasonable grounds and the officer pursued an impaired driving investigation. Without the failure, the officer testified there would have been no charges.

During a *voire dire* challenging the roadside screening test as a violation of the accused's s.8 search and seizure *Charter* right, he argued that the officer should have clarified the meaning of the word "just " in "I've just had a couple of drinks". British Columbia Provincial Court Justice Brecknell noted that the term "just" could either have temporal significance as in, "It was just a few minutes ago", or quantifying significance as in, "There are just two of them". If the word "just" was meant to mean recently, the roadside screening device failure would be unreliable and could not elevate the officer's suspicion to

reasonable grounds. In accepting the accused's argument that the officer failed to make further enquiries over the word "just", the Court held:

> The police officer knew that the vehicle had been parked within the 10 or 15 minute time frame immediately prior to obtaining the test from the defendant. There was no evidence called as to what the defendant was or was not doing in that residence for that period of time. But given his answer or his statement to the police, "I have a dying sister and I just had a couple of drinks," in my view, and I conclude that the [officer] when presented with that statement, combined with the fact that he saw the pick-up truck parked, should have put him on notice, on an objective basis, to make further inquiries as to whether or not the word "just" meant just as in time, "a few minutes ago, I just had a few drinks," or just as to amount, "I just had two drinks."
>
> His failure to do so and to make that inquiry may have allowed him to form a subjective opinion, but does not meet what I conclude should have been done to maintain necessity for coming to an objective conclusion on the matter.
>
> In my view, the roadside screening device test results should not be admissible, and from that I draw, at least from what Crown has said to this point, that without that test result, the [officer] had no reasonable or probable grounds to proceed further with the investigation.

Complete case available at www.provincialcourt.bc.ca

X-PLORING X-PECTATIONS OF GENERATION-X

Sgt. Mike Novakowski

Introduction

As today's workforce 'evolves' across generational lines, new leadership techniques are necessary to manage an organization effectively. In today's market it is necessary to successfully compete for a limited labour force while at the same time retain existing employees. Leaders must recognize the differences among the generations that make up their work force. Effectively leading generation Xers will require learning "what they want, how they feel, and how they view their world"[4]. By understanding the generations, an effective leader can modify their approach to the worker, tap the worker's capacities, and develop their strengths. This article will focus largely on generation X workers and offer some understanding of how to shepherd them in the workplace.

Generational Generalizations

The Encarta World English Dictionary[5] defines a generation as "all people who were born at approximately the same time, considered as a group, and especially when considered as having shared interests and attitudes". In today's workforce there are four generations working along side each other, although the exact generational dates differ among authors: veterans, baby boomers, generation X, and generation Y. As a leader in contemporary organizational life, it is important to understand each generation. It is also important to remember however, that these are only generalizations of each group. Painting all persons with the same brush who fall within the birth ranges identified could be a disservice to the individual and the organization. With this in mind, what follows is a brief 'bio' of each generation.

Veterans, 'traditionalists', or the 'silent generation', are those persons born between the early 1920s and 1945[6]. This generation was formed

[4] Nagle, Terri. (1999). *Coaching generation X.* [On-line] Available: http://www.coachingandmentoring.com/Articles/x's.html [2002, November 23] at para. 5.

[5] Encarta World English Dictionary (2002). [On-line] Available: http://encarta.msn.com/encnet/features/dictionary.html [2002, November 24]

[6] Hood, Sarah. (2000). Generational diversity in the workplace. *HR Professional.* 17(3), 19-21.

during the great depression and World War I. They are considered hard working company loyalists who are detail oriented and are closely reaching retirement[7]. "They value hard work, law and order and respect for authority"[8]. In policing, this generation will soon largely be extinct, since many collective labour agreements have mandatory retirement at age 60.

Baby boomers, or 'boomers', are those born between 1945 and 1965[9]. Boomers grew up in the age of the Civil Rights and women's movements, the Vietnam War, and the sexual revolution. Boomers live to work and, as a result, define themselves through their work[10]. They "tend to be most comfortable working within a chain of command and expect promotions after years of hard work"[11]. They are comfortable with the immediate and familiar, while they struggle with change.

Generation X, 'baby busters', '13th generation', or 'twenty somethings', are those born between 1965 and 1980[12]. They saw their parents getting divorced and working late hours while they became the generation known as 'latch key kids'. They are at ease and comfortable with technology and change, and are shaped by specialized knowledge[13]. Video games, television, and computers were a staple in their lives. As a result, they became more independent than previous generations and more adaptive to change.

Generation Y, 'Nexters', or 'Millennials' are those persons born since 1980. They are growing up in a world defined by school violence, diversity, and TV talk shows[14]. Bismark State College[15] describes this optimistic and confident generation as being 'education minded', with feedback and praise as motivating factors in their work life.

Since the majority of the police labour force is comprised of baby boomers and generation Xers, the remaining discussion will focus of these two generations.

Comparing / Contrasting Generation-X with Baby Boomers

Boomers enjoy the status quo, place loyalty to the organization as a premier value, and are uncomfortable with change. Generation Xers are "more global, technologically oriented, and culturally diverse than the generations before them"[16]. This bodes well for police organizations because offenders are becoming more technologically savvy and global. Police organizations will need generation Xers to utilize their skills in combatting cyber and other similarly sophisticated crimes. They are "adaptable, independent, creative and techno-literate. They are not at all intimidated by authority, which makes them able to cope with a high level of responsibility. However, their people skills are less developed than those of the Boomer generation"[17]. Carol Hacker[18] argues that

[7] Hood, Sarah. (2000). Generational diversity in the workplace. *HR Professional*. 17(3), 19-21.
[8] Commitment [Homepage]. *How veterans, baby boomers, generation Xers and generation nexters can all get along in the workplace*. [On-line]. Available: http://commitment.com/getalong.html [2002, November 23] at para. 3.
[9] Hood, Sarah. (2000). Generational diversity in the workplace. *HR Professional*. 17(3), 19-21.
[10] Brown, Robert M., LeMaster, Leslie, and Swisher, Steve. (2001) Training the correctional work force of today and tomorrow. *Corrections Today*. 120-121
[11] Ruch, Will. (2000) How to keep gen X employees from becoming x-employees. *Training and Development*. 54(4), 40-43 at p.42.
[12] Scott, Oreen. (2002). *Baby boomers and generation-x in the workplace*. [On-line] Available: http://www.oreenscott.com/baby_boomers.htm [2002, November 23], Alexander, Amy. (2002). *Generation x: Love 'em or they might leave ya*. [On-line] Available: http://www.businessreport.com/pub/20_20/aalexander. [2002, November 23], Hacker, Carol A. (2002). *Recruiting and retaining "generation Y and X" employees*. [On-line] Available: http://www.chartcourse.com/articlegenx hacker.html [20002, November 21], Hood, Sarah. (2000). Generational diversity in the workplace. *HR Professional*. 17(3), 19-21 at p.20, Brown, Robert M., LeMaster, Leslie, and Swisher, Steve. (2001) Training the correctional work force of today and tomorrow. *Corrections Today*. 120-121
[13] Ruch, Will. (2000) How to keep gen X employees from becoming x-employees. *Training and Development*. 54(4), 40-43.
[14] Commitment [Homepage]. *How veterans, baby boomers, generation Xers and generation nexters can all get along in the workplace*. [On-line]. Available: http://commitment.com/getalong.html [2002, November 23]
[15] Bismark State College. (2001). Generations in the workplace: The Challenge and Opportunities. *Training Tips and Techniques*. Vol 2 Issue 4.
[16] Lankard, Bettina A. (1995). *Career development and generation X*. [On-line] Available: http://ericacve.org/docs/genx.htm. [2002, November 11] at para. 1.
[17] Hood, Sarah. (2000). Generational diversity in the workplace. *HR Professional*. 17(3), 19-21 at p.20.

generation Xers are self-described "free spirits". They are able to multi task, seek new challenges, and thrive for recognition of their abilities. Bettina Lankard[19] describes generation X as follows:

> This generation is concerned about having a balanced life. They are not workaholics and believe in compartmentalizing their work, social, and family lives. Their outside interests are as important to them as their jobs….They are more realistic about the balance between their work and family/social lives that will give them satisfaction and make them happy.

However, generation X is often described by the boomers as "lazy, hostile, uneducated, anti-authority, apathetic couch potatoes"[20]. Pam Wyess[21] describes generation X as having the "why" chromosome; constantly questioning what is done. When given a direction, generation Xers no longer reply "Yes Sir!", but "Why Sir?". This questioning can be perceived by members of the command and control model (the traditional paradigm of policing) as challenging authority or a sign of disrespect. Generation Xers also take a holistic, or 'big picture', approach to understanding an organization. "They are less likely to accept a 'because I said so' attitude from a supervisor"[22]. Unlike 'blind' boomers, who can be characterized by blind trust, blind faith, and blind acceptance in organizational status quo, Xers question and examine the status quo, only accepting what they believe is useful and appropriate to their context. Again, this can be seen as a lack of respect for, or insubordination towards, authority.

Leadership Appreciated by Generation X Compared to Boomers

Gregory Smith[23] suggests that baby boomers have developed in a traditional workplace defined by job security and loyalty to the organization. Promotions are based on longevity and 'time served'. Respect is attained by position or rank and action is taken only with direction. These are also the characteristics of any paramilitary organization, such as the police. Police departments are highly regulated with policy and procedure and have a thoroughly delineated rank structure.

Although this may have worked in the 'controlling' environment of the traditional workplace, police leaders must look beyond this status quo if they seek to effectively manage across generational lines. Generation X employees, on the other hand, gain security from within and are loyal to themselves, believe promotions should be based on performance, challenge authority, and feel respect should be earned[24]. The regulation and hierarchy enjoyed by boomers can be viewed by Xers as too constrictive, stifling the innovation and creativity that motivates them.

The X generation does not trust the organization or chain of command. They "tend to be less accepting of traditional hierarchy and traditional approaches to management"[25]. They grew up seeing their parents lose their jobs through restructuring, downsizing, and recession. However, unlike many private organizations and the recent layoffs in the public sector, Xers can find some comfort, although it is not necessarily important to them, that police departments today still offer job security because of a deluge in retirements.

[18] Hacker, Carol A. (2002). *Recruiting and retaining "generation Y and X" employees*. [On-line] Available: http://www.chartcourse.com/articlegenxhacker.html [20002, November 21]

[19] Lankard, Bettina A. (1995). *Career development and generation X*. [On-line] Available: http://ericacve.org/docs/genx.htm. [2002, November 11] at para. 11.

[20] Aguilar, Dahlia. (1993). Boom or bust? *Hispanic*. 6(4), 20-23 at p.20.

[21] Wyess, Pam. (2001). *Understanding the new breed of cop: Generation x in policing*. [On-line] Available: http://63.238.99.136/le_newsstand_5GenXtraits.asp [2002, November 23]

[22] Smith, Gregory. (2002). *How to manage generation x employees*. [On-line] Available: http://www.chartcourse.com/articlegenx.html [2002, November 21] at para. 4.

[23] Smith, Gregory. (2002). *Baby boomer versus generation x managing the new workforce*. [On-line] Available: http://www.businessknowhow.com/manage/genx.htm [2002, November 23]

[24] Smith, Gregory. (2002). *Baby boomer versus generation x managing the new workforce*. [On-line] Available: http://www.businessknowhow.com/manage/genx.htm [2002, November 23]

[25] Conference Board of Canada. (2002). *Developing business leaders for 2010*. Conference Board Inc.

Generation Xers believe in and trust themselves above the organization. They believe in promotions through merit and performance, not tenure. They do not respond well to micromanagement, preferring to be given an objective with the freedom to innovate and create to meet that objective. Gamonal and Williams[26] contend that generation Xers spurn micromanaging while at the same time loathe managers who 'cave in' arbitrarily to every request of the worker, including requests in the Xers best interest.

Smith[27] also suggests that leaders of generation Xers must "take time to be personal". They must build relationships with individual workers and encourage innovation. Personal recognition and job satisfaction are what drives these workers. They seek personal growth and knowledge, with the premier benefit from an organization being development and training[28].

Rationale for Transition

Why care about the generational attitudes within the workplace? The hard, cold reality is that police organizations cannot afford to ignore the new workforce. There is little doubt that police leaders must transition their style in managing the X generation. Never has the need to attract qualified recruits into policing been so important. Not only are police departments competing for a limited labour force with industry, they are competing with each other for the same pool of applicants. Today's leaders must also address employees who demand appraisal based on qualifications, not tenure.

Employee morale and enjoyment at the workplace, which translates into a more productive workforce, must be addressed by leaders. This is not to suggest that leaders must change their entire leadership style to accommodate the generation X worker. Much like situational leadership, leaders must develop a form of "generational leadership". Managing the different generations takes an awareness of what motivates them and their world view. Not only must police leaders address managing the generation X employee, they must also provide a 'service' to the generation X 'client'.

Trust: The Golden Thread

Authors Solomon and Flores[29] suggest that true leadership requires authentic trust. However, the power and hierarchy paradigm that characterize traditional workplaces, such as a police organization, is the antithesis of trust and simply institutionalized distrust. They draw a distinction between a power manager, defined by position or rank, who manages by the way it has always been, and an authentic leader who is able to lead in a time of instability and change. The ladder must be capable of building trust that goes beyond present comforts and security in the workplace, to lead in a turbulent, unknown, and adventurous future (the type of environment Xers thrives in).

The X generation "disdain…corporate politics and bureaucracy and don't trust any institution"[30]. Micromanaging, which they loathe, suggests they cannot be trusted by their managers. In its 2002 report, "*Developing business leaders for 2010",* the Conference Board of Canada notes that younger workers "are less trusting of organizations, and less willing than past generations to subordinate their interests to that of the firm"[31].

With this innovative and adventurous generation, building trust is critical. A leader must make every effort to build trust at an individual level.

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[26] Gamonal, Paula and Williams, John. (2002). *Leading generation x: Getting in touch with the energy.* [On-line] Available: http://www.ravenwerks.com/leadership/genx.htm [2002, November 21]

[27] Smith, Gregory. (2002). *Baby boomer versus generation x managing the new workforce.* [On-line] Available: http://www.businessknowhow.com/manage/genx.htm [2002, November 23] at para. 12.

[28] Smith, Gregory. (2002). *How to manage generation x employees.* [On-line] Available: http://www.chartcourse.com/articlegenx.html [2002, November 21]

[29] Solomon, Robert C. & Flores, Fernando. (2001). *Building trust in business, politics, relationships, and life.* New York, NY.: Oxford University Press.

[30] Nagle, Terri. (1999). *Coaching generation X.* [On-line] Available: http://www.coachingandmentoring.com/Articles/x's.html [2002, November 23] at para. 6.

[31] Conference Board of Canada. (2002). *Developing business leaders for 2010.* Conference Board Inc. at p.5

Unlike previous generations, today's leader cannot rely on the institution itself providing the inherent trust past generations were attracted to. Relationship, not regulation, by giving personal recognition, one-to-one feedback, and developing individual workers, is the cornerstone for constructing the trust necessary to successfully lead generation X.

Conclusion

The challenge for today's police leaders is to first recognize generational differences. By understanding the differences and, by inference, the commonalities, leaders will be able to adapt enough to address the needs of generation X workers while at the same time retain baby boomers. Although this may seem a nearly impossible task to please everyone, by building trust and a leadership style appreciated by all generations, it may be attainable. This does not suggest that addressing generation X issues is the ultimate solution to effectively lead an organization. It is a component of providing leadership to the kind of employees a leader has, not the kind of employees they once had or wish they had!

PROACTIVELY PROVIDING LEGAL AID VIOLATES RIGHT TO CHOOSE LAWYER

R. v. Feldman, 2003 BCPC 0041

The accused was arrested by a police officer for assault causing bodily harm and informed of his right to counsel. Although he initially said he did not want to speak to a lawyer, he changed his mind at the police detachment. The officer did not give the accused a phone book, but instead called Legal Aid and a private call lasting 6 minutes ensued. He was lodged in cells and later, contrary to the advice of Legal Aid, provided a recorded statement.

During the *voire dire* to determine the admissibility of his statement, the accused argued that the police violated his right to counsel of choice protected under s.10(b) of the *Charter*. He contended that the officer prematurely contacted Legal Aid without adequately explaining that he had the right to choose counsel. The Crown, on the other hand, submitted that the accused never asked for a specific lawyer or took issue with Legal Aid being provided.

British Columbia Provincial Court Justice Auxier agreed with the accused. In the Court's view "there was no urgency, danger or other matter which prevented those with custody over the accused from taking the time to provide him with the means of contacting counsel." Although the officer was acting in good faith in trying to assist the accused, his right to counsel of choice was violated. In excluding the statement because it would affect the fairness of the trial, Justice Auxier held:

> One reason for an accused to speak to the lawyer of his choice is because of being comfortable with that lawyer. [The accused] may well have followed legal advice had he received it from a lawyer he knew and trusted….[W]e simply don't know what the accused would have done had his right to counsel of his choice not been breached.

Complete case available at www.provincialcourt.bc.ca

SPECIFIC LAWYER NOT REQUESTED: NO s.10(b) *CHARTER* BREACH

R. v. Mirkovic,
[2003] O.J. No. 367 (OntCJ)

A tow truck operator observed the accused driving a damaged vehicle on a flat tire at a very slow rate of speed on the express lanes of a highway. The tow operator activated his flashing lights and the accused stopped his vehicle. After noting a smell of

alcohol on the accused's breath, vomit on his clothing, and that he appeared physically ill, the tow operator called police.

A police officer attended, observed physical signs of impairment, and arrested the accused. At the police station the accused stated he wanted to talk to a lawyer, but did not request to speak with anyone specific. After speaking in private to duty counsel for 5 minutes, a matter to which he did not object, the accused provided breath samples in excess of the legal limit.

During a *voire dire* the accused alleged, among other *Charter* motions, that he was denied counsel of his choice. Justice Ritchie of the Ontario Court of Justice accepted the evidence of the officer that the accused did not ask to speak to a particular lawyer. As such, there was no s.10(b) violation and the application was dismissed. The accused was convicted.

'JUDGE SHOPPING' RENDERS WARRANT INVALID

R. v. Chan & Cheung,
[2003] O.J. No. 188 (OntSCJ)

Following a winter storm, Ontario Hydro One employees were called by the accused Chan to repair a transformer that resulted in a power failure at a rural resort property. They found a frozen fuse and one of the linesmen went into a nearby open shed to find a screwdriver. He did not see any tools, but went further into the building and opened a closed interior door where he found some plants. After completing repairs the linesman went to a long building with many wires running into it to see if the power was back on. He entered this building after calling "hello" and knocking. Again he found more plants, taking a leaf from the floor.

This information was provided to the police and a telewarrant application was made to search the shed and long building for marihuana, but was denied by the Justice of the Peace because the linesmen were trespassing when they made the observations. When excising these observations from the warrant, there were insufficient grounds remaining. A second in-person warrant application was successful in front of a different Justice of the Peace. This warrant disclosed the initial refusal and also contained a number of paragraphs setting out a legal argument in support of the application. As a consequence of the search, police found almost 3,700 marihuana plants and $100,000 in electrical equipment. The accused sought to have the evidence excluded because the hydro employees made the marihuana discovery during a warrantless search and that the police were "judge shopping" when they applied for and received the second warrant.

Was the Charter Engaged?

The *Charter* only applies to government agents and does not apply to private citizens, unless they were acting on behalf of the state or exercising statutorily delegated governmental powers. At the preliminary hearing, the linesmen testified that they entered the shed to look for a screwdriver and/or to see if the power was flowing even though they did not have the authority to do so. Although Justice Hennessy of the Ontario Superior Court of Justice recognized that Hydro One was created by statute and included a right of entry onto land to repair transmission and distribution equipment, the "linesmen were not acting in furtherance of government policy when they entered the sheds, since they were neither state agents nor pursuing statutorily delegated governmental activity."

The linesmen were invited onto the property when the call was made to investigate the power and distribution system and they had the statutory authority to repair the transmitter. However, they were not invited onto the property to look into buildings for tools or to check power flow. Nor were they in the shed to gather information or evidence for a prosecution. Thus, their conduct did not engage *Charter* scrutiny because when they entered the shed "they exceeded any

authority given by statute or by invitation of the occupier as a result of the service call".

Judge Shopping

Both informations to obtain the warrants were substantially the same facts. The only differences were that the second warrant outlined the prior refusal and several paragraphs presenting a legal argument why the warrant should be issued. Justice Hennessey ruled the second warrant invalid because the decision of the first Justice of the Peace was final. There were no new or additional facts added to the warrant, only legal arguments presented to help the second Justice of the Peace exercise his discretion.

The second Justice of the peace had no jurisdiction to review or overrule the judicial decision made by a colleague on the same facts. He ruled that "the decision of a judicial officer from one court is final and binding unless and until it has been overturned by a higher court." As Justice Hennessey noted, "What would stop a police officer from bringing the same application to successive justices, asking each to review the decision of the other on the same facts?". In the Court's view, if this were allowed the confidence enjoyed by the judicial system would be undermined.

Admissibility

Since the second warrant was invalid, the search carried out by the police was warrantless and a violation of the accused's s.8 *Charter* right to be secure against unreasonable search and seizure. However, the evidence was ruled admissible under s.24(2). The admission of the real, non-conscriptive evidence in these serious charges found in non-residential property by police acting on a facially valid warrant obtained would not bring the administration of justice into disrepute. The accused's applications for exclusion were dismissed.

QUICK & DRAMATIC POLICE ENTRY REASONABLE

R. v. Dinh, 2002 BCPC 0542

Six police officers executed a residential electricity theft search warrant. The police, seeing the accused inside the house, loudly knocked several times on the front door while yelling, "police, search warrant". However, they received no response. As a result, a battering ram was used and police forced entry into the home with their firearms drawn. The police cleared the house and found the accused and her infant child in a bedroom near the front door. The hydro by-pass was located in a wall in the kitchen after a small hole was made in the gyproc. Also found in the house was a large marihuana grow operation, which was subsequently seized under a second search warrant. The accused was arrested, advised of her *Charter* rights, and allowed to call and make arrangements for the care of her child. Following transport to the police station, she was provided access to counsel.

During the *voire dire*, the accused challenged the admissibility of the evidence by alleging that her *Charter* rights were violated because the police violently entered her home and damaged it during the search. She also submitted that her arrest was not lawful because of the manner of police entry and that she was denied the right to counsel until she was at the police station.

Entry

British Columbia Provincial Court Justice Gove found the entry reasonable in all of the circumstances. The police testified that they expected to find a marihuana grow operation once they entered. Furthermore, even though there was no danger expected, the use of the battering ram was common practice when there was no response to knocking. The officers also testified about safety concerns when entering a home

containing a marihuana grow operation. The police do not want to stand on the door stoop for more than a few seconds because they fear the use of weapons or booby traps to protect the crops from theft. As well, trying door knobs may result in electrocution. Justice Gove found that "any damage done was directly related to the entry, finding the hydro by-pass, and removing the marihuana grow operation."

Arrest

The arrest was also lawful. Justice Gove stated:

> I am also not satisfied that the manner in which the house was entered, although it may have caused some fear in the mind of the accused, in anyway affected the lawfulness of the search and her arrest. The police officers were very candid that they intended to have a dramatic entry in order to catch those inside off guard. Once there was not a response to the knock on the door and the yelling "police, search warrant" the officers believed, and I think reasonably so, that their safety and the safety of the occupants would be best insured by a quick and somewhat dramatic entry.

Counsel

Justice Gove did however, find that the police breached the accused's s.10(b) *Charter* right to counsel when they did not provide her with the opportunity to contact counsel at her home stating:

> The police violated the accused's s.10(b) rights when [the officer] failed to allow her an opportunity to telephone counsel shortly after her arrest. Once the police "cleared the house" and had the situation under control, there was no reason that she should not have been allowed to use the telephone while still at her home. There were no issues of urgency that would have precluded her from making such a telephone call, and although she may not have been able to make a telephone call in private, that is not an issue in which I can rule, as she was not afforded an opportunity to at least attempt a telephone call. She may have waived any right to privacy, under all the circumstances … I am satisfied there was a breach of s.10(b) rights. [references omitted]

Admissibility

Despite the s.10(b) violation, the evidence was ruled admissible for trial. There was no nexus between the breach and the discovery of the marihuana and the violation was not serious; it lasted only a matter of minutes until she contacted counsel at the detachment.

Complete case available at www.provincialcourt.bc.ca

ARTICULABLE CAUSE NOT NECESSARY FOR SOBRIETY VEHICLE STOP

R. v. Sothmann, 2002 SKQB 682

A uniformed police officer was suspicious that the accused was a possible impaired driver and stopped him after he was caught on radar driving approximately 20 km/h below the 100 km/h speed limit. As a result of the stop, the accused submitted to a roadside screening demand and failed. He was advised of his right to counsel and taken to the police station for a breathalyser test. Once there, he was asked if he wished to contact counsel, but declined. He then provided breath samples in excess of the legal limit and was subsequently convicted in Saskatchewan Provincial Court of driving while over of 80mg%. The accused appealed to the Saskatchewan Court of Queen's Bench arguing, in part, that he was arbitrarily detained contrary to s.9 of the *Charter* because the officer did not have an articulable cause to stop him.

Queen's Bench Justice Laing dismissed the appeal. In his view, "articulable cause only applies when the motorist is being stopped for a non-highway-traffic…reason." In this case, the officer stopped the accused for a lawful highway traffic reason (sobriety). Justice Laing stated:

> If a uniformed patrol officer whose duties include traffic patrol can randomly stop (meaning for no reason at all) a motor vehicle to check its licence, its mechanical condition, or the sobriety of the driver, then it follows that if something about the driving of the vehicle causes the officer to randomly stop it, that something can be anything, including intuition, as long as the purpose is to check the licence, the sobriety of the driver or any other highway traffic reason. It is not necessary that the motorist first commit a driving infraction or irregularity before the stop is lawful. As the cases referred to above note, the random stopping of vehicles is directed at the prevention and deterrent aspects of highway traffic law enforcement.

Complete case available at www.conlii.org

FAILURE TO ENQUIRE ABOUT DESIRE TO CALL LAWYER NOT FATAL

R. v. Keel & York, 2003 BCPC 0077

A rural officer on patrol in the mid-afternoon observed a pick-up truck being driven by two males without shoulder harness seatbelts. He also noted ropes in the back of the pick-up used for slinging shakes. This was unusual in the officer's view because shake block cutters traveled the accused's direction in the morning, not mid-afternoon. The officer stopped the pick-up to check the seatbelts and the sling ropes. The occupants exited the vehicle and the officer asked for and was provided a driver's licence.

The officer told the driver Keel why he was stopped and began to question him about the contents in the rear of the pick-up; sling ropes, bags of dirt, manure, shovels, several buckets, and a tarp. The truck was an older model and was not equipped with shoulder belts; it had only lap belts. The officer asked what was under the tarp and was told boxes with dirt. After the officer asked to see the dirt, the accused Keel opened the corner on one of the boxes. The officer observed marihuana, told the accused to close the box, and advised him he was being detained for investigative purposes related to possession of a controlled substance.

Because the stop was in an isolated and remote area the officer was unable to make contact with his dispatcher. As directed, the accused followed him in their pick-up to a location where the radio would work. The officer called for back-up and read Keel a *Charter* warning from a card. Although he asked Keel if he understood the warning, the officer did not ask him if wished to call a lawyer since he did not have a telephone readily available. He then proceeded to question him about the contents of the box in the back of the pickup.

Keel admitted to possessing the marihuana plants and that he was going to plant them in the forest. The officer then provided a *Charter* warning to the passenger York who stated Keel owned the plants and that they were going into the bush with them. Other officers arrived on scene and the two accused were taken back to the detachment and the marihuana was seized. The accused argued that his right to counsel under s. 10 and his right to be secure against unreasonable search and seizure under s.8 of the *Charter* were breached.

Right to Counsel

The accused submitted that the s.10 violation stemmed from the fact that the officer failed to ask, "Did you want to contact a lawyer?" In their view, the police are obliged to ask this question. The Crown, on the other hand, submitted that once the police have advised an accused of their right to counsel there are no additional duties triggered unless they express a desire to exercise the right. The Crown further contended that the accused must establish that they were denied an opportunity to contact counsel. In reluctantly agreeing with the Crown, British Columbia Provincial Court Justice Doherty stated:

> The police have developed a protocol that requires them to ask a detained or arrested person whether

> they want to contact counsel after they have ensured the person understands their rights. It would be a retrograde step in the development of civil liberties in this country should police abandon what has become, for all intents and purposes, what they perceive to be their duty to ask this crucial question, "Do you want to contact a lawyer?"
>
> Still, the law would seem to be that the inquiry is not mandatory and that all that is required is for police to inform the person of their rights. The onus would seem to be on the accused to assert that right to consult counsel, and the onus is on the accused who asserts he was deprived of an opportunity to do so.
>
> In the case at bar, considering the remote location at which the police and the defendants found themselves, there was no realistic opportunity for the defendants to contact counsel, even if the question "Do you want to contact counsel?" had been asked. The troublesome aspect of this case is that the police officer has given evidence that he would have stopped asking questions of the defendants had this question been asked and been responded to in the affirmative. By not asking the question in the first place he avoided having to halt his questioning.

The Search

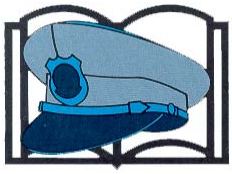
Justice Doherty also concluded that there was no s.8 breach because the officer had, at minimum, an articulable cause to justify the search. The Court held:

> There is little doubt that the police officer had good reason to stop the pickup truck to investigate a possible seatbelt infraction, and I have no difficulty in ruling that the stop was legal. Once the vehicle was stopped, the police officer's suspicion that the defendants might be going into the forest to plant marihuana was supported by certain of his observations regarding the bags of dirt, manure, and shovel.
>
> [The officer] asked Mr. Keel if he could examine the content of the boxes or be shown the contents in the back of the pickup. Mr. Keel was under no obligation or compulsion to open the box for the constable to view. I agree with the submissions of the Crown that even if it were determined that the officer did not have reasonable and probable grounds to search, he had, at the very least, articulable cause.

In the end, no *Charter* breaches were found and the evidence was admissible on charges of unlawfully possessing a controlled substance.

Complete case available at www.provincialcourt.bc.ca

"IN SERVICE: 10-8" e-LETTERS TO THE EDITOR



The "*In Service: 10-8*" newsletter would like to share some of our readers' comments about the publication. We appreciate the kind words we have received thus far and look forward to future editions:

****

"*I was forwarded a copy of your newsletter by a co-worker and must say I was impressed with the way it was delivered. I especially like the fact that the issues revolve around street level activity, things I deal with daily. I found both issues I read to be more than useful and have referred to them twice*". **Police Constable, RCMP New Brunswick**

****

"*…I happened to come across your In Service: 10-8 newsletter. I just wanted to let you know that you put together a great collection of relevant operational case laws. I share your newsletter with my recruit and other members who care about their work*". **Police Constable, RCMP British Columbia**

****

"*Your analysis of recent cases was pointed out to me as a great way to keep up on case law - great job*". **Police Inspector, British Columbia**

****

"*Really enjoy the newsletter! Would like to get on the mailing list…*". **Police Constable, RCMP British Columbia**

"*I (and our team) find the newsletter very informative and [it] is often referred to during discussions/debates with some of our more junior members*". **Police Constable, RCMP British Columbia**

****

"*I have read the newsletters from the first issue through and I thoroughly enjoy it and find it a valuable source for information*". **Police Constable, RCMP British Columbia**

****

"*I hope that…10-8 will continue as I find it very informative and useful. Keep up the good work*". **Investigator, Canada Customs and Revenue Agency**

****

"*Everybody on my shift looks forward to reading it. Great job!*" **Police Constable, British Columbia**

****

"*I have read it and found it to be most informative.*" **Police Corporal, RCMP British Columbia**

****

"*[J]ust wanted to tell you that after 1 1/2 years your paper has just got better and better. I use your paper regularly to identify current case law and to keep my own members informed of judicial changes in the way we do our business. Keep up the good work!!*" **Police Sergeant, Manitoba**

****

"*Thanks for the In-Service 10-8 Newsletter. It is greatly appreciated by the office*". **Crown Prosecutor, British Columbia**

****

"*It's after midnight and I am reading your newsletter and enjoying it! I just wanted to drop you a line and thank you for putting it out, it's great to have a place to keep up with the recent decisions…*" **Police Constable, British Columbia**

****

"*Thank you very much for the newsletters. They are very informative and useful.*" **Supreme Court Justice, British Columbia**

****

"*I have just received the latest edition of the … newsletter. I just wanted you to know how much the newsletter is appreciated by myself and others around our office. I always ensure that all members of my unit get a copy and I keep mine handy. Just this morning as I was distributing it, the members comments were "Thanks, these are great", as I put it in their 'In Basket'. I am frequently referring to the past editions regarding issues that arise, and am very happy to have the reference material.*" **Police Constable, British Columbia**

****

"*I was given a copy of your newsletter and thoroughly enjoyed reading it.*" **Police Constable, Saskatchewan**

****

"*I find the newsletters very informative, and extremely helpful. Keep up the good work.*" **Police Constable, British Columbia**

****

"*I just recently discovered your newsletter on the web and have found it to be a most useful source of information!!… Great work on the newsletter….I'm really happy that I discovered it when I did!!*" **Citizen, British Columbia**

JIBC OFFERS CERTIFICATE IN FORENSIC TRAFFIC SCIENCES

The Justice Institute of British Columbia (JIBC), in partnership with the Insurance Corporation of British Columbia, is pleased to offer a Certificate in Forensic Traffic Sciences. This Certificate prepares graduates to enter the field with a sound educational base and a solid practical foundation, to advance within their current careers, or to change careers. This Certificate is only available at the Police Academy. The 30 credit program is the "first year" of an applied program of study. Future plans include a Diploma in Forensic Traffic Sciences, which will advance the skills and knowledge of students to "second year" level with the completion of the necessary credits. The Applied Degree approach to post secondary education is broad and practical-delivering integrated technical skills with substantial applied content and the completion of 120 hours. An applied degree offers:

- valuable applied experience before graduation;
- the skill and knowledge employers want in Canada and around the world; and
- more opportunities for rapid career advancement.

What is forensic Traffic Sciences?

Forensic Traffic Sciences is the study of traffic unit collisions involving the investigation, analysis, and reconstruction of the incident. The JIBC Certificate in Forensic Traffic Sciences now offers working professionals a unique opportunity to learn theory and apply learning while acquiring significant academic recognition. Working practitioners in the program include law enforcement personnel as well as other professionals engaged in public safety:

- insurance investigators;
- motor vehicle and transit fleet supervisors;
- railway police agencies;
- workers compensation professionals;
- military investigators;
- legal and medical practitioners; and
- highway safety engineers.

The opportunities for work include:

- investigating the scene of a traffic unit(s) collision;
- managing an incident when first on scene;
- identifying, collecting, recording, and interpreting evidence; and
- planning and conducting interviews and analyzing statements.

This program prepares students to continue their study to a diploma or degree level.

How is the Certificate Program Delivered?

Six core courses (24 credits) are offered in concentrated, one-week modules, with pre-readings and post-course assignments at the JIBC. In addition, two liberal arts courses (6 credits) are required to complete the 30 credit certificate.

Core Courses (24 credits)

On-scene Collision Investigation (POLFTS100 -3 credits) Learning how to manage a collision scene is the primary intent of this course. Students learn the principles and practices of selecting and using appropriate tools and measurements, identifying, photographing, and interpreting physical evidence at the scene.

Interview Techniques and Statement Analysis (POLFTS110-3 credits) Explores the human elements of a collision. Through interviews and statement analysis students will learn how to retrieve vital information to enhance the interview process, demonstrate mastery in verbal and non-verbal interrogation, and analysis techniques.

Hit and Run Investigations (POLFTS120-3 credits) Conducting a comprehensive hit and run investigation is the focal point of learning in this course. Students learn to develop search patterns, coordinate investigation teams, and apply the principles of damage profiles and collision dynamics.

Forensic Photography Techniques (POLFTS 130-3 credits) Applying forensic photographic skills to the investigation of traffic unit(s) collision is the focus of this challenging module. Students will learn how to use SLR, digital, and video cameras, and apply the theory of forensic photography in order to secure evidential photographs under varied conditions.

Impaired Driving Detection (POLFTS140-3 credits) Focuses on the scientific basis of sobriety testing approved and recommended by the IACP, developed by the Federal U.S. Department of Transportation and the National Highway Traffic Safety Administration. Includes legal study, evidence gathering, and decision making. Topics include principles of psycho-

physical testing and an introduction (8 hrs) to drugs that impair.

Commercial Vehicle Assessment and Enforcement (POLFTS150-3 credits) Provides students with knowledge to recognize unsafe commercial transport units and to take action. Students explore topics including driver fitness and qualifications, vehicle inspection, and essential investigative criteria.

Basic Collision Analysis (POLFTS200-6 credits) Prerequisite POLFTS100. Conducting in-depth technical collision investigations through on-site analytical skills, students learn to collect evidence, identify vehicular restraint systems, conduct damage analysis, and manage and interpret the collection of pertinent data.

Liberal Arts Courses (6 credits)

Foundation of Communication and Conflict Resolution (3 credits) Offered by the Centre for Conflict Resolution at the JIBC. This course will be scheduled especially for students who will be notified of dates and times. Additionally, an English 100 course (first year College/University) is necessary. This course may be taken at any recognized educational institution and the credits transferred to the certificate program.

Transfer Credits and PLAR

Students may apply to have courses from other institutions -- including police colleges, military colleges, or in-house training -- applied to this program. Students who have worked in the field and have met the learning objectives of core courses may apply to have their learning recognized through the Prior Learning Assessment Recognition (PLAR) process.

Course Fees

Course fees vary depending on the cost of the individual course materials, facilities, and equipment. Check the course description for details.

Admission Requirements

Completion of Mathematics Grade 12 and Physics Grade 11 is recommended for some courses, but not required. Students do not need to be enrolled in the Certificate Program in order to take courses. Once students have completed 15 credits however, they are encouraged to apply.

Applications are available through the Program Coordinator and mature students who have not completed Grade 12 may be admitted to the program under some circumstances.

For information on this program call 604-528-5753 or visit our web page at www.jibc.bc.ca

TAX LAW & LAW ENFORCEMENT: WORKING WITH THE CCRA

Dave Quail[32]

Investigations are one of many enforcement activities used by the Canada Customs & Revenue Agency (CCRA) to preserve public trust in the fairness and integrity of the self-assessment system by ensuring that the provisions of the legislation administered by the CCRA are honoured by all taxpayers, registrants, importers and exporters, and that they pay their fair share of taxes and duties and receive their proper entitlements. The *Income Tax Act*, *Excise Tax Act*, *Customs Act* and the other acts administered are regulatory statutes that provide for criminal sanctions.

As with all regimes in the developed world, criminal sanctions are provided to ensure compliance by deterring fraudulent behavior. The overall mandate of the Investigations Program is to enhance compliance levels with the various acts administered through effective enforcement and,

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thereby, contribute to the public trust, fairness, and integrity of the self-assessment system.

The Investigations Division operates 3 main programs for the CCRA:

- **the Leads and Assistance Program (LAP);**
- **the Special Enforcement Program (SEP); and**
- **the Criminal Investigations Program (CIP).**

This article will focus on **LAP** & **SEP,** as they are more relevant to police organizations. As well, the mandate of **CIP** is also discussed.

Leads and Assistance Program (LAP)

Mandate

The LAP mandate is to coordinate the informant leads received and to provide assistance, upon request, to other programs, domestic and foreign tax and customs authorities, and other enforcement agencies.

Program Objectives

The LAP program objectives are summarized as follows:

- To control and screen leads received from informants relating to alleged non-compliance under the revenue acts administered, refer these leads to the appropriate area for action, and report on their disposition. These leads are reviewed, databases are searched for information, and a decision based on potential tax at risk is made to determine the appropriate action. Leads are recorded in a database and those leads are forwarded to other areas for action and are followed up for results. These activities are handled by Investigations because of their expertise in investigative matters and the need to protect the information and the identity of informants;
- To control and process, on a priority basis, international requests for assistance in gathering evidence for criminal investigations, including grand jury and multi-agency investigations; and
- To assist other functions and departments as required with administrative prosecutions and requirements for information. The assistance provided includes advice and guidance to Audit, Collections and International Tax, handling *Criminal Code* access orders, and processing requests for information from other government departments including Human Resource Development.

Confidentiality of Income Tax (ITA) & Excise Tax (ETA) Information

Subsection 241(1) of the *ITA* and 295(2) of the *ETA* prohibit an official, including officers of the CCRA, from communicating any information to or allowing access to any books and records obtained under these acts to any person. Subsection 241(2) of the *ITA* and 295(3) of the *ETA* prohibit an official from giving evidence or producing any books or records obtained under these acts, in any legal proceedings. All taxpayer information is also protected from 3rd parties.

However s.241(3) *ITA* and s.295(4) *ETA* allows for information to be released to Law Enforcement Agencies under specific circumstances. Subsection 241(3) *ITA* and s.295(4) *ETA* provide an exception to s.241(1) & (2) *ITA* and s.295(2) & (3) *ETA*, with respect to the production of information in the possession of the CCRA. When criminal proceedings related to the administration or enforcement of the acts administered by the *CCRA* have commenced by charge, CCRA policy regarding the production of information in their possession to the police is as follows:

- The police or Crown counsel must provide a copy of the charges and a letter advising that charges have been laid. As well, the letter must set out what information is requested and assurances that the information requested is relevant to the charges laid.

Information will not be passed where certain named charges have been laid and the letter indicates or it is believed that the information requested is in respect of a different investigation for which charges have not yet been laid.

- Once it is determined that the requested information may be provided, it is not required that CCRA have a subpoena in hand before providing the information to the police or Crown counsel. This will allow the requesting agency prepare for trial. However, a subpoena must be received prior to producing the information in court.

This policy is also applicable to s.107 and 108 of the *Customs Act*.

Special Enforcement Program (SEP)

Mandate

The SEP mandate is to combat, with the assistance and support of the Office of the Solicitor General represented by the Royal Canadian Mounted Police (RCMP) and other external partners, organized crime through the enforcement of the various acts that the CCRA administers. In 1972, the Government of Canada directed that the Department of National Revenue and Taxation, with the assistance and support of the RCMP, conduct a continuing program of tax audits and investigations into the affairs of members of organized crime.

These individuals are usually charged by police agencies for other major offences such as drug trafficking. The fact that they are also prosecuted for tax charges does not usually result in greater sentences/fines. In many instances, the prison term received on the tax charges is served concurrently with the jail sentence related to the other charges. In view of this, Investigations adopted a policy that no criminal investigation will normally be conducted in cases where an individual has been or will be charged by a police agency for a criminal offence and has received or is likely to receive a term of imprisonment of two years or more. Exceptions to this policy would be when the police request that we proceed with tax charges to increase the chances of convicting a high-profile member of organized crime.

Originally, the program only enforced the ITA in its attack on crime. However, with the consolidation of Tax, GST and Customs, SEP is now also enforcing the other acts where appropriate.

Program Objectives

The overall objectives of SEP are to:

- Minimize the accumulation of unreported illicit wealth amassed by persons engaged in illegal activities, thereby causing disruption to organized crime, stem the infiltration of legitimate business by criminal elements, and reduce the activities of organized crime on society.

- Forge strategic alliances and partnerships with law enforcement agencies with the view to improve CCRA efficiency and expand the impact of CCRA actions on organized criminal activities including areas outside direct taxation, such as proceeds of crime and the proposed money laundering legislation.

The main motivation of criminal organizations is the attainment of profits. Governments of most countries have realized that to combat organized crime, ways have to be found to control the wealth generated by their activities. The enforcement of the laws administered by the CCRA is one effective way to control such wealth.

Illegal activities of organized crime are usually viewed as pertaining to violent predatory crimes such as drug trafficking, robberies, and prostitution. However organized crime is also extensively involved in other types of non-violent crime such as stock fraud, investment fraud,

international telemarketing fraud, money laundering, corruption of public officials, and tax, GST, and Customs fraud. The Program targets all those illegal activities that generate profits.

It may be viewed that the attack on organized crime and its wealth is a policing issue and that the proceeds of crime legislation enacted by government gives police the necessary tools to attack criminally obtained wealth. However, the proceed of crime laws should not be construed as a replacement for the SEP program. There are several distinct advantages enjoyed by SEP. For example, it is not necessary to separate legitimate from illegitimate income.

The burden of proof is less stringent within the context of a revenue civil re-assessment than with criminal proceedings under the proceeds of crime legislation. Also, in order for proceeds of crime forfeitures to take place, there must be a conviction of a substantive offence. Frequently, this is not possible and provisions of the ITA and ETA become more effective and often the only means of minimizing the accumulation of illicit wealth. SEP continues to play an important role in government actions against persons involved in organized criminal activities.

The above objectives are accomplished through the following activities:

- Identifying potential targets and obtaining information on the scope of their illegal activities. Since the CCRA has no intelligence per say on criminal organizations and its members, it relies on police agencies to provide targets, their involvement in crime, and financial data such as assets and lifestyle. The CCRA generally accepts the police evaluation of a problem in the criminal economy from their perspective and work with them to enforce revenue laws. Therefore, if police are placing emphasis on motorcycle gangs or the Italian Mafia, these will invariably be the principal targets referred to the program.

  At the inception of the program in 1972, all referrals came from the RCMP. Since then, through marketing efforts, other enforcement agencies have become aware of the Program. The RCMP accounts for 45% of the referrals to SEP; 55% comes from other agencies such as the provincial police, local police, insurance investigators and stock exchange security, to mention a few.

- Pursuing strategic alliances with law enforcement agencies where the goal is to remove the accumulation of unreported illicit wealth. Investigations have seconded investigators to the RCMP Integrated Proceeds of Crime units (IPOC) across Canada.

  The main roles of Revenue Canada personnel on the IPOC units are liaison between the two organizations and the identification of cases offering tax re-assessment potential for timely referral to the SEP units in CCRA's Tax Services Offices. Another key role is to provide forensic accounting expertise to the other members of the IPOC units. Both groups operate effectively while ensuring that the confidentiality provisions of the acts administered are observed.

- Working with the Anti-evasion Division and other departments in developing a proposal for the establishment of a Mandatory Suspicious Transaction Reporting system to identify and deter money-laundering practices.

- Requesting from individuals and corporations tax returns and/or statements of assets and liabilities. Persons involved in illegal activities have normally no desire to participate in a legal system. In an attempt to hide profits earned and their assets, they normally do not file tax returns or keep books and records. Therefore, one of the first enforcement actions initiated is to require them to file tax returns. In situations where there is insufficient financial data regarding an

individual's assets and lifestyle, the CCRA requires them to produce statements setting out their assets, liabilities, and personal expenses. These are used to establish the potential for further compliance or enforcement action. Should the persons fail to file the returns and/or the statements, they may be prosecuted. Fines range from $1,000 to $25,000 and may include a jail term not exceeding 12 months in addition to being ordered by a court to file these returns and/or statements.

- Conducting audits on files showing good potential for tax recoveries. Since most individuals do not keep records of their illegal activities, the audits are usually conducted by indirect methods, principally the net worth method. Re-assessments issued include taxes, interest, and civil penalties.

- Conducting investigations of significant cases where there are indications of tax fraud. Where cases of suspected tax fraud are uncovered, the file is referred to the Criminal Investigations Program (CIP) where investigations are performed and referrals are made to the Department of Justice for prosecution. Jail sentences are often sought in addition to monetary fines.

Criminal Investigations Program (CIP)

The CIP mandate is to conduct criminal investigations into suspected cases of evasion or fraud with respect to the various acts administered and to prosecute and publicize each case where sufficient evidence is obtained to support conviction for deliberate or wilful evasion with respect to these acts. The major acts administered include the Income Tax Act, the Excise Tax Act, the Excise Act, the Customs Act, the Customs Tariff Act, and the Export and Import Permits Act.

Editor's Comments: "**In Service: 10-8**" would like to thank Canada Customs and Revenue Agency Investigator Dan Quail for this submission.

OUT OF PROVINCE INTERCEPTION VALID WITHOUT HOME COURT BACKING

R. v. Chang & Kullman,
(2003) Docket:C31682-C31401 (OntCA)

The police in Quebec were investigating the bid-rigging of municipal construction contracts involving a city official and subsequently obtained a wiretap authorization from the Superior Court of Quebec to intercept the telephone conversations of the city official and another involved person. As a result of these wiretaps, the police were then led to further investigate an alleged sale of false visas for entry into Canada. Two Ontario residents were identified as also being involved in the discussions over the fraudulent visas. Quebec police applied for and received two further wiretap authorizations; one to renew the authorization relating to the bid-rigging and the second in relation to the immigration investigation. The Ontario RCMP assisted and they obtained the cooperation of the telephone company in Ontario in setting up the wiretaps on the targets. These wiretaps under the Quebec authorization resulted in information pertaining to various illegal immigration schemes.

The Ontario RCMP subsequently applied for and received their own authorization in the Ontario Superior Court of Justice to intercept communications largely on information obtained from the Quebec immigration investigation wiretap. This Ontario wiretap authorization included, for the first time, discussions involving the accused Chang. Ontario RCMP received a further authorization naming many of the same targets but added five others, including Chang. Under this new authorization, telephone calls made by the accused Kullman were also intercepted.

Although objected to at trial, the intercepted telephone calls were admitted into evidence and the accused Chang was charged with conspiracy to assist a named person into Canada illegally while both Chang and Kullman were charged with conspiracy to assist unnamed persons to enter Canada illegally. Evidence at trial determined that Chang, an immigration officer, was going to allow a young woman (destined to be a prostitute) to arrive on a flight from Thailand to Toronto and pass through his inspection without enquiries. For his involvement, Chang would receive a $1000 bribe. Kullman, also an Immigration officer, was also overheard to be involved in the sale of blank visitor visas. The two accused, sitting without a jury, were convicted partially on the intercepted conversations, but appealed to the Ontario Court of Appeal. They argued, among other reasons, that the Quebec authorizations were unlawful and therefore the Ontario police could not use them to support their authorization. Furthermore, they contended that the police failed to comply with s.188.1(2) of the *Criminal Code* and did not have the Quebec authorizations backed by an Ontario Court.

Using the Quebec Authorizations

The accused submitted that the Ontario police used information obtained from the Quebec authorizations, which in their view were not lawful because the police failed to establish investigative necessity as required under s.186(1)(b) of the *Code*. However, the trial judge limited her review only to the facial validity of the authorizations and did not review the sufficiency of the evidence to support the wiretap. In other words, she found that the Quebec superior judge who made the order had the jurisdiction to do so and there was no need to go any further and review whether investigative necessity had been established. It was this failure to go beneath the face of the warrant itself and examine the evidence that the accused argued was an error. However, the Ontario Court of Appeal disagreed. The Court held:

> In our view, the trial judge quite properly concluded that once an Ontario judge is satisfied that the Quebec judge had jurisdiction to make the order, and that the steps that were taken to execute it were lawful, then that is the end of the Ontario court's inquiry.

And further:

> We are also of the view that for an Ontario superior court judge in these circumstances to review the sufficiency of the evidence underlying the authorization of another province's superior court would offend the general rule that a court order is immune from collateral attack.

Extra-provincial execution of wiretaps

Section 188.1(2) of the *Code* states that an authorization given in one province may be confirmed by a judge in another province and then shall be of full force. The trial judge found the language used in this section ("may") was permissive, but not mandatory. Thus a confirmation order in a different province is not compulsory. The Ontario Court of Appeal agreed and held that "if Parliament had intended to require a confirmation order in every situation of extra-provincial execution of wiretap authorizations, it could have done so in simple and straightforward language." Thus, this ground of appeal was rejected.

The appeals were dismissed.

Complete case available at www.ontariocourts.on.ca

Note-able Traffic Quotes

"*No Sir, I got my quota yesterday. These tickets are just for fun.*"

"*Yes, I can give you a warning. Speed again and I'll write you another ticket.*"

"*You already got a break. It's the pedal next to the accelerator.*"

"*The answer to the next question will determine if you are drunk. Was Mickey Mouse a cat or a dog.*"

ONLY FACTORS USED BY OFFICER MAY BE CONSIDERED IN ASSESSING ARTICULABLE CAUSE

R. v. Coles, 2003 PESCAD 3

A police officer stopped the accused with the intent to issue a warning after he had followed him drive at a speed well below the speed limit, signal well in advance of his turn, and proceed through a crosswalk just as a pedestrian entered it. As a result of interacting with the driver, the officer formed the opinion he had sufficient grounds to make a demand for breath samples. Subsequent samples provided were in excess of the 80mg% limit. At his trial on impaired driving charges, the judge found the accused's detention arbitrary and thus contrary to s.9 of the *Charter* because he was stopped without authorization or reasonable cause. As a consequence, the evidence of impairment and certificates of analysis were excluded as evidence and the accused was acquitted.

The Crown appealed to the Prince Edward Island Supreme Court[33], which overturned the conviction and ordered a new trial. The Supreme Court judge found the detention lawful and not arbitrary. He concluded that the authority to stop the vehicle could arise from either statute or articulable cause at common law. In this case, the officer had a reasonable belief the vehicle was being operated contrary to Prince Edward Island's *Highway Traffic Act (HTA)*. The officer had an honestly held belief that the accused failed to yield to a pedestrian under s.190(1) *HTA*. Furthermore, s.10(1)(c) of the *Act* permits a police officer to direct traffic to ensure safety on the highway. This would allow the officer to stop the accused believing his actions were a public safety hazard. Stopping him was therefore not arbitrary, random, or without foundation.

[33] see R. v. Coles, 2003 PEISCTD 36

At the same time, the Supreme Court judge was of the opinion that under the common law the police may stop persons where they have an articulable cause. In allowing the appeal and ordering a new trial, the judge stated:

> There were three specific, objective, discernable facts, namely the slow driving, the early signalling, and the alleged failure to yield that caused the police officer to select the [accused's] vehicle. It was not a hunch. It was not a random stop. There was a rational foundation for the detention. It was not a[n] arbitrary detention…

And further:

> I am of the opinion that the three specific and articulable observations, when taken together with rational inferences from those facts, would constitute objectively discernible facts and provide reasonable grounds to suspect the driver to be impaired. The fact that, subjectively, the officer did not connect the three observations and suspect impairment does not preclude finding, on an objective analysis, that there were grounds to suspect impairment, and therefore, grounds to stop the [accused].

Dissatisfied with the result, the accused appealed to the Prince Edward Island Supreme Court Appeal Division (PEISCAD) seeking a reversal of the Supreme Court's judgment. He submitted that the officer in this case acted arbitrarily because he neither had lawful authority (statutory or common law) to stop the vehicle nor an articulable cause. The PEISCAD agreed and ruled in favour of the accused.

Arbitrary Detention

Chief Justice Mitchell, writing the opinion for the 2:1 majority, noted that a detention will not be arbitrary under s.9 of the *Charter* when a police officer "acts in accordance with statutory or common law authority and has articulable cause." In this case, the officer stopped the accused because he believed s.190(1) *HTA* had been violated when a pedestrian had just stepped into a crosswalk, but was not yet into or near the

accused's side of the roadway. However, s.190(1) does not cover such a situation. A breach of s.190(1) requires the pedestrian to be on or so near the motorists half of the roadway as to constitute a danger. Furthermore, s.10(1)(c) and (d) of the *Act* were not applicable. None of the specific purposes enunciated in s.10(1)(c) (directing traffic in an emergency/ expediting traffic/ ensuring highway safety) were present. Nor did the officer have a reasonable belief that the vehicle was being operated illegally which would have permitted a stop under s.10(1)(d). His belief in a s.190 contravention was not reasonable; it was based on a misunderstanding of the law.

Since the officer's only reason for stopping the accused was erroneous, his "ignorance of the law could not provide reasonable cause for him to detain the [accused]." Nor could a judge use factors, although objective, that were not considered by the officer at the time of the stop. Justice Mitchell wrote:

> Detaining a person on the highway may be justified even though it does not result in any charge or conviction provided that prior to doing so the officer has reasonable cause to suspect the detainee is implicated in a violation of the HTA or the Criminal Code. However, here, prior to the detention, the officer had no basis to suspect a violation of the Criminal Code and should have known there was no violation of the HTA. A detention that would otherwise be unconstitutional cannot be rendered lawful on the basis of what was found after or as a result of it. Attempts to justify unconstitutional acts by that type of ex post facto analysis is repeatedly criticized by the Supreme Court of Canada…
>
> I disagree with [the P.E.I. Supreme Court] judge's statement…to the effect that a detention would be justified so long as grounds existed even though the officer did not utilize them in making his decision to stop the [accused]. In my view, the grounds must have existed in the mind of the officer and influenced his belief at the time of the detention otherwise his actions would not be justified. An officer could not afterwards rely on factors he did not consider as grounds at the time of the detention. A detention would be nonetheless arbitrary if it turns out the officer might have had grounds had he only taken into account certain other factors that existed but that he did not in fact consider at all. The question is whether the officer acted on reasonable grounds, not whether there were such grounds available. The purpose of s. 9 of the Charter is to prevent agents of the state from interfering with a person's freedom of movement without their acting on reasonable cause. Just as a police officer must satisfy him or herself that there are valid grounds for conducting a search before carrying it out, so too an officer must also satisfy him or herself that grounds exist for a detention before detaining. There is both a subjective and an objective aspect. The officer must have reasons for his belief, and those same reasons must be reasonably capable of supporting such belief. [references omitted, emphasis added]

Justice McQuaid, in his dissenting judgment, disagreed with the majority. In his view, the officer was entitled to stop the accused under either s.10(1)(c) or (d) or on the basis of articulable cause. The officer did have a reasonable belief the accused contravened s.190(1) *HTA* even though a close reading of the section would have precluded a conviction. He also proceeded through the pedestrian crosswalk thereby jeopardizing public safety. As well, Justice McQuaid concluded that articulable cause, the minimum standard justifying state interference in a citizen's right to move freely about, existed. He stated:

> The inference from all the evidence of the police officer is that while the incident at the crosswalk was the defining reason for the detention, the police officer had two additional reasons to be concerned the [accused] might be a public safety menace as he drove along Euston Street/Brighton Road. He was driving much slower than the posted speed limit and he was tentative in the use of his signalling devices. These two facts alerted the police officer to the operation of the motor vehicle and while they were not the reason he stopped the [accused], they constitute evidence the officer had an objective belief there was a public safety issue that would justify the detention of the [accused].

> The purpose of s. 9 of the Charter is to allow citizens to move about freely without the threat of being detained by agents of the state in the absence of some reasonable belief they have violated the law. As [the Supreme Court judge] points out in…his reasons for judgment, an assessment of the police officer's reasonable belief that a vehicle is being operated contrary to the Highway Traffic Act does not require proof the police officer's belief be correct in that grounds must exist to charge and convict the driver for a violation of the Act. Drivers are stopped many times by police out of interest for public safety. Some are not charged with violations of the Act and even when they are charged with a violation, a conviction may not result because at law it was not possible to establish a violation. In those circumstances, the driver's rights under s.9 of the Charter could not be said to be violated as long as the police officer had a reasonable belief, founded on objective criteria, there was a violation or a public safety issue.
>
> In this context, it is useful to remember the right to move about in a motor vehicle is not a fundamental liberty. It is a licensed activity which, for the protection of the public, is subject to regulation and control. If a citizen is exercising his or her right to participate in this licensed activity in accord with the relevant law, the individual's right under s. 9 is to be respected. However, when an agent of the state has a reasonable belief this is not so and holds a reasonable belief there is a danger being posed to the public, the individual's right under s. 9 of the Charter yields to the right of the state to protect the public by the enforcement of the law.

Despite Justice McQuaid's opinion, the majority granted leave to appeal and the verdict of the trial judge excluding the certificates of analysis and acquitting the accused was restored.

Complete case available at www.canlii.org

Note-able Quote

"*Experience is a hard teacher, because she gives the test first, the lesson afterwards*" Vernon Sanders Law

REQUEST FOR IDENTIFICATION DOES NOT NECESSARILY CREATE DETENTION

R. v. C.R.H., 2003 MBCA 38

Police officers on routine vehicle patrol at 1:20 am observed the accused and his two companions walking on the sidewalk in a residential neighbourhood. The police stopped abreast the three young men and one officer stated, "Hi, how's it going? Where are you guys headed?", through an open car window. The youths went over to the police car and were asked several questions including names, dates of births, addresses, and telephone numbers. At all times the police officers remained within their car. While one officer engaged the youths in casual conversation, the other officer queried the names on CPIC and it was learned the accused was breaching his probation curfew for which he was consequently arrested and charged.

At trial for breach of probation, the Manitoba Provincial Court Judge ruled the accused had been arbitrarily detained contrary to s.9 of the *Charter* and his right to be secure against unreasonable search and seizure under s.8 had been infringed when the police requested personal information in the form of identification and checked it on the computer. The evidence obtained by the police resulting from the stop was excluded. In his view, the accused was detained because it is to be presumed that a person is compelled to answer police questions unless there was evidence of informed consent. In particular, he concluded that a pedestrian stopped by police for a computer identity check is subject to "an atmosphere of oppression."

The Crown appealed to the Manitoba Court of Queen's bench. The appeal justice overturned the acquittal. In her view, the accused failed to demonstrate that there was any compulsion to

comply with a direction or demand. There was no evidence of a command, order, or direction for the accused to approach the police car or to remain while the CPIC query was completed. Nor did the accused testify that he believed there was no option but to answer the police questions. Further, she ruled there was no s.8 Charter breach when the police ran the name on CPIC. The information in the police computer was not personal and the accused could not claim a privacy interest in his probation order that would exclude the right of police access.

The accused appealed the Queen's Bench judgment to the Manitoba Court of Appeal arguing that he was arbitrarily detained (s.9 *Charter*), that he was not informed of his right to counsel (s.10(b) *Charter*), and that the request for identification and computer search violated his right to be secure against unreasonable search and seizure (s.8 *Charter*).

Detention

Justice Steel, rendering the unanimous judgment for the Manitoba Court of Appeal, began the analysis by assessing whether there was a detention. Before the right to counsel under s.10 is triggered or the arbitrariness of a detention is considered under s.9, it must be first determined that a detention in fact occurred. A detention under the *Charter* may occur in one of three ways:

1. deprivation of liberty by physical restraint;
2. state control through a direction or demand which prevents/impedes access to counsel and failure of non-compliance may result in significant legal consequences; or
3. submitting to a state direction or demand in which the person reasonably perceives they have no choice but to comply, even though there is no criminal liability for failing to do so. This is commonly referred to as "psychological detention".

Justice Steel noted that the police may question anyone they believe may have information while investigating an offence, but cannot compel answers. However, "the mere fact of a conversation between a citizen and a police officer does not raise a presumption of detention." The court must look beyond the fact of an officer/citizen encounter and examine the "entire relationship between the questioner and the person being questioned", including the reasonableness of the person's subjective belief. For example, "the personal circumstances of the accused, such as age, intelligence and level of sophistication" may be considered. He wrote:

> The accused argues that the request for identification from police officers creates an inference that the accused reasonably believed he had no other choice but to comply. At that point, it is submitted, the onus shifts onto the Crown to prove informed consent. I do not agree. There must be more than the request itself, even if it is from police officers and even if it is a request for identifying information.

And further:

> We have not yet reached a situation where a compulsion to comply will be inferred simply because the request comes from a police officer or that a compulsion to respond should be presumed unless the Crown can show evidence of informed consent. It is true that the very nature of the police function and the circumstances which often bring the police into contact with individuals introduce an element of authority into a request made by a police officer. Certainly, there is a power imbalance between police and citizens, but that cannot mean that police can never ask questions. Instead, the power imbalance should be one of the factors to be considered in an analysis of the interaction and a consequent determination of whether there was a compulsion to comply. [references omitted]

Although "a pedestrian has the expectation of complete freedom of movement" where no crime has been committed or investigation is taking place, "so long as police officers merely question citizens and do not interfere with individual

liberties by detaining them, such proactive policing should not be prohibited." The Court concluded that there is no bright line rule that a detention can be assumed when the police approach a pedestrian. Since there was no detention, the right to counsel was not engaged nor was there a need to enquire into its arbitrariness.

Search and Seizure

In addressing the accused's additional argument that the CPIC computer search violated his s.8 *Charter* right to be secure against unreasonable search and seizure, the Court held:

> The implications for law enforcement of a finding that access by the police to CPIC computer information engages Charter rights are significant. I do not need to enter into that discussion. For the purposes of this case, I would dismiss this ground of appeal for substantially the same reasons as the summary conviction appeal judge. The accused's probation order was a public record, as was his criminal record information maintained by the police. The place where the information was obtained was a computer maintained by the obtaining party itself; namely, the police service. The police database is not an area in which the accused can assert a privacy interest that would exclude the right of access of the police.

In dismissing the appeal, Manitoba's top court concluded that both the purpose and motive of the police must be considered in determining what impact the citizen/police interaction had on the person's reasonable expectation to comply. It is incorrect to infer a presumption of compulsion simply because there was an encounter with police. As noted by Justice Steel, "the overall situation must be evaluated having regard to what is said and done, in what manner, in what location and for what purpose."

Complete case available at www.canlii.org

Note-able Quote

"*Law is mind without reason*" Aristotle 384 B.C.-322 B.C.

SECTION 25 *CRIMINAL CODE*: A SHIELD, NOT A SWORD

Sgt. Mike Novakowski

Section 25(1) of the *Criminal Code* protects a police officer and anyone else acting lawfully, in using force to do what they are authorized or required by law to do. This provision has also been referred to as the "Peace Officer" defence[34].

s.25(1) *Criminal Code*
Every one who is required or authorized by law to do anything in the administration or enforcement of the law… (b) as a peace officer…is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Section 25 affords a qualified protection from liability for police officers using force while in the lawful execution of their duty. However, this provision does not in itself "provide authority for the use of force, it merely provides a defence that may be raised when the force used is challenged as unlawful"[35].

For example, in *R. v. Brennan* (1989) 52 C.C.C. (3d) 366 (Ont.C.A.), an officer who ran a stop sign while pursuing a stolen vehicle argued he was entitled to disobey the sign under s.25(1). The question addressed by the Court was not whether the officer was required or authorized to apprehend the driver, but whether the officer was required or authorized to drive through the stop sign. In the absence of a statutory provision or common law authority to do so, the officer was not entitled to drive past the sign without stopping. In this sense, s.25 acts as a "shield" not a "sword".

Thus, the police must be authorized or required by statute or common law to undertake the action

[34] R. v. Finta [1994] 1 S.C.R. 701, see also R. v. Devereaux (1996) 112 C.C.C. (3d) 243 (Nfld.C.A.)
[35] R. v. Garcia-Guiterrez (1991) 65 C.C.C. (3d) 15 (B.C.C.A.) per Wood J.A., see also Eccles v. Bourque [1975] 2 S.C.R. 739.

at issue (eg. arrest, detention, search, entry, etc.); if so, s.25 merely cloaks the officer with protection from criminal or civil liability[36] when they use reasonable force in doing so. For example, police may use reasonable force, as necessary to overcome resistance to a lawful search, and to preserve from destruction any evidence that is properly the object of that search[37]. Similarly, s.495 of the *Criminal Code* "implicitly authorize[s] a police officer, acting on reasonable grounds, to use as much force as is necessary to effect an arrest"[38]; "the right to use reasonable force is, in the eyes of the law, simply part and parcel of the right to make an arrest"[39].

To be protected by s.25(1) of the *Code*, the following must be demonstrated[40]:

> [T]he force was used by a peace officer authorized by law to engage in law enforcement, that he acted on reasonable grounds, and that the force used was "necessary for [the] purpose."

In *Hudson v. Brantford Police Services Board*, (2001) Docket:C34963 (Ont.C.A.), justice Rosenberg for the Ontario Court of Appeal held:

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

Similarly, the Ontario Court of Appeal in *R. v. Asante-Mensah* (2001) Docket: C24828/C25026 (Ont.C.A.) stated:

> [Section] 25 of the Criminal Code does not confer powers upon police officers or others, but rather shields them from civil or criminal prosecution if they act on reasonable grounds in the exercise of their authority and use reasonable force for that purpose.

Using as much force as is necessary

In assessing whether the level of force was reasonable, "it is the belief of the police officer in light of all the circumstances that is important."[41] Mere suspicion however, is insufficient. There must be some level of objective grounds to support the officer's subjective decision to act; the cumulative effect of their observations, their knowledge of the subject(s) and the situation, information they have received, and their experience. Further, the police are not required to measure the amount of force with exactitude[42]. The Courts have recognized that there will be some consideration given to the amount of force used and whether it exceeded the reasonable amount necessarily required. The following quotes from various courts underscore this principle:

> In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the [officer] could not be expected to measure the force used with exactitude. *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 B.C.C.A.

> It was necessary for the constable to strike hard enough to release the determined grip of the complainant on the handle of the door. To effect that result, the constable could not be expected to weigh to a nicety the exact measure of force necessary to achieve that result. *R. v. Cline* (1991), 117 A.R. 4 (Alta C.A.)

> While according to the circumstances some allowance must be made for an officer in the exigencies of the moment misjudging the degree of force necessary to restrain a prisoner… *Foster v. Pawsey & Draper* (1980), 28 N.B.R. (2d) 334 (N.B.Q.B.).

> In assessing [whether excessive force was used], I must bear in mind that the degree of force must be viewed from the subjective view of the police

[36] Priestman v. Colangelo (1959) 19 D.L.R. (2d) 1 (S.C.C.).
[37] R. v. Garcia-Guiterrez (1991) 65 C.C.C. (3d) 15 (B.C.C.A.) per Wood J.A.
[38] R. v. Leahey 2000 ABPC 198
[39] R. v. Asante-Mensah (2001) Docket: C24828/C25026 (Ont.C.A.)
[40] Mohamed v. City of Vancouver et al 2001 BCCA 290
[41] R. v. Bottrell (1981), 60 C.C.C. (2d) 211 B.C.C.A.
[42] R. v. Garcia-Guiterrez (1991) 65 C.C.C. (3d) 15 (B.C.C.A.) per Wood J.A.

officers as well as the objective circumstances. I must also make due allowance for a police officer in the exigencies of the moment misjudging the degree of force needed, and avoid holding a police officer to a standard of conduct that one sitting in the calmness of a courtroom later might determine was the best course. *Stewart v. Canada* [1999] F.C.J. No. 1996 (F.T.C.) appeal to Federal Court of Appeal [2001] FCA 128 dismissed.

The right to use force must in each case depend upon its own circumstances, which must be considered to determine how they might be expected to act upon the mind and judgment of the officer, and to determine whether the officer was justified in using force. *R. v. Purvis* (1929) 51 C.C.C. 273 (Ont.Co.Crt.)

Counsel argues that the physical force which was exhibited was out of proportion to the nature of the offence (a traffic related offence) which was at the heart of the matter. While it is indeed unfortunate that the altercation in question occurred, the nature of the offence is not relevant. Disputes over seemingly minor matters can at times raise emotions out of all proportion to the issue involved. It is the circumstances in which the officer finds himself that are relevant for section 25(1) purposes. *Dyer v. Canada* [1992] F.C.J. No. 238 (F.T.C.)

Summary

To be justified in using force generally, a police officer must establish:

- they were required or authorized by law to act in the administration or enforcement of the law (acting in the lawful execution of their duties);
- they were acting on reasonable grounds; and
- they used no more force that was reasonably necessary

In short, the use of force must be necessary and proportionate in the circumstances[43].

[43] Mohamed v. City of Vancouver et al 2001 BCCA 290

SPONTANEOUS RESPONSE TO ALLEGATION NOT ELICITATION

R. v. Gitsadig, 2003 ABCA 91

The accused, a taxi driver, was arrested for the sexual assault of a passenger after she reported the incident and the number of his cab to police. At the time of his arrest he was advised of his right to counsel and cautioned about providing a statement. He asked to speak to a lawyer and was transported to the police station where he was placed in a room with a telephone, telephone books, and was advised that a list of telephone numbers for duty counsel were available. As the officer turned to leave the room, the accused asked what the allegations were. After the officer told him, the accused stated he remembered the female passenger but that there was no physical contact between them. During the *voire dire* to determine the admissibility of this statement, the judge concluded there was no violation of his right to counsel under s.10(b) and even if there had been the statement would be admissible under s.24(2).

The accused appealed to the Alberta Court of Appeal arguing he had not been given the opportunity to exercise his right to counsel before he gave his statement. In dismissing his appeal, Justice Fruman for the unanimous court rejected this submission stating:

> The trial judge correctly found that the [accused's] s. 10(b) Charter rights had not been violated. The [accused] gave a very short, spontaneous statement when told of the allegations against him. He had been chartered and cautioned and indicated he understood his rights. His statement was not elicited in any way by the police officer, nor did she continue the interview. She did not question him, but merely provided information to him in response to his question about the nature of the charges against him. The [accused's] statement was brief and the police officer had no notice that he was going to give it

and no means of stopping him from speaking. She had no opportunity to provide a Prosper [[1994] 3 S.C.R. 236] warning, nor was one called for.

Finally, even if a breach could be found, the trial judge was correct that, at best, it was a technical breach that could not bring the administration of justice into disrepute.

Complete case available at www.albertacourts.ab.ca

POLICE NEED NOT PLAY WORD GAMES OVER RIGHT TO COUNSEL

R. v. Matkea, 2003 ABQB 27

A police officer pulled the accused over after he was observed weaving a homemade go-cart on the roadway at approximately 30 km/h. The officer could smell alcohol and the accused responded that he had been drinking when questioned. He was arrested and advised of his right to counsel. When asked, "Do you want to call duty counsel, or any other lawyer?" he replied, "I don't know yet." He was then given the police caution. The accused was then transported to the police station and again asked if he wished to contact a lawyer. He replied, "No." At trial the accused was convicted of an alcohol related driving offence under s.253 of the Criminal Code.

However, he appealed to the Alberta Court of Queen's Bench arguing, in part, that his right to counsel under s.10(b) of the *Charter* had been violated. He submitted that when he first ambiguously answered, "I don't know yet", the officer failed to fulfill his obligation in holding off from eliciting evidence (breath samples) until further efforts were made to determine full and proper waiver. Queen's Bench Justice Watson disagreed. In his view, the police are "not required to play word games with a detainee, under circumstances such as this". He held:

> It seems to me that [answering "No" at the police station to the officer's second question about speaking to a lawyer] would have ended any dubious nature of the first comment that was made by the individual. Especially having regard to the fact that the first comment was not made that he wanted to speak to counsel, or that he had any contemplation about doing so; but that in fact he wasn't sure yet, or he hadn't made up his mind yet, or whatever he meant by the expressions that he used there.
>
> Under the circumstances, I do not find any violation of a holding off requirement here, because as I said before, the Constable did not attempt to obtain self-incriminatory evidence, prior to an answer, No. Once he got the answer, No, and then the cooperation of the [accused] after that, it seems to me that there was not any violation of the right to counsel, or the right to have a reasonable opportunity to exercise it.

Complete case available at www.albertacourts.ab.ca

SLEEPING DRIVER REBUTS PURPOSE OF OCCUPYING OPERATOR's SEAT

R. v. Shuparski, 2003 SKCA 22

At 12:07 am a police officer found the accused asleep in his vehicle at the roadside. He was reclined in the driver's seat with the keys on the front passenger seat. The engine was off and the vehicle was in park. He exhibited signs of impairment, was arrested, and given the breath demand. He subsequently provided breath samples at 2:50 am and 3:12 am in excess of the legal limit and was charged with care and control while impaired and over 80mg%. At trial, the accused testified that about 10 minutes after leaving his girlfriend's home at midnight he was feeling fatigued and unsafe to drive because he was tired and had been drinking. He pulled off the road, put his vehicle in park, placed the keys on the seat, locked the doors, reclined his seat, and fell asleep.

The Saskatchewan Provincial Court judge acquitted the accused of the impaired charge because she had a reasonable doubt as to his

impairment. On the over 80mg% charge, she was satisfied his blood alcohol content was over the limit and that he was both in actual care and control (presented a present danger to resume driving) and presumptive care and control (he never abandoned the purpose to set the vehicle in motion even though he intended to sleep for awhile). She would have convicted him but for the prior judicial decision of the Saskatchewan Court of Queen's Bench she felt bound to follow in *R. v. Sherbrook*, [1998] 6 W.W.R. 602 (Sask.Q.B.). In her view, the rationale barring her from convicting the accused was as follows[44]:

> [With reference to the presumption found in s.258(1)(a) of the *Criminal Code*] the time to assess the accused's purpose is when he or she is found by the police, and if asleep at that time, when he or she went to sleep… The essence of the decision regarding the presumption is that the making of a conscious decision to sleep in the vehicle for awhile constitutes an abandonment of occupation of the driver's seat for the purpose of setting the vehicle in motion. The intention to resume driving at a later time is not sufficient to establish that the accused occupied the driver's seat for the purpose of setting the vehicle in motion.
>
> ……
>
> [With reference to actual care and control] the Queen's Bench ruling was that, as a matter of law, a person who stops driving and intends to sleep, and then to resume driving when he is of the view he has sobered up enough to do so has only a future intention to drive. This does not constitute care or control at the time he is found asleep in the vehicle by the police, if the vehicle is not running and in the absence of some other evidence that the accused has "...performed some act or series of acts involving the use of the car, its fittings or equipment" …. The decision precludes a finding that an intention to resume driving at a later time coupled with a present ability to set the vehicle in motion is de facto care or control. [references omitted]

Thus the accused was acquitted. A Crown appeal of the trial judge's decision was dismissed. The Crown further appealed, this time to the Saskatchewan Court of Appeal.

Impaired Care & Control Principles

Chief Justice Bayda, for the 2:1 majority and concurred in by the dissenting justice, first outlined four sets of principles respecting alcohol related driving offences:

1. The offence of operating a motor vehicle over 80mg% is a separate and distinct offence from care and control of a motor vehicle, in motion or not, while over 80mg%. Each has its own *mens rea* and *actus rea*.

2. The *mens rea* of care and control "is the intent to assume care and control after the voluntary consumption of alcohol or a drug.[45]" Intent to drive or set the vehicle in motion is not required.

3. The actus *reus* of care and control is "acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous" after the voluntary consumption of alcohol has produced in the person's blood a concentration of alcohol that exceeds 80mg%.

4. The Crown may prove care and control either by proving actual (non-presumptive or *de facto*) care and control or by relying on the presumption found in s.258(1)(a) of the *Criminal Code* which deems the person occupying the driver's seat in care and control of the motor vehicle.

> s.258(1)(a) *Criminal Code*
> …where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle…the accused shall be deemed to have had the care and control of the vehicle…unless the accused established that the accused did not occupy that seat or position for the purpose of setting the vehicle…in motion

[44] see R. v. Shuparski [2001] S.J. No. 220 (Sask.Prov.Crt)

[45] R. v. Toews [1985] 2 S.C.R. 119

Under this section however, it remains open to the accused to prove on a balance of probabilities that they did not occupy the seat for the purpose of setting the vehicle in motion. If the accused is successful in rebutting the presumption, the Crown must prove care and control beyond a reasonable doubt through the non-presumptive means.

Under s.258(1)(c) of the *Code*, the results of breath samples taken pursuant to a demand are proof of blood alcohol concentration at the time of the driving or care and control provided the first sample was taken within two hours of the offence.

> s.258(1)(c) *Criminal Code*
> …where samples of the breath of the accused have been taken pursuant to a demand…if (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time…evidence of the results of the analyses so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed…

In other words, the Crown can only rely on a certificate of analysis under s.258(1)(c) if it could be proven, either by relying on the presumption or proving actual care and control, that the accused was in fact in care and control within two hours of the taking of the first sample. Since the first sample was taken at 2:50 am, the care and control offence would have to occur within the "critical overlap" period -- between 12:50 am (2 hours before the first sample) and 2:07 am (the time the officer found the accused) -- in order for the Crown to use the two hour presumptive window provided by s.258(1)(c). Thus, the accused's purpose in occupying the driver's seat between 12:50 am and 2:07 am was critical. He testified that his purpose in occupying the driver's seat during this crucial period was to sleep, not to set the vehicle in motion.

Can the purpose for occupation change without vacating the driver's seat?

Even though the accused was driving the vehicle before he pulled over to fall asleep, his purpose changed. It was not necessary for him to vacate the driver's seat to change his purpose for occupying it. Justice Bayda held:

> A requirement that the [accused] vacate the driver's seat in order to change the purpose for occupying it is not merely unreasonable, but nonsensical. To require that physical act hardly fits the pattern for the way the human mind makes decisions. And of course, to acquire a "purpose" is to make a decision, to perform a mental act. Consider this example: A person gets into the driver's seat of his car to listen to his CD stereo. He has no other purpose. He then makes a deliberate decision to fall asleep. He turns off his stereo, remains in his seat, but reclines it and falls asleep. Is it rational to say that his purpose throughout was to listen to the stereo even after he turned it off and fell asleep? Surely, his purpose changed when he decided to turn off the stereo and fall asleep. It is nonsensical to suggest he first had to vacate the driver's seat to change purposes. Suppose when he woke up he decided to again listen to the stereo. Can it be said that his purpose then was to sleep? Hardly. Can it be said that his purpose throughout this entire period was to listen to the stereo even when it was turned off and he was asleep? Again, hardly. I find that whatever purpose a person has for originally occupying the driver's seat (e.g. when he first gets into the vehicle) that purpose may change at any time the person decides to change it. He does not need to vacate the seat to change purpose.

Can more than one purpose exist simultaneously?

The majority of the court concluded that a person can have more than one purpose at any given time, but consideration must be given to the "controlling or dominant purpose". The majority stated:

> The statute speaks to "the" purpose. That connotes either one purpose and if there should be

more than one, the controlling or dominant purpose. In other words, a person occupying the driver's seat could have a dominant or controlling purpose and also one or more incidental, inchoate or contingent purposes. Those latter purposes, by definition, are neither dominant nor controlling and do not qualify for "the" purpose. Any one of them may qualify as "a" purpose, but that is not the way the statute is worded.

Is purpose outside the crucial time period relevant?

Finally, the majority found that the purpose for occupying the driver's seat outside the critical overlap period could provide proof of the sole or dominant purpose inside the critical overlap period if the occupation continues without interruption. In this case, the accused's purpose in occupying the driver's seat changed from driving home to falling asleep. He accomplished the changed purpose by stopping his vehicle, putting it in park, turning off the engine, taking the keys out of the ignition, reclining the seat, and falling asleep. At this moment, his actions were entirely inconsistent with "the purpose of setting the vehicle in motion." It would be absurd to suggest that, while asleep, he again changed his purpose to one of setting the vehicle in motion when he awoke. Justice Bayda wrote:

> A sleeping person is unconscious and cannot perform the mental act of acquiring a new purpose. Even if he had a broad general intention before he fell asleep to drive home after he was awake and refreshed, and even if that broad general intention may be construed and narrowed to a particular purpose for occupying the driver's seat, then at that critical point it was not the controlling or dominant purpose for occupying the driver's seat. At most, it was a contingent, inchoate or incidental purpose, but not "the" purpose.

The accused successfully established that during the critical overlap period (12:50 am to 2:07 am) he did not occupy the driver's seat to set the vehicle in motion. Thus, he had rebutted the presumption found in s.258(1)(a). The Crown also failed to prove the *actus reus* of actual (non presumptive) care and control. The only act during the critical overlap period was sleeping. There was no "risk of putting the vehicle in motion so that it could become dangerous". The accused was sleeping in a parked vehicle with the engine off and the keys on the seat. Justice Bayda held:

> Whether a potential for dangerousness should be a cause for concern where a person is in a "position" to set a vehicle in motion depends not so much on the physical "position" the person happens to be in as it does on his attitude or disposition towards potential dangerous situations. If it is nonchalant, non-caring or reckless, that is one thing. If the attitude is to specifically address the situation with a view to eliminating it, that is quite another thing. In the present case, the [accused's] deliberate rational decision, after he realized his driving may be creating a dangerous situation, to stop his driving in order to sleep is strong evidence of his attitude to potential dangerous situations: It is an attitude towards eliminating those situations after a realization takes hold. Given that attitude, it is unlikely that after eliminating one potential dangerous situation, he would be apt to create a new dangerous situation by driving after he awoke if he was unfit to drive. In other words, when the facts of the case are viewed from an "overall" perspective that element of dangerousness that is central to all of these care or control cases was not present in this case, which is to say the Crown failed to prove this element of the offence beyond a reasonable doubt.

The majority dismissed the Crown's appeal.

A different view

Justice Jackson, in dissent, took a different view. With respect to actual care and control he concluded that "the case law permits a court to find danger where an individual enters a vehicle for the purpose of driving it and decides to sleep. The risk that [they] might set the vehicle in motion upon awakening is sufficient to prove the risk and dangerousness necessary for the actus reus of care and control." He stated:

> A risk of putting the vehicle in motion, and the possibility of danger emanating therefrom, are almost always present with these facts, i.e., a

person over .08 enters a vehicle to drive and then decides not to drive but to sleep. I use the word "almost" because I cannot foresee all possible fact situations, but on the facts of this appeal, there was an increased risk, and therefore, an increased danger that the accused would drive because he had already done so and he still needed to do so to get himself home. This is an anticipation of harm, but the criminal law addresses itself not just to actual harm but to the creation of offences prohibiting behaviour which can lead to physical harm or property loss.

If a court cannot find dangerousness in this situation, one would have to conclude that impaired drivers in the circumstances of this case are no hazard. This would not seem to be correct…. It is trite to say, but no less true, that we discourage people from entering the driver's seat because persons who are impaired cannot accurately assess the extent of their own impairment and may believe they are sober enough to drive when they are not.

……

Since an accused does not have to "intend to drive" when the court is considering actual care or control, this must mean that dangerousness…can be found where there is only a risk of driving with no immediate intention to drive….

While the intention to drive does not form part of the mens rea of the offence of actual care or control, it does not mean that intention has no role to play in determining whether the actus reus of the offence is present. The intention to drive can be relevant to determine whether there is a risk of setting the vehicle in motion from which danger may arise.

With respect to relying on the presumption found in s.258(1)(a), Justice Jackson was of the opinion that a court must consider all of the surrounding circumstances, including past and present reasons for the accused's presence in the driver's seat as well as the vehicle's operability. Furthermore, a court can infer from the person's actions whether they had more than one purpose for occupying the driver's seat, including setting the vehicle in motion.

[The accused] occupied the driver's seat of his vehicle. The trial judge found his intention to drive continued into the period of sleep, which means he could not establish he did not occupy the driver's seat for the purpose of setting it in motion. He is, therefore, deemed to be in care or control under clause 258(1)(a). Since the Crown proved the prohibited level of blood/alcohol concentration at the time of discovery, [the accused] must be found guilty.

Justice Jackson would have allowed the appeal, directed a guilty verdict, and remitted sentencing back to the trial judge.

Complete case available at www.canlii.org

UPCOMING APPEAL

The Supreme Court of Canada has granted leave in the appeal of the Manitoba Court of Appeal judgment in *R. v. Mann*, 2002 MBCA 121 (see Volume 2, Issue 10 of this publication). In that case, Manitoba's top court ordered a new trial after a provincial court judge excluded evidence obtained after police searched a detainee's pocket during an investigative detention and found marihuana. Justice Twaddle, writing for the unanimous Manitoba Court of Appeal, concluded that the police were acting within the scope of their common law duties of preventing crime and protecting life and property when they detained a suspect matching the description of a break and enter suspect. Furthermore, a security search of the detainee's pullover pouch for safety purposes was necessary to carry out these duties and involved a minimal interference with personal integrity. This will be the first time the Supreme Court of Canada deals head-on with searches incidental to investigative detention.

For comments on or contributions to this newsletter or to be added to our electronic distribution list contact
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2003 NATIONAL FIELD TRAINING CONFERENCE JUNE 1-5, 2003

Scottsdale, AZ

The National Association of Field Training Officers (NAFTO) is an educational and professional association concerned with apprenticeship training (commonly referred to as the Field Training Officer concept) for Law Enforcement, Communications, and Corrections personnel. Educators, Administrators and other Criminal Justice practitioners are also encouraged to participate. The concept of NAFTO was formalized with its incorporation as a non-profit organization in California in 1991 and was reorganized/ relocated in 1993 to a more central location in Colorado. The goals of NAFTO include:

1. To promote and foster mutual cooperation between Field Training Officers (FTO), other members of their agencies, private industry and the public;
2. To provide a forum for the exchange of ideas and techniques;
3. To conduct training seminars and conferences in FTO Program related issues;
4. To research educational methodology so that improvements may be made in the areas of teaching and learning;
5. To educate the membership and the public regarding apprenticeship training;
6. To keep the membership, agencies and the public informed of legislative and statutory changes and their influence on field training.

This year's conference is being held in Scottsdale, Arizona from Sunday, June 1 to Thursday, June 5, 2003 at the Chaparral Suites Hotel (www.chaparralsuites.com). Cost of the conference is $315 for members and $355 for non-members. These costs will rise for registration received after May 1st ($335 for members/$375 for non-members). A block of rooms has been set aside, on a first come first serve basis, at a very reasonable rate of $69 per night if booked prior to May 1, 2003.

Topics scheduled for this year's conference, presented by a compliment of high quality and professional speakers, include:

- FTO's Role in Mentoring Our New Warriors
- Policing with Integrity
- The C's of Leadership
- Investigating Officer Complaints
- Use of Force Investigations
- The Warrior, Fear, and Courage
- Recognizing and Implementing Change
- Teaching Leadership Development
- Training in the Rolling Classroom
- The Implications of Response Time in Survival Skills Training

For more information on the NAFTO conference, check out their website at **www.nafto.org** or contact NAFTO's Executive Director, Lt. Glen Miller at:

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