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

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

2004 POLICE LEADERSHIP CONFERENCE APRIL 5-7, 2004

Mark your calendar! The British Columbia Association of Chiefs of Police, the Ministry of Public Safety and Solicitor General, and the Justice Institute of British Columbia Police Academy are hosting the 2004 Police Leadership Conference in beautiful Vancouver, British Columbia. This is Canada's largest police leadership conference and the theme for this year is ***Excellence in Policing through Community health, Organizational performance, and Personal wellness***. The Conference will provide an opportunity for delegates to hear leadership topics discussed by lively and renowned keynote speakers.

The Conference will be held April 5-7, 2004 at the beautiful and picturesque waterfront Westin Bayshore Resort & Marina. Register early as the previous conference was sold out. Early registration is $325 before March 1, 2004.

Keynote speakers:

Mr. Gordon Graham

Gordon Graham is a 30 year veteran of California Law Enforcement. He holds a Master's Degree in Safety and Systems Management from the University of Southern California, a Juris Doctorate from Western State University, and was awarded his teaching credential from California State University. His education as a Risk Manager and experience as a practicing Attorney, coupled with his extensive background in law enforcement, have allowed him to rapidly become recognized internationally as a dynamic presenter with multiple areas of expertise.

Over the last decade, Mr. Graham has spoken to over 300,000 law enforcement and other public safety professionals from every state in the US. Since 1990, he consistently received the highest evaluations on California P.O.S.T critiques. In 1995, Mr. Graham received the Governor's Award for Excellence in Law Enforcement Training, the highest tribute available in the critical mission of training police professionals. His penetrating wit coupled with his vast knowledge in multiple disciplines provides the enlightened listener, regardless of rank, with an information packed seminar that will benefit them in current and future assignments.

Sir Ronnie Flanagan

Sir Ronnie Flanagan joined the Royal Ulster Constabulary in 1970 and was promoted through the ranks, attaining the post of Chief Constable in 1996. In 1998 he received a Knighthood in the New Year Honours List. In 2002, Sir Ronnie retired from the police service and was appointed Her Majesty's Inspector of Constabulary for London and the East Region and also the Ministry of Defence Police, UK Atomic Energy Authority

Police, Guernsey, Jersey, the Sovereign Base in Cyprus and the Isle of Man. His portfolio responsibilities include Public Order, Terrorism, Ports and Special Branch, and Officer Safety.

Sir Ronnie has travelled extensively in Europe and the United States to study policing methods. He has attended all the major courses, including the Senior Command Course at the Police Staff College at Bramshill. Holding a Bachelor of Arts degree and a Master of Arts degree in Administration and Legal Studies, he is also a graduate of the FBI Academy. In 2002 Sir Ronnie was awarded a Knight Grand Cross of the Order of the British Empire in the Queen's Birthday Honours List.

Dr. Kevin Gilmartin

A veteran of the U.S. Marine Corps, Dr. Gilmartin is a principal in Gilmartin, Harris and Associates a Behavioral Sciences/ Management Consulting Company specializing in law enforcement/ public safety consultation. He holds a doctoral degree in clinical psychology from the University of Arizona and is the author of the book Emotional Survival for Law Enforcement: A Guide for Officers and Their Families. He holds adjunct faculty instructor positions with the University of Massachusetts Police Leadership Institute, and the Sam Houston State University Law Enforcement Management Institute of Texas. He is an instructor at the FBI Academy in Quantico, Virginia and a faculty member of the FBI Law Enforcement Executive Development Institute (LEEDS and EDI). He is also a guest instructor at the Federal Law Enforcement Training Center in Glynco, Georgia. He is retained by several Federal law enforcement agency critical incident response teams.

Dr. Gilmartin formerly spent twenty years in law enforcement in Arizona. During his tenure, he supervised the agency Behavioral Sciences Unit and the Hostage Negotiations Team. He is a former recipient of an IACP-Parade Magazine National Police Officer Citation Award for contributions during hostage negotiations.

RCMP Commissioner Giuliano Zaccardelli

Commissioner Giuliano Zaccardelli joined the RCMP in 1970, and following recruit training was posted to Alberta where he performed a number of general policing duties. He was commissioned in 1986 and was promoted to the rank of Deputy Commissioner, responsible for National Headquarters. In August 1999, Commissioner Zaccardelli assumed the newly created position of Deputy Commissioner, Organized Crime and Operational Policy.

In 2000 Commissioner Zaccardelli officially became the 20th Commissioner of the Royal Canadian Mounted Police. He holds a Bachelor of Commerce degree in Business Administration from Loyola College in Montreal and has completed the National Executive Institute Program at the FBI Academy in 1998. He is also a graduate of the Senior Command Course at Bramshill Police Staff College in England.

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

www.policeleadership.org

For information, support, or sponsorship opportunities, contact the Police Leadership Conference Coordinator Sgt. Mike Novakowski at 604-528-5733, toll free 1-877-275-4333 local 5733, or e-mail at mnovakowski.jibc.bc.ca.

MOTOR VEHICLE ACT DRIVING PROHIBITION NOT PUNISHMENT

R. v. Sull, 2003 BCCA 321

The accused was convicted in British Columbia Provincial Court of refusing to provide a breath sample and impaired driving. He was sentenced to nine months imprisonment and prohibited under s.259 of the *Criminal Code* for three years. In addition, the judge prohibited him from driving under British Columbia's *Motor Vehicle Act* for a period of 10 years. The accused appealed under Part XXI of the *Criminal Code* to the British Columbia Court of Appeal arguing that the ten year prohibition under the *Motor Vehicle Act* was excessive.

The provincial driving prohibition could either be imposed as punishment or as a civil disability arising from the criminal convictions. If the prohibition was imposed as punishment then an appeal court could quash it. However, in this case the judge made the prohibition to protect the public; this was his 10th drinking driving conviction. Therefore, the prohibition was neither punishment nor a sentence. If there was a remedy to be sought, it would have to come from the provincial *Motor Vehicle Act* or *Offence Act*, not the *Criminal Code*. The accused's appeal was dismissed.

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

SEARCH UNREASONABLE, BUT EVIDENCE ADMITTED

R. v. Wong, 2003 BCCA 188

The accused was stopped for speeding and admitted to the officer that he did not have a driver's licence because he was prohibited from driving. At this time the officer detected an odour of marihuana coming from his truck. Although the accused denied there was marihuana in the truck, he admitted to recently smoking a joint. Following confirmation of his driving status, the accused was arrested for driving while prohibited. When told the vehicle would be towed, he asked the officer to retrieve some of his belongings from the cab of the truck. While in the cab, the officer could smell an odour of dried, not smoked, marihuana. After viewing a large garbage bag through a side window in the canopy, the officer searched the bag and found several zip-lock bags of marihuana. The accused was subsequently arrested for possession of marihuana for the purpose of trafficking.

At trial in British Columbia Provincial Court, the search was found to be unlawful and a violation of s.8 of the *Charter*. However, the evidence was admitted under s.24(2) and the accused was convicted. The accused appealed to the British Columbia Court of Appeal arguing that the trial was unfair because the judge erred in admitting the marihuana and also that there was no evidence to prove possession.

Admission of the Evidence

In determining whether the evidence should be excluded under s.24(2) of the *Charter*, a court must consider the following three matters:

- trial fairness;
- the seriousness of the *Charter* violation; and
- whether the admission of the evidence would bring the administration to justice into disrepute.

In addressing each of these issues, the British Columbia Court of Appeal dismissed the appeal. Here, the trial was not unfair. The marihuana was real, non-conscriptive evidence and only in rare and exceptional cases will its admission render a trial unfair. Nor was the *Charter* violation serious. The search was not obtrusive, the accused's expectation of privacy was reduced, and the officer acted in good faith and on a reasonably based suspicion. The offence was serious and

without the evidence there would be no case. The exclusion of the evidence, not its inclusion, would tend to bring the administration of justice into disrepute.

Possession

The accused submitted that there was insufficient evidence to prove the elements of possession; knowledge, control, and consent. He argued that it was beyond common sense to send the officer back to the truck to get his belongings if he knew there were drugs in it. Although it was open to the judge to draw this inference, she did not. The appeal court was not persuaded the trial judge's findings were unreasonable. The truck belonged to the accused, the sole occupant and driver. Since the smell of marihuana was noticeable to the officer, it must have been apparent to the accused. The conviction was upheld.

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

911 TAPES ADMISSIBLE TO DEMONSTRATE CALLER'S STATE OF MIND

R. v. Stapleton, 2003 BCCA 444

The accused appealed his convictions at a jury trial on charges of robbery and possession of a weapon dangerous to the public peace by arguing that the trial judge erred in admitting the complainants' 911 call to police as evidence to rebut the defence's suggestion of recent fabrication. He also argued that the judge erred in instructing the jury that the call could be used as evidence to reflect the state of mind of the callers. The British Columbia Court of Appeal concluded the trial judge did not err and dismissed the appeal.

The call was real evidence. The contents of the conversation, the phraseology used, and the callers' tone of voice were all relevant in demonstrating their mental condition and state of mind at the time the events were unfolding. In charging the jury members, the judge properly told them to limit the use of the 911 tapes only to rebutting the suggestion of recent fabrication and to understand the complainants' state of mind. There was no error in the admission of the evidence or in the instructions to the jury.

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

SEARCH PROPERLY CONDUCTED INCIDENTAL TO ARREST WITH WARRANT: DRUGS ADMITTED

R. v. Pham, 2003 BCCA 460

Police officers saw the accused and a female companion descend the stairs from a suite known for the use and sale of drugs. Upon seeing the officers, the accused and his companion changed their direction of travel. The officers overtook them and asked them for their names and dates of birth. They complied. While one officer conducted a radio check for warrants, the second officer asked them to empty their pockets onto the ground. The accused placed his contents, including gum wrappers and a crack pipe, on the ground. At this time it was learned there was an outstanding Immigration related warrant for the accused and he was arrested, handcuffed, and searched. Police found a small package of heroine and 31 cocaine rocks on the accused. A further eight more crack rocks were found in the gum wrappers he had placed on the ground earlier.

Although the British Columbia Provincial Court trial judge found that the police were justified in stopping the accused "because of the nature of the place he had just left", he concluded the initial search was unreasonable and a breach of s.8 of the *Charter*. However, after his arrest on the outstanding warrant, the police were entitled to search him incidental to the arrest. The s.8 violation was brief and the drugs were

nonetheless admitted under s.24(2). The accused was convicted of possession of cocaine and possession of heroin. The accused appealed to the British Columbia Court of Appeal suggesting that the evidence should have been excluded.

Justice Low, writing for the unanimous appeal court, concluded that all the drugs were discovered during a lawful search:

> Here the police officers learned of the warrant outstanding for the arrest of the [accused]. At that stage, they not only had legal justification to arrest the [accused], they had a duty to arrest him. The second part of the search was incidental to the arrest and reasonable. In my opinion, it is not necessary to decide whether the [accused] was detained by the officers before they learned of the arrest warrant because they discovered the bulk of the drugs during a lawful and reasonable search incidental to the arrest. They did not learn of the presence of drugs before that because neither of them had inspected the items the [accused] placed on the ground. Therefore, the presence of drugs was not revealed until after the search became lawful and reasonable. In addition, the cocaine on the ground would have been discovered in any event during the search incidental to the arrest. [para.6]

Since there was no s.8 *Charter* breach, s.24(2) was not engaged. The appeal was dismissed.

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

ARRANGING SEX WITH FICTITIOUS YOUTH RESULTS IN ATTEMPT CONVICTION

R. v. Kerster, 2003 BCCA 246

The accused, expressing a desire to obtain the sexual services of a person under 18, exchanged e-mails with a police officer. The officer, posing as the husband of a woman with three children, suggested a meet with the accused to make arrangements for him to have sex with her fictitious 11 year old daughter. The accused met with a person posing as the mother, accompanied her to a hotel room where the child would allegedly be found, and was arrested. The accused unsuccessfully argued at trial that culpability would only attach if a real person, not a fictitious one, from whom sexual services may be obtained existed. The trial judge found the accused had taken steps beyond mere preparation to carry out his intent and was therefore convicted of attempting to obtain for consideration sexual services from a person he believed was under 18 years old contrary to s.212(4) of the *Criminal Code*. The accused appealed to the British Columbia Court of Appeal submitting that if a real person does not exist, he could not be convicted of an attempt. The appeal court disagreed and the appeal was dismissed.

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

LIVING ROOM IS A PUBLIC PLACE UNDER PROPER CIRCUMSTANCES

R. v. Clark, 2003 BCCA 408

A neighbour, in a nearby house, observed the accused standing in a brightly lit room of his home masturbating while naked. The curtains were open and at one point the accused stood on a stool making himself more visible. The accused was looking into the neighbour's home and watching the occupants, including two young girls. The police were called and when they arrived they saw the accused standing at the window masturbating. As the police approached the home, he retreated from the window and the lights were extinguished. After repeatedly knocking at the door, the police were allowed to enter and the accused was arrested.

At trial the accused was convicted in British Columbia Provincial Court of committing an indecent act in a public place contrary to s.173(1)(a) of the *Criminal Code*. Based on the

circumstances, the judge concluded that the accused's living room became a public place. This was affirmed on appeal to the British Columbia Supreme Court. The accused further appealed to the British Columbia Court of Appeal arguing that his living room was not a public place.

In upholding the conviction, Justice Hall for the unanimous appeal court dismissed the appeal. There was an "inescapable inference" from the circumstances that the accused was acting in an exhibitionist manner and seeking to draw attention to himself. Justice Hall stated:

> In my view, the proven circumstances of this case lead inexorably to the conclusion that this appellant intentionally conducted himself in an indecent way, seeking to draw the attention of others (members of the public) to himself on the evening in question. I consider the conviction registered against him to be soundly based in fact and law…[para. 10]

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

ARTICULABLE CAUSE JUSTIFIES DETENTION

R. v. Willis, 2003 MBCA 54

Two patrol officers saw a person running through a clearing in a residential area with a white sheet draped over his head containing items bundled inside. A description was broadcast on the police radio and an officer gave chase on foot. After losing sight of the person when he ran between some houses, the officer slowed to a walk. The officer then saw the accused, recognized him from past dealings, and knew he lived 5 km away. The accused turned and walk towards the officer, but did not have a white sheet and somewhat differed from the original description. As the accused engaged the officer in a conversation, he would back up whenever the officer moved forward. The officer noted The accused' breathing was laboured, he was fidgety, would not make eye contact, and was holding his hands in the front of his body over an obvious bulge in his jacket.

The accused told the officer that his house had been broken into and that he was after the thief. The accused was arrested for break and enter and theft and possession of crime property and he was pat searched. Items linking him to a recent robbery were found. The police subsequently located the white sheet and property belonging to the robbery victim between some houses and blood found on the accused's jacket belonged to the victim.

The accused was charged with robbery and break and enter but he argued that the police breached his rights under s. 8 (search and seizure) and s.9 (arbitrary detention) of the *Charter*. The trial judge convicted the accused after finding the police had reasonable grounds to effect an arrest. The accused appealed to the Manitoba Court of Appeal arguing that the trial judge erred in concluding that his rights were not infringed.

In dismissing the appeal, Manitoba's top court noted that an accused bears the burden of proving that they were arbitrarily detained. In this case, the police did not know a crime had been committed, they only saw something suspicious, which did not amount to reasonable grounds. The break and enter was not reported until nine minutes after the arrest and "there was nothing objectively probable to link the accused with the commission of an offence." Thus, the trial judge erred in finding that the police had the requisite criteria necessary to justify the arrest. However, an unlawful arrest does not necessarily equate to an arbitrary detention. If the officer had an articulable cause, regardless of his intention to arrest, the effect of his conduct may nonetheless pass Charter scrutiny.

Under the investigative detention doctrine, the police are justified in detaining persons if they have an articulable cause (aka: reasonable suspicion or reasonable grounds to suspect) the person was involved in a crime. Articulable cause is a legal standard, above suspicion but below

reasonable grounds for belief. Here, the Court concluded that there was a constellation of facts giving rise to a reasonable suspicion, despite the disparity in description and police losing sight of the suspect during the foot chase. The Court rejected the accused's submission that the police can only detain persons for investigations when they have an actual known crime. Based on the circumstances in this case, detaining the accused to question him for a few minutes was lawful. The detention was not arbitrary and therefore there was no s.9 violation.

As for the search, the appeal court cautioned that not all searches incidental to detention will be justified. Justice Steel, writing for the unanimous court, stated:

> [A] minimal search incidental to a lawful detention can be reasonable provided that the purpose of the search is to ensure the safety of the police and "any passing public". The scope of such a "minimal search" would normally consist of a "pat-down" or "frisk." There may be situations where this would be too intrusive and situations where more is reasonable.

And further:

> There are two competing values at work in these scenarios that occur routinely on our streets. Police officers are at risk everyday. They never know when a routine, mundane situation will explode into violence. Therefore…it is undesirable to measure with extreme nicety whether their safety or that of the public in any particular search requires more or less than a quick pat-down. On the other hand, an individual has a right to be free from unreasonable search and seizure. There is a temptation for authorities to sometimes use such a search as an opportunity to obtain evidence of a crime. That temptation must be resisted strongly by the courts.

Here, the officer was concerned that the accused might be concealing a weapon in his jacket. Moreover, the officer had prior knowledge of the accused that also gave him reason to believe he could be violent. This subjective concern for safety was also supported objectively. The circumstances leading to the detention, the bulge in the jacket, the way it was being held, and the knowledge of past violence objectively substantiated the officer's concern.

Complete case available at www.canlii.org

INVESTIGATIVE SEARCH JUSTIFIED FOLLOWING DETENTION

R. v. Hunt, 2003 BCCA 434

The police arrested the accused, who matched the general description of a bank robbery suspect, 1.5 km away from and 15 to 20 minutes after the robbery. He was walking and looking over his shoulder and from side to side. The police searched the accused because they believed the robbery suspect had a weapon. As a result of the search police found 30 x $100 bills, the amount taken from the robbery. A jury convicted the accused of robbery, but he appealed to the British Columbia Court of Appeal arguing that the police lacked the articulable cause necessary to justify an investigative detention, the resultant search was unreasonable under s.8 of the *Charter*, and the evidence should have been excluded. In dismissing his appeal, Justice Oppal, for a unanimous court, concluded that the police reasonably suspected the accused was involved in the robbery and had an articulable cause to search him for an investigative purpose. The trial judge did not err in holding the search reasonable and the conviction stood.

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

Note-able Quote

"Don't tell people how to do things, tell them what to do and let them surprise you with their results" - George S. Patton

PATROLS ON THE WILD SIDE: WHERE FACTS ARE OFTEN FUNNIER THAN FICTION

collected By Constable Ian Barraclough

Being proud of your family grow op

The family-run marijuana growing operation Bellevue police say they walked into sounds like something out of a drug-induced hallucination itself. Residents called police at 3am to deal with a group of teens running around the neighborhood and Officers Travis Nunn and Jesse Brewer spotted several teenagers running into a nearby home.

Bellevue Police Chief Bill Cole said officers were invited inside where three residents and two teenage visitors provided a tour of the home. Cole said the indoor marijuana growing operation literally greeted visitors at the front door. "One of the kids came to the door -- and standing in the corner of the living room was a marijuana plant that was 4 or 5 feet high, displayed in like a house plant stand," Cole said.

"One of the kids in the house then said, 'Yep, we've got more' and took the officers through the rest of the house and showed them the rest of the plants and everything. ...This was unbelievable. ...I couldn't believe they would leave it all out in the open like that." Cole said a bedroom was wallpapered with aluminum foil to reflect indoor growing lights onto plants, including those establishing roots in a crude hydroponics system.

Cole said harvested plants were suspended in a closet equipped with drying fans to shorten time from sprout to street sale. "There were 19 plants seized, Cole said. "If you just looked around the living room there were bongs and pipes and joints all over the living room. ...We seized grow lights, foil, books, fertilizer, water jugs, sets of scales and packaging materials."

Cole said police believe it was a family-run operation, including the teenagers' 42-year-old mother, Bernadette Dusing, who was home at the time. Dusing, her 19-year-old daughter, Danielle Dusing and a 15-year-old child were all arrested and charged with cultivating marijuana, possession of drug paraphernalia and trafficking in marijuana.

"She was aware of the whole thing. ...It is extremely sad ...it really is," Cole said. "Especially (when) we've been stepping up our efforts with drugs and kids, and in most cases we consider parents to be our partners. In this case, the parent was obviously not our partner."
Shelly Whitehead Kentucky Post, 03-06-24.

Don't play with handcuffs

Ten-year-old Brian Kline wanted to be close to his dad on Father's Day, so he took an old pair of handcuffs and cuffed himself to his father, wrist to wrist. It was a cute little joke, until they couldn't find the key. So they called the Des Moines Police Department and Brian's dad, William Kline Jr., 33, had a good laugh about it with police dispatchers. Brian and his dad continued to joke about it while they waited for the police to arrive. William and Brian Kline then thanked officers for releasing them and everyone was happy.

However, when officers ran Kline on their computer system, they immediately returned and told William they had warrants for his arrest. Kline was back in handcuffs - this time police cuffs - and on his way to jail. "I was hoping to spend more time with my kids on Father's Day," Kline said Monday afternoon. "I ended up spending the last part of it with 13 other guys in the City Jail." "It was kind of ironic," Kline agreed. "But also a little embarrassing." He was

transferred to the Polk County Jail and released Monday after posting bond.

"Everyone was professional about it; the cops were just doing their job," said Kline. He had handcuffs at the house because he worked for a security company about a decade ago. "The key is upstairs somewhere," he said. "I just don't know where."
Tom Alex Des Moines Register, 03-06-17

Beware of bow and arrows during traffic stops

As Orange County sheriff's deputy Owen Hall was standing beside a car he had stopped, he was shot in the leg with an arrow. After Hall pulled the arrow out and reported to a hospital, deputies combed the neighbourhood to locate the perpetrator. The deputy had made a traffic stop and was giving the female motorist a warning, but investigators do not believe there was any link between the stop and the arrow shooting. A patrol car camera captured an image of the hunting arrow as it came from a southeast direction and struck the deputy's right calf.

The tape shows the deputy removing the arrow, which chipped a bone in his leg. The deputy let the woman motorist go, because he was unsure if someone was shooting at him. Deputies canvassed the area until darkness fell, then they began a door-to-door search the next day. When they knocked at 44yr old Tri Thanh Lam's residence, he opened his garage door and deputies saw a bow and arrows that matched the one that struck the deputy.

Lam was arrested, but he went free two days later when authorities realized that he had committed no crime, since the state's negligent-shooting law applies only to guns.
Los Angeles Times, 03-07-02

FINDING FUN IN FITNESS

Cst. Kelly Keith

Ways to beef up your work-out:

- Increase time under tension (longer time to do one rep);
- Use music to inspire you, Stay Motivated!;
- Increase the tempo of your work-out (reduce rest between sets);
- Increase the weight lifted;
- Have a goal, plan, and method to your madness
- Increase your sets or reps;
- Increase range of motion;
- Decrease range of motion and work on your weak area's;
- Ensure you have a high glycemic drink (Gatorade etc. within 15 minutes) to enhance recovery;
- Use spotters – Get a motivating training partner;
- Use visualization techniques in the gym;
- Remember exercising and eating go hand in hand – Be Smart!;
- Keep a log book of your progress;
- Try different training techniques; and
- Learn, Learn and Learn more about what you are doing

In the flow:

"Flow" is the state of being completely absorbed in the performance and action of your sport. The next time you are in the flow, take the time to think about how your body feels, your posture, what you ate, how your breathing, and what all is going right in your life. Top athletes have duplicated the flow by thinking the same thoughts and copying their postures and mindset. Don't waste the opportunity – next time get in the flow!

How does age affect physical fitness and exercise programs?

Your maximum fitness can be achieved while you are in your late 20's. However, you must keep in mind that the figures below assume everything is equal. If you are in your 40's and you've decided to change your eating habits, use better technique in the gym and live a fitter lifestyle. You can be in better shape while you are in your 40's than when you were in your 20's.

These are the stats:
25-27 = 100 %: Optimal
30 = 95 %
40 = 85 %
50 = 70 %
60 = 60 %
70 = 48 %
80 = 38 %

As for exercise programs - the older you are, the better form you should use due to an increased risk of injury. As well you should use higher reps because muscle endurance is more important.

Is there a standard chart/form to determine how far or fast a person has to run to get in shape?

There is no chart or form to determine this. There is no clear definition of what is *"in shape".* Everyone has different starting points. What is important is that you *start* and *stay consistent*. To progress in your fitness, push your limits, whatever they may be. Exercise *regularly*. The following are exercise guidelines:

- try exercising for 20 minutes, 4 times per week;
- at first start with *gentle* exercises and increase the intensity as you get fitter;
- don't *overdo* it; and
- try to *walk* or *cycle* short distances, instead of taking the bus or going by car.

Is a person who can run 1.5 miles in 10 minutes in better shape and more healthy than a person who runs the same 1.5 miles in 15 minutes ?

All things being equal = if your effort, pre race nutrition, sleep, and ability are the same then the answer is YES. All aerobic endurance activities are essentially contests to see how much oxygen your body can deliver to your exercising muscles. Increase the amount of oxygen and you can go faster. All aerobic training improves your aerobic capacity, even slow, relaxed jogging. But some workouts improve it more than others. The best and most efficient way to increase your aerobic capacity is to run slightly faster (10 to 30 seconds per mile) than your 5 km pace. Or if your cycling, cycle faster for wind sprints, or if your swimming, swim faster every 3rd lap.

If a person is a slow runner, does that mean that they have poor cardio ?

The short answer is no. Skeletal muscles make up over half of a lean individual's body weight. The muscle cells contain two distinct types of muscle cells or fibers.

- Type I - Slow Twitch - These are the major muscle fibers in use at 70 - 80 % VO2 MAX.
- Type II - Fast Twitch - These are called into action for sprints when the athlete approaches 100 % of their maximum performance.

The relative proportion of Type I and Type II fibers within a muscle varies from person to person and is determined by genetics (i.e. inherited from your parents). The ratio can be modified with exercise and training. Succinctly, an endurance runner has slower twitch muscle fibers while the sprinters have faster twitch muscle fibers. There are persons that have a genetic advantage when it comes to sprinting or distance activities. A person can be a slow runner in a *sprint* and in awesome shape as they can run slowly for a long distance.

This may seem to contradict the previous answer, however when we are talking about 1.5 miles, we are talking about aerobic endurance only. Usually when we are talking about IN SHAPE, we are talking about aerobic endurance.

No time to exercise?

One of the most common reasons people have for not exercising is that they do not have the time. There are a number of barriers to exercising such as studying (exercise is proven to enhance the clarity of your mind!), family commitments, cost, lack of facilities, etc.

95 % of people can achieve their goals in 3 hours per week. This is approximately 3% of your waking hours every week. Ask yourself – Do you really need more time or more discipline? If you truly believe that you do not have enough time, try to keep a log of your time throughout the day for a one week period and see where your hours in the day are spent (including sleeping hours). Check into how much of your time is spent on the computer, in front of the TV, oversleeping, reading, etc. Possibly there are some gaps that you can sneak in 3 hours per week to exercise.

Why exercise? Briefly, exercise enhances sleep, improves digestion, increases metabolism, builds strength and endurance, lowers resting heart rate, strengthens the heart, lowers high blood pressure, improves mood, cops need to be in shape, etc…… Make exercise part of your everyday routine, be consistent, vary your exercises, and make it fun!

You need variety in your exercises:

If you have a workout routine and have not changed it your body will adapt and gains will cease. Unchanging routines lead to overuse injuries, every time you repeat a program it becomes less effective, and too much time on any one routine and your body will adapt to the positive aspects and accumulate the negative ones. KEEP CHANGING THINGS!

THE MYTH OF THE NAKED MAN

Sgt. Dave Schmirler

Recently, a fresh class of recruits were involved in a low level foot pursuit drill in an Arrest and Control class. The recruits were just starting out week two at the Police Academy. During a discussion about the assumption of weapons on suspects, a recruit indicated that the only surely unarmed suspect was the "naked" suspect. The Arrest and Control Sergeant immediately challenged this assumption and provided some good examples of when this was not the case. In one recent example, officers in a nearby jurisdiction were involved in a strip search of a person taken into custody. A small caliber handgun and other evidence were located in between the buttocks of the suspect.

This also reminds us of the death in 2002 of Deputy Herzog of the King County Sheriff's Department in Washington State. Deputy Herzog, a former US Army veteran and 7 year member, responded to a call of a disturbance involving a naked man one Saturday afternoon in June. During an attempt to subdue the man, Deputy Herzog used pepper spray without success. Herzog was attacked by the man and had his .40 caliber Glock knocked to the ground with the magazine becoming detached. The suspect picked up the Glock and re-inserted the magazine. As Deputy Herzog retreated he was shot and knocked to the ground. The suspect then stood over the Deputy and shot him 10 more times.

We import a variety of weapons into every situation we engage in. Instructors and experienced officers must challenge assumptions in recruits that can lead to tragedy. The assumption of "safety" in dealing with naked suspects is one of them.

Rest in Peace Deputy Herzog.

POLICE ACADEMY BLOCK ONE: THRILLS AND SPILLS- A RETROSPECTIVE

Cst. Bouchey Vancouver Police
Cst. Asplin Abbotsford Police

Whether it was a long time ago or as recent as yesterday, every municipal police officer in British Columbia remembers their first experiences in Block One of the Police Academy. These experiences started at the Justice Institute of British Columbia as part of a three block process. The following contains some personal experiences and memories of Block One that will give new recruits some insight into what they are getting themselves into and provide some useful tips on how to make Block One as painless as possible. It will also remind existing members what Block One was like so they will remember to be patient when working with a new recruit. At the very least, the following will show you the fun you can have in the Police Academy.

Day One

I was both nervous and excited because this was the day I had been waiting for. After all the hoops I had to jump through just to get hired, I was finally here. On day one of the Police Academy I arrived 45 minutes early, looking and feeling like Bambi on ice for the first time. I sat outside in my car for about 10 minutes just trying to relax enough to be able to walk in without falling flat on my face. I looked around to see if I could find someone else with the same look of panic I was feeling, but everyone else seemed to know what they were doing and where they were going. I felt as though I was the only one suffering from this emotional turmoil. I walked into the classroom to find most of my classmates already there. I initially thought I was late, but I quickly realized it was because we all had the first day jitters. After finding my seat I looked around at all the new faces. Everyone seemed confident and relaxed. I hoped that I could at least fake it, because I was a nervous wreck inside.

The first day went by in a blur. I was overloaded with information about the Justice Institute, what was expected of me, and what the next 11 weeks were going to be like. At the beginning of the day, the typical classroom introductions were made. Everyone had to stand up, introduce themselves, and explain why they wanted to be police officers. There were three categories of answers ranging from "Policing is what I was meant to do since I was born", "I cannot wait to learn all there is to know about policing" and "What am I getting myself into?" While listening to the introductions, I learned that each person in our class came from a different place in life, with different experiences, ideas and beliefs. However, we all had one common goal; to survive Block One, to make it out to the field for Block Two, and ultimately to graduate.

It became apparent that training was not based on individuals, but on the ability of the class to work as a team. The instructors set the tone of Block One with rigid discipline. They continually repeated some things that will stay with me forever:

1. I am a police officer. People will look at and treat me differently.
2. The general public will be watching me through a microscope waiting for a chance to put me on the 6 o'clock news.
3. There are three sure-fire ways to get kicked out of the academy; lying, cheating, or stealing.
4. For every seat in the class, there were 20 other candidates that could have replaced me. I should feel proud of my achievements.
5. There are many ways to survive Block One, but I have to figure them out for myself, with the help of my classmates.

This was also the beginning of group physical training. Throughout the day we heard about the pending journey up Holmes Hill due to happen after lunch. It started out with a 3 km run to a large field followed by forming what was known as

the Ring of Fire. In short, the Ring of Fire was approximately 150 push-ups and 150 sit-ups. Next, we proceeded to the bottom of Holmes Hill where we were we told by the instructors that on the way up there was no walking or stopping. We jogged to what I thought was the top of the hill, until we turned a corner. I noticed the hill just kept going up and up. Just when I thought I could not make it any further, we reached the top. A job well done, only 54 days left.

Diving In Head First

After the first day, I became accustomed to life at the Police Academy. There were a few bumps along the way, for example trying to break habits that have been ingrained since childhood, like calling people sir to show them respect. How was I supposed to know it was some sort of insult? A few rounds of push-ups quickly broke me of that habit, except for a small slip in week eleven. It is amazing how quickly a person can learn when they cannot feel their arms. My days became filled with attending different classes, all of which provided their own unique experiences.

Inspection

During our first inspection I thought we all looked pretty sharp. I was a bit surprised when our Sergeant began picking us apart. He pointed out shirts that needed ironing, boots that were not shiny enough, and in one case, one boot that was shinier than the other. He was very picky about hair that was too long and it was not long before the buzz cuts made their way on the heads of several recruits. What I really wanted to know was how small a spec of lint had to be before it went unnoticed? After a couple of failed inspections and a few more rounds of push ups, we figured out it was not about the lint, but about working as a team to remove it.

Drill

Drill is the class where we learned how to march. I thought to myself, "This will be easy, it's just like walking, how hard can it be?" For some of my classmates, drill class was a nightmare. I saw more than one classmate out of step doing the "bear walk". In order to correct our marching errors, the Drill instructors used their own form of motivation, usually involving a raised voice or insult (I'm not sure what the memory retention of a turtle is, but I am sure it is not good). After all, this was practice for our graduation ceremony and we all wanted to look our best.

Firearms / Driving

This was the most fun I had while getting paid. I had to survive one day of "driving with finesse" before I got to the good stuff. The good stuff was driving around the track, trying not to crash into the cornfield or hitting a barrel, but these activities are also very fun as a few recruits will attest. Firearms training was a little bit more stressful than driving. I have never even held a gun before let alone shoot one. Day one of firearms training was a lecture, followed by being issued a firearm. As the box containing my new gun was placed in front of me I thought, "I cannot believe they are giving me a gun". In the following classes came the unique experience of shooting a gun for the first time. I felt nervous with all the power I had in my hands, but when the initial shock wore off, I became more confident handling a gun.

Legal studies

This was the most academic portion of Block One and the basis for all of our authority as police officers. I was given an incredible amount of information and was told by the instructors that although this makes up about 7% of what I needed to know, I would spend 93% of my time cramming for legal studies exams. This was true as I spent more time studying for one of my legal exams than I did for the rest of the exams combined. This class is where several classmates discovered the "extra-long blink", leading to an elbow in the ribs from the person sitting next to them and a re-discovery of caffeine in all of its forms. Just when I thought my brain was full, I

received yet another power point handout and was told to read the corresponding chapter in time for the next class.

Professional Patrol Tactics/Traffic

These classes consisted mostly of practical police knowledge. The most valuable lessons came from the instructors' personal experiences when they were out on the road. I learned a lot (and laughed a lot) from listening to these stories. For example, what to say during a traffic stop to earn a visit from the Internal Investigations section. I also learned the three rules to remember when processing a crime scene:

1. Don't touch anything.
2. Don't touch anything.
3. Don't touch anything.

Remember, there are no stupid questions, unless you want to know if it is okay to put a temporary licence permit on the back of a motorcycle helmet (The answer is no, if you were wondering).

Arrest and Control

This was one of the most important classes at the Police Academy. Here I was taught officer safety tactics that could ultimately save my life. I overcame being shy at having to feel up someone's crotch in order to conduct a proper search and felt what it was like being on the receiving end of an arm-bar takedown. It seemed that the more officer safety tactics I learned, the more confident I became. Plus we got to use all the tools on our duty belts.

Simulations

Simulations lasted for two days near the end of Block One. I was able to use all the things I learned and put them into a practical setting. It gave me an idea of what it would be like taking calls in the field. There were many mistakes and blunders made by all of us but it proved to be the most valuable learning experience. Although no one explained specifically how to deal with each and every situation, my common sense and knowledge pulled me through.

Conclusion

With Block One behind me, I can look forward to new and equally nerve-racking experiences in the months to come. I am satisfied that although I was not taught everything, I was given the tools I need to stay safe and continue learning. When I look back at my experiences in Block One, it reminds me of the climb up Holmes Hill. I started out slow and cautious, not knowing what to expect. I kept climbing until I reached what felt like the top of the hill where things seem to ease up just a little. Then I realized there was still a long way to go and it became continually steeper until the top was finally reached.

I will not only look back on my personal success of completing Block One, but also on the class' accomplishment of completing it as a team. I now realize how strong the bond is between my fellow constables. These relationships, whether a sincere friendship or a mutual respect, cannot be understood or denied by any outside observers. This is one of the true benefits of the Police Academy experience.

The Lighter Side

Despite the tremendous pressure to achieve greatness, there were fun times to be had, usually at someone else's expense. The moment was especially sweet when the person who made a mistake had to contribute involuntarily to the class' grad fund. For example, during Block One simulations, one recruit advised a suspect, "You are under assault for arrest". At Boundary Bay, we spent the day practicing tactics for vehicle stops. One recruit stopped a vehicle for speeding and received information from dispatch that the driver was under investigation and all information obtained was to be forwarded to a detective. The recruit had no idea what this meant so when the driver demanded to know if he was free to go, he told him, "You are under arrest for speeding...and some other things I'm working on".

In the real world, one may be expected to have to wrestle a 6 foot 7, 300 lb bad guy to the ground. As one of our classmates found out, if this "bad guy" happens to be a Sergeant, taking him down on the hard concrete is probably not a good idea. Anything can happen in the sanctity of the change room. It can be where you discover even the tough guys have a soft side.

In firearms class, always listen to what your Sergeant says. Here is an actual scenario that happened during our firearms training:

> Sergeant: "Draw!"
> Recruit fires two rounds.
> Sergeant: "What are you doing, did I say fire? Let's try that again. Draw!"
> Recruit fires two rounds.
> Sergeant: Shakes his head.
> Outcome: Push-ups.

And a word of advice to future recruits; do not recite the old cliché, "when you assume you make an ass out of you and me" while pointing at your Sergeant. They will be quick to point out that it is just you.

BUS LOCKER SEARCH UNREASONABLE: EVIDENCE INADMISSIBLE

R. v. Buhay, 2003 SCC 30

Two Winnipeg bus depot security guards investigated the contents of a Greyhound Bus Lines locker. The locker was opened using a master key and a duffel bag was removed and examined. After finding a quantity of marihuana rolled up in the middle of a sleeping bag, the security guards replaced the contents back into the locker, locked it, and contacted police. Police attended, smelled marihuana at the locker, and had it opened without a warrant. The drugs were seized and the accused was subsequently arrested and charged with possession of marihuana for the purpose of trafficking.

At trial, Justice Aquilla of the Manitoba Provincial Court excluded the evidence because he concluded that the police violated the accused's s.8 *Charter* right to be secure from unreasonable search and seizure. Even though the Charter did not apply to the initial search by the private security guards because they were not agents of the state, the accused nonetheless had a personal and reasonable expectation of privacy in the rented locker when the police searched it. The police exhibited a casual attitude towards accused's *Charter* rights and the evidence was excluded. He was acquitted.

The Crown appealed to the Manitoba Court of Appeal. The appeal court justices found that there was no search and seizure by state agents at all, even when the police opened the locker. The security guards merely transferred their control of the contents to the police. If the security guards had placed the contents elsewhere after their find, there would have been no search and seizure. The fact the guards placed the contents back into the locker should not change the result; a transfer of control from the security guards to the police had occurred. The appeal was allowed and a conviction was entered.

The accused appealed to the Supreme Court of Canada. Justice Arbour, writing for Canada's unanimous high court, agreed with the lower courts that the security guards were not agents of the state and therefore the initial search did not engage the *Charter*. However, she concluded that the accused did have a reasonable expectation of privacy in the contents of the locker when the police entered and searched it, albeit not as high as one would expect in their body, home, or office. He paid a rental fee for exclusive use of the locker, he had possession of the key and could regulate access to it, and there were no signs suggesting the locker may be opened and searched. Third party ownership of the locker or the existence of a master key did not extinguish his privacy.

The initial privacy invasion by the security guards into the locker, even though free from *Charter* scrutiny, did not cause the accused's expectation of privacy to end and subsequently justify further privacy invasions. Justice Arbour stated:

> In this case, it cannot reasonably be said that the [accused] had ceased to have a privacy interest in the contents of his locker. The subsequent conduct of the police should be considered a seizure within the meaning of s. 8. I see no basis for holding that a person's reasonable expectation of privacy as to the contents of a rented and locked bus depot locker is destroyed merely because a private individual (such as a security guard) invades that privacy by investigating the contents of the locker. The intervention of the security guards does not relieve the police from the…requirement of prior judicial authorization before seizing contraband uncovered by security guards. To conclude otherwise would amount to a "circumvention of the warrant requirement" …. The security guards' search of the locker, which is not subject to the Charter, cannot exempt the police from the stringent prerequisites that come into play when the state wishes to intrude the appellant's privacy … [references omitted, para.34]

The Court also rejected the Crown's plain view argument. For plain view to apply, the police needed prior justification for entry into the locker, which they did not have. Since there were no exigent circumstances or other statutory or common law authority to justify the search and seizure, the Crown could not rebut the presumption that a warrantless search or seizure is prima facie unreasonable.

Considering all of the factors, including the lower court's concern that the *Charter* breach was serious and that it was necessary to discourage police misconduct of this kind, the Supreme Court of Canada found the trial judge's exclusion of the evidence was reasonable. The accused's acquittal was restored.

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

LOCKER DOG SNIFF UNREASONABLE

R. v. Dinh and Lam, 2003 ABCA 201

The police were at a Calgary bus depot as part of a "Jetway" drug detection program. A police dog was deployed to sniff for the smell of drugs on incoming buses and unloaded baggage. The police followed the accused Dinh and Lam walking towards the public lockers after they exited the bus. Before the accused Dinh could completely close the locker she had placed her two pieces of luggage in, the police spoke to her and Lam. The police asked to see their tickets and identification. A police dog was also used to sniff around the lockers. The dog made a positive indication for drugs and a locker was opened so the dog could stick its head inside. Once more, the dog indicated the presence of drugs in the locker.

At this time, the accused Dinh was in the washroom. A police officer entered the washroom to arrest her and found her in a cubicle. After she did not open the cubicle door on request, the officer went into an adjoining stall, stood on the toilet, and peered over the top to find Dinh holding a white package (later found to contain $14,000 cash). Dinh was arrested for possession of drugs for the purpose of trafficking. After searching Dinh's baggage found in the locker the police discovered almost 7 kg of marihuana and an additional $1,475. Dinh was in possession of the key that opened the lock on a suitcase found in the locker. Lam was also arrested for possession of the drugs and a search subsequent to his arrest revealed a gram of heroin, a marihuana bud, and over $1000 in cash.

At trial Dinh and Lam were acquitted. The trial judge found that they had been arbitrarily detained contrary to s.9 of the *Charter* when the police asked for their bus tickets. Furthermore, the police use of the drug dog to sniff inside and outside the lockers was a warrantless and

unreasonable search and seriously violated Dinh's s.8 *Charter* right to privacy. The judge inferred that she intended to lock the locker before the police deliberately interfered. The evidence was excluded.

The Crown appealed to the Alberta Court of Appeal arguing that, although Dinh had a reasonable expectation of privacy in the luggage placed in the locker, she did not have a reasonable expectation of privacy in the odour emanating from it into the public area of the bus depot and detectable by a specially trained police dog. Since there was no reasonable expectation of privacy there was no search and the indication by the police dog provided reasonable grounds to arrest both accused and search them and their belongings incidental to arrest. On the other hand, the accused submitted that they were arbitrarily detained and subject to unreasonable searches. They contended that the warrantless sniff provided personal and protected information concerning the contents of baggage which was unattainable though human senses. Thus, the search was unreasonable and the information obtained from the sniff could not be used to support their arrests and subsequent searches.

In dismissing the Crown's appeal, Justice Conrad, writing for the unanimous Alberta Court of Appeal, concluded that the police conducted a search when they were able to "see" into Dinh's luggage by having the dog sniff, thereby obtaining information about her. The Court compared this to the police using a FLIR camera while flying over a house suspected of having a marihuana grow operation to uncover heat emanating from the premises otherwise undetectable by human senses. Justice Conrad wrote:

> If it is improper for the police to invade a privacy interest using a technique or device that goes beyond enhancing the human senses, it does not matter whether it is a sophisticated technological FLIR device or a police dog with an acute sense of smell. The effect is the same.

The police did not discover the odour of marihuana through inadvertence, but were deliberately trying to discover what was inside the luggage using the aid of a police dog's enhanced olfactory senses Since the police search (dog sniff) was warrantless, it was unreasonable unless the police could otherwise justify it under statute or common law. There were no reasonable grounds or even an articulable cause to target the accused for investigation. The appeal court ruled that the trial judge's findings of an arbitrary detention and unreasonable searches were not in error. The trial judge's exclusion of the evidence under s.24(2) of the *Charter* was also reasonable. The acquittals were upheld.

Complete case available at www.albertacourts.ab.ca

NEW SUPREME COURT OF CANADA JUDGE APPOINTED

On September 9, 2003, Mr. Justice Morris Fish was appointed from the Quebec Court of Appeal to the Supreme Court of Canada. Chief Justice McLachlin stated, "Justice Fish is a remarkable judge. His experience and expertise will undoubtedly be a great asset to the Supreme Court of Canada. I am pleased that Justice Fish will be able to take up his duties in time for the opening of the Fall Session on October 6th and that we will have a full complement of judges to tackle the upcoming cases on our agenda." Canada's top court is comprised of nine justices, three of which must be from Quebec. For more information on the Supreme Court of Canada, visit their web-site at www.scc-csc.gc.ca

Note-able Quote

"How far that little candle throws his beams! So shines a good deed in a weary world" – William Shakespeare

CLASS 92 GRADUATES

The Police Academy is pleased to announce the successful graduation of recruit Class 92 as qualified municipal constables on July 25, 2003.

DELTA
Cst. Phillip Di Battista
Cst. Jason Formby
Cst. Kimberly Petruka

NEW WESTMINSTER
Cst. Felipe Correa
Cst. Sean Schultz

STL'ATL'IMX
Cst. Steven Davidson

WEST VANCOUVER
Cst. Steven McCuaig
Cst. Jeff Palmer
Cst. Jennifer Simms

VANCOUVER
Cst. Deborah Baxter
Cst. David Buchanan
Cst. Christine Cho
Cst. Blain Christian
Cst. Jennifer Daniel
Cst. Erin Holtz
Cst. Ivis Lee
Cst. Garett Legault
Cst. Keith MacDonald
Cst. Jennifer McInnis
Cst. Kimberly Menzies
Cst. Biant Padam
Cst. Julie Riches
Cst. Uwe Rieger
Cst. Matthew Smart
Cst. Jessie Tiwana
Cst. Richard Vanstone

Congratulations to Cst. Ivis Lee (Vancouver), who was the recipient of the British Columbia Association of Chiefs of Police Shield of Merit for best all around recruit performance in basic training. Cst. Steven McCuaig (West Vancouver) received the Abbotsford Police Association Oliver Thomson Trophy for outstanding physical fitness. Cst. Blain Christian (Vancouver) received the Vancouver Police Union Excellence in Academics award for best academic test results in all disciplines. Cst. Phillip Di Batista (Delta) received the British Columbia Federation of Police Officers Valedictorian award for being selected by his peers to represent his class at the graduation ceremony. Cst. Steven Davidson (Stl'atl'imx) was the recipient of the Abbotsford Police Recruit Marksmanship award for highest qualification score during Block 3 training. Chief Constable Tom Karanfilis of the Stl'atl'imx Tribal Police Service was the keynote speaker at the ceremony.

NO MINIMUM PUNISHMENT FOR IMPAIRED CAUSE BODILY HARM

R. v. Gomes, 2003 ABCA 149

The Alberta Court of Appeal has ruled that although there is a minimum penalty for impaired driving, there is no minimum for impaired driving causing bodily harm. The accused was convicted of impaired driving and, despite having a prior conviction for refusing to provide a breath sample, was sentenced to a nine month conditional sentence, 100 hours of community service, and a two year driving prohibition. The Crown appealed, arguing that the mandatory minimum impaired driving sentencing provisions under s.255(1)(a) of the *Criminal Code* apply to impaired driving causing bodily harm convictions; therefore, the conditional sentence was improper.

Section 255(1)(a) of the *Criminal Code* creates mandatory minimum sentences for impaired driving convictions under s.253 (impaired driving/driving over 80mg%) and s.254 (refusal). These include a $600 fine for a first offence, at least 14 days in jail for a second offence, and at least 90 days in jail for subsequent offences. Although this minimum sentencing regime is found in s.255, it only applies to offences under s.253 and s.254, not s.255 offences themselves. Impaired causing bodily harm is one such offence created under s.255. Therefore, there is no minimum sentence for causing bodily harm while impaired and a conditional sentence is available.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

"Twenty years from now you will be more disappointed by the things that you didn't do than by the ones you did do. So throw off the bowlines. Sail away from the safe harbor. Catch the trade winds in your sails. Explore. Dream. Discover" – Mark Twain

FOUR & HALF YEAR SENTENCE STARTING POINT FOR DRUG COURIER

R. v. Ma, 2003 ABCA 220

Following his conviction in court on a charge of possession of cocaine for the purpose of trafficking, the accused was given a conditional sentence for his integral involvement as a middleman in a wholesale commercial drug trafficking scheme. The 19 year old, criminal record free accused delivered drugs for a major drug trafficker to dial-a-dopers. He also participated in delivering kilograms of cocaine to the major trafficker. The accused had been found in possession of 238 grams of cocaine worth $23,823 in 10 plastic bags after he was stopped driving. The Crown appealed to the Alberta Court of Appeal arguing that the sentence was unfit and four and a half to six years would be more appropriate.

Since conditional sentences can only be given for a duration of less than two years, the appeal court first examined whether such a sentence was appropriate. In holding that a sentence of less than two years was demonstrably unfit, the court found many factors warranted a more severe sentence, including:

- crack cocaine is a hard drug, not a soft one, and is extremely addictive, costly, and leads to crime and prostitution;
- the value of the drug was high;
- the accused was a middleman, higher than a dial-a-doper, but lower than the major player who plead guilty and received 7 ½ years incarceration; and
- trafficking in cocaine is highly profitable and the accused was not an addict. He was motivated purely by greed.

In its ruling, the Court concluded that a sentence of four and a half years was the starting point for "a courier engaged in wholesale commercial trafficking." This four and a half year term, with consideration of other sentencing principles like denunciation, deterrence, rehabilitation, and protection of society, can be increased if there are aggravating circumstances and decreased if there are mitigating circumstances. Although the commercial nature of the operation, greed, and the high cost to society of trafficking crack cocaine, there were mitigating factors favouring a reduction in sentence. These mitigating factors included the age of the accused, the absence of a criminal record, his employment record, his family circumstances, and his guilty plea. The Alberta Court of Appeal set aside the conditional sentence and substituted a term of three years imprisonment.

Complete case available at www.albertacourts.ab.ca

VOICE IDENTIFICATION OBTAINED IN BREACH OF RIGHT TO COUNSEL

R. v. Ngo, 2003 ABCA 121

During the course of a drug trafficking investigation in Calgary, the police used an interpreter to translate intercepted telephone communications into English. The conversations were mostly in Vietnamese and the interpreter was told by police to pay attention to the voices for the purpose of voice identification. Three days after he was arrested in Vancouver on an outstanding warrant, the drug investigator traveled from Calgary to Vancouver to execute the warrant and arrange for transport back to Calgary. Arrangements were made for the interpreter to accompany the investigator to the detention centre to provide interpreter services, if required, and to determine if she could recognize the voice. The investigator informed the accused of the charge, cautioned him, and told him of his right to counsel. The interpreter translated, but the accused stated he understood English and did not need a translator.

The accused stated he wanted to speak to counsel but was not provided the opportunity. The investigator told the accused he would not be discussing the case, but needed to complete an administrative form regarding his transfer. For 34 minutes the investigator interviewed the accused about personal information, however no form was completed. The interpreter, who remained in the room, identified the accused's voice as one of the voices on the intercepted communications. This was tendered as evidence.

At trial, the judge found that there were no *Charter* breaches under either s.7 (right to silence) or s.10(b) (right to counsel). He found that providing an opportunity for voice recognition was not akin to compelling someone to participate in the creation of inculpatory evidence. Since s.7 only protects the content of the statements and the words spoken here were innocuous, he ruled there was no protection under s.7. In addressing the s.10(b) issue, the trial judge concluded that "without delay" does not mean "immediately" and the police are entitled to carry out administrative procedures, as long as they do not create evidence, before they provide an arrestee with a reasonable opportunity to contact counsel. Since there was no identification evidence created, there was no breach. The accused was convicted of conspiracy to traffic in a controlled substance, but appealed to the Alberta Court of Appeal arguing that obtaining evidence of the sound of his voice violated his right to counsel and his right to silence.

Section 10(b) of the *Charter* guarantees an arrestee the right "to retain and instruct counsel without delay and to be informed of that right." When an arrestee asserts a desire to contact a lawyer, the police are obligated to provide a reasonable opportunity and refrain from eliciting evidence until the opportunity has been provided. In this case, the completion of the form was used as a ruse to have the accused speak for the purpose of obtaining voice identification evidence, thus he was conscripted against himself. Further, there was no urgency to complete the administrative paperwork before allowing access to counsel. The accused had been in custody for several days and would be for several more. The police deliberately deceived the accused to create an opportunity for the interpreter hearing his voice. This was done to compel the accused to produce incriminatory evidence. His request for counsel was denied to prolong the dialogue and allow for voice identification. Thus, evidence was elicited and the police failed to comply with their obligation in holding off until counsel is contacted. Justice Paperny for the unanimous appeal court stated:

> [T]he evidence clearly establishes that [the accused's] attempt to exercise his 10(b) right to consult counsel was denied in an effort to prolong the dialogue, the purpose of which was to elicit evidence. The investigating officers conducted an interview which was made to appear routine for this very purpose. .... Instead of advancing the request, [the officer] advised the [accused] that he need not call his lawyer at that time because [the officer] would not be discussing the case but merely asking for some administrative information. This statement was intentionally misleading and intentionally disregarded the [accused's] right and the consequential police duty. [The officer] had devised a ploy to obtain voice identification evidence for use against the appellant at trial. The duties under s. 10(b), to provide a reasonable opportunity to consult with counsel and to " hold off" until a reasonable opportunity is facilitated, were breached. It was only as a result of these breaches that the voice identification evidence required to convict the appellant was obtained. [pra.36]

Since the Court found a s.10 breach, it was not necessary to determine whether his right to silence was violated. The voice identification evidence was excluded under s.24(2) of the *Charter*. The evidence was conscriptive evidence and would render the trial unfair. Furthermore, although the breach was not invasive, like gathering bodily fluids, it nonetheless was flagrant and willful. There was no urgency. The

purposeful deception by the police prevented the accused from contacting counsel and could not be condoned by the Court. A new trial was ordered.

Complete case available at www.albertacourts.ab.ca

MANITOBA's HIGH COURT RULES SOBRIETY QUESTIONING VIOLATES *CHARTER*

R. v. Elias, 2003 MBCA 72

Police stopped the accused after he was seen leaving a hotel, enter his truck, and drive away at 1:44 am. An odour of liquor was noted on his breath and the officer asked if he had been drinking. The accused acknowledged drinking and an ASD test was demanded. The accused failed and he was arrested, cautioned, and given his rights under s.10(b) of the *Charter*. A breathalyzer demand was made and two tests resulted in readings of 100mg%. The accused was charged with impaired driving and driving over 80mg%.

At his Manitoba Provincial Court trial the accused was acquitted. The trial judge concluded that the accused's rights under s.10(b) of the *Charter* were violated when the officer asked him if he had been drinking. The answer to the incriminating question was inadmissible under s.24(2) and therefore there was insufficient basis for the ASD demand. The fail reading on the ASD was therefore also excluded. In the end, there was no basis for the breathalyzer demand. The charges were dismissed. The Crown's appeal to the Manitoba Court of Queen's Bench was allowed. That court found the police were entitled and had a duty to ask questions related to sobriety. The acquittal was set aside and a new trial was ordered. The accused then appealed to the Manitoba Court of Appeal, which was divided on the issue.

The Majority

Since the accused was detained when he was randomly stopped by the police, he was entitled to be advised of his right to counsel unless that right could be suspended as a reasonable limit prescribed by law under s.1 of the *Charter*. Section 76.1(1) of Manitoba's *Highway Traffic Act* allows the police to stop motorists for road safety purposes:

> s.76.1(1) Highway Traffic Act
> A peace officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop, and the driver of the motor vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as such, shall immediately come to a safe stop and remain stopped until permitted by the peace officer to depart.

Legal reasons for which a police officer may stop a driver include driver's licence, registration, insurance, and mechanical fitness checks. If during these routine stops the officer forms a reasonable suspicion the person has alcohol in their body, an ASD demand can be made under the *Criminal Code*. However, the majority ruled, "there is no provision that expressly or by necessary implication authorizes a police officer to question a detained driver concerning alcohol consumption." In other words, s. 76.1(1) nor any other provisions of the *Highway Traffic Act* allow for inquiries respecting sobriety. Furthermore, nothing can be found in the common law. Hence, there is no "reasonable limit prescribed by law" that would justify a limit on the accused's right to counsel under s.1 of the *Charter* when a driver is stopped and questioned about alcohol consumption.

Having found a s.10(b) violation, the majority then determined whether the evidence was admissible under s.24(2). In this case the officer had a reasonable suspicion that the accused had alcohol in his body on the basis of the liquor odour. This observation, apart from the admission of consumption, provided an adequate basis for the

ASD demand. Justice Philp (Justice Freedman concurring) wrote:

> Evidence of the odour of alcohol apparently emanating from the sole occupant of a vehicle who had been observed departing a hotel in the early hours of the morning may not amount to proof beyond a reasonable doubt that the driver had alcohol in his body. In my view, however, those circumstances are more than sufficient to meet the objective component of the reasonable suspicion required for an ASD demand.

Since the evidence of the ASD and the subsequent breathalyzer readings would have been obtained without the offending question, the trial would not be unfair. The s.10(b) violation was not serious. The police were not abusive or aggressive and the question was not an intrusive interrogation. The breathalyzer evidence would have been obtained without the *Charter* breach and the exclusion, not its admission, would bring the administration of justice into disrepute. The accused's appeal was dismissed and the order by the Queen's Bench justice ordering a new trial stood.

The Minority

Justice Kroft took a different view. He concluded that the accused's s.10(b) right to counsel was limited by law. In his opinion, the power of inquiry (asking questions) is included in the power to stop a motorist and in some cases this may justify limiting a persons *Charter* rights, like what happened in this case. He stated:

> I do not suggest that the authority to impose intrusive tests like compulsory statements or sobriety tests should be implied, but I have little doubt, after reviewing our drinking and driving legislation, that once having brought a vehicle to a halt, police officers are authorized and expected to make a cursory investigation or screening to ascertain if the concerns of both the [Highway Traffic Act] and the Code are being met. That is, during the brief investigation conducted at the side of the road, the police are expected to make a meaningful, but non-intrusive inquiry regarding licensing, insurance, sobriety and mechanical fitness. If an inadvertent breach of some Charter provisions such as s.8 or s.10(b) is committed, in a minor or trivial form, the admissibility of evidence obtained through the inspection will be determined by applying the standard which has emerged from s. 1 of the Charter.

Justice Kroft found that the denial of the accused's right to counsel was a reasonable limit. Even if the suspension of the right was not justified, he was of the view, like the majority, that the evidence should not be excluded. He would have also dismissed the appeal and ordered a new trial.

Complete case available at www.canlii.org

IN MANITOBA, RIGHT TO COUNSEL MUST PROCEED SOBRIETY TESTING

R. v. Orbanski, 2003 MBCA 43

The police stopped the accused after he was observed drive through a stop sign, make a wide turn, drive onto the shoulder, and swerve back and forth. The officer could smell an odour of liquor from the accused's breath. His eyes were glossy and he admitted to having one beer. The accused was asked to step from his vehicle and perform roadside sobriety tests. He was told the tests would be voluntary, that he did not have to do them, and that he could call a lawyer. However, the abbreviated *Charter* warning was not read from a card and was deficient in that it did not meet the informational components mandated by the Supreme Court of Canada in advising of the availability of duty counsel and legal aid. The accused declined a lawyer and agreed to the tests. The accused failed the sobriety tests and the breathalyzer demand was given. Subsequent analysis resulted in readings above the legal limit. The accused was charged with impaired driving and over 80mg%.

At trial in Manitoba Provincial Court, the judge found the accused's right to counsel under s.10(b) was violated. In his view, there was nothing in the common law or under statute which would allow the police to limit his right to a lawyer under s.1 of the *Charter* when he was stopped and subject to the sobriety tests. As a result, he excluded the evidence of the sobriety tests and the breathalyzer readings under s.24(2). The Crown appealed to the Manitoba Court of Appeal.

In balancing individual rights with highway safety, the unanimous Court of Appeal concluded that a driver stopped by the police is entitled to be informed of and consult with counsel before being asked to undergo sobriety tests. Before a court can consider whether there is a limitation on a person's constitutional rights under s.1 of the *Charter*, the limitation itself must be prescribed by law. Such a limitation can be found either at common law or under statute. In this case, the Manitoba Court of Appeal ruled that there is no common law rule or statutory provision that allows for sobriety testing without a driver being properly advised of their right to counsel.

Crown Counsel tried, unsuccessfully, to argue that the statutory obligation imposed by s.76.1(1) of Manitoba's *Highway Traffic Act* on drivers to stop at the roadside when signaled by police includes, by necessary implication, the authority to conduct appropriate investigative measures. The Court opined that neither this section, nor ss.265 or 263.2(1.1) of the *Highway Traffic Act*, gave police officers the express or implied authority to compel sobriety tests. Therefore, there was no limit prescribed by law that would justify a driver being denied his right to counsel before being requested to perform sobriety or coordination tests.

However, despite the *Charter* breach, the evidence was admitted. The roadside testing evidence was non conscriptive. The police did not compel or coerce the tests; they were voluntary. Nor was the breach serious. Finally, the accused's erratic and dangerous driving was sufficient to raise the suspicion that he was impaired. The reputation of the administration of justice would be better served by admitting the evidence. The accused's acquittal was set aside and a new trial was ordered.

Complete case available at www.canlii.org

POLICE ENTITLED TO CONTINUE QUESTIONING AFTER CONSULTATION WITH COUNSEL

R. v. Bohnet, 2003 ABCA 207

Following the discovery of a body at a drive in movie site, the accused agreed to attend the police station for an interview on the invitation of the police. He was advised of his right to counsel. After initially speaking to the accused for an hour and a half and consensually taking his shoes, he was arrested for the improper disposal of a body and was again advised of his *Charter* rights. He was also warned that he may be charged with a much more serious offence if a scheduled autopsy determined the death was culpable.

The accused was allowed to contact a lawyer and told the police he would take his lawyer's advice and not make a statement or answer questions. However, he agreed to accept a police offer to tell him about their investigation. This included information that the police had recovered a receipt near the body that could be traced to him. The accused told police he wanted to talk to his lawyer and that the discussion should cease. The police ignored his request and continued to speak to him. Eventually, he confessed to the murder.

At his first degree murder trial in the Alberta Court of Queen's Bench, the judge admitted the statements. In his view, the accused's right to silence was not violated. He had received legal advice from a lawyer and the police were entitled

to continue questioning provided they did not override his right to choose whether to answer or not or deprive him of an operating mind. Moreover, his right to counsel was not breached. He had been fully and fairly apprised of his legal jeopardy before he contacted a lawyer and it did not change thereafter. The accused appealed to the Alberta Court of Appeal arguing, among other grounds, that the trial judge erred in finding no *Charter* violations.

The Right to Silence

The appeal was dismissed by Alberta's top court. In proper circumstances, there is no breach of the right to silence where an accused "has consulted counsel, asserted a right to silence, is persuaded by the police to continue talking, and ultimately confesses." Justice Hunt, for the unanimous court, stated:

> In this case, the [accused] consulted a lawyer who, apparently, advised him not to make any statements. Although he was not given a second opportunity to talk to his lawyer before he confessed, that was not a Charter breach in the context of this case…. The fact that the police successfully engaged him in further discussions after he had stated he would follow his lawyer's advice not to say anything, and after he once more said that discussions should cease, does not constitute a breach of his rights. As was observed by the majority [of the Supreme Court of Canada in R. v. Hebert], "[p]olice persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence." What the police did in this case was not outside the acceptable boundary. [para. 16]

The Right to Counsel

The accused argued that there had been a change in legal jeopardy when he went from being questioned about the disposal of his estranged wife's body to her killing. Further, he suggested that once he admitted to strangling his wife, he should have been re-advised of his right to counsel. The Alberta Court of Appeal disagreed. In holding that the trial judge did not err in his ruling when he found there was no change in legal position, the Court stated:

> [The accused] was advised of his right to counsel at the outset of the interview, when he was told that he was a person of interest in the investigation. At that point, he declined to consult a lawyer. He was advised a second time, when he was told he was under arrest for improper disposal of the body and that, depending on the outcome of the autopsy, he could face a homicide charge. He was asked by the police whether he understood and replied that he did. [para. 18]

The appeal was dismissed and the conviction was upheld.

Complete case available at www.albertacourts.ab.ca

ANONYMOUS TIP REQUIRES VERIFICATION OF CRIMINAL ASPECT

R. v. Campbell, 2003 MBCA 76

The police received a telephone tip from an anonymous informant that the accused would be transporting drugs between Winnipeg and Thompson under the guise of attending a snowmobile race. The informant, who stated he was aware the accused was trafficking in drugs and enjoying a lifestyle beyond his legitimate means, refused to identify himself. A vehicle description, licence plate number, and occupation of the accused were provided. Although the informant did not say he had personal knowledge of the information, the police officer believed he did. He was told to call back when the accused was making his trip to Thompson. The police confirmed the accused resided at the same address as the vehicle's registered owner and that there were snowmobile races scheduled in Thompson in two weeks.

Two weeks later the informant called police and reported the vehicle was enroute to Thompson.

Acting on the tip, the accused was stopped and asked to produce his driver's licence. In response to the officer's enquiry about the purpose of his trip, the accused stated he was going to the snowmobile races. He also replied "No" in response to the officer's question whether there were any drugs or liquor in the vehicle. The accused was asked to step from the vehicle, arrested, advised of his right to counsel, and his vehicle was towed. After speaking to a lawyer, the accused confirmed there were drugs hidden in the car. A search warrant was obtained and several kilograms of marihuana and cannabis resin were found hidden in the car door.

At his trial in Manitoba Provincial Court, the judge found that the police had reasonable grounds to arrest the accused. The arrest was lawful, the detention was not arbitrary, and the search warrant was properly obtained. However, the accused was not informed of his right to counsel without delay when he was first stopped. Despite this breach, the drug evidence was not conscripted and its exclusion was not justified. The evidence was admitted and the accused was convicted of possession for the purpose of trafficking x 2 and one count of simple possession. The accused appealed to the Manitoba Court of Appeal arguing that his rights to be free from arbitrary detention (s.9 *Charter*), unreasonable search and seizure (s.8 *Charter*), and right to counsel (s.10(b) *Charter*) were violated.

Reasonable Grounds

In order for the police officer to arrest the accused or obtain a search warrant for the vehicle, reasonable grounds to believe that he was transporting drugs was necessary. Evidence of the tip itself is insufficient. Three areas are assessed in determining whether reasonable grounds exists when relying on informer tips:

1. Is the information predicting the crime compelling? Bald conclusory statements, gossip, or rumour are not sufficient.
2. Was the source of the tip credible? If the source is anonymous, credibility is unknown.
3. Can the police corroborate the information by further independent investigation?

Where an unidentified informant is supplying the information, "the standard of reasonable grounds will likely only be attained where the quality of information provided by the informant and the quality of the corroborative evidence adequately compensates for the inability to assess the credibility and reliability of the source." This corroboration by the police "should confirm both the credibility of the informant and the tip itself." Imperative in this analysis is that the information in some material respect corroborates the criminal aspect, not merely the "innocent" nature, of the informer's tip.

Although the tip itself was fairly compelling, no criminal aspects of the tip were verified. Only the innocent nature of the tip could be confirmed. Hence, the information's reliability regarding criminal behaviour was not established, nor did reasonable grounds exist, ruled Manitoba's highest court. Without reasonable grounds, the seizure of the vehicle leading to the search warrant was a violation of s.8 of the *Charter*.

Arbitrary Detention

Once the vehicle was stopped by the police the accused was detained. A detention will be arbitrary, and thus a violation of s.9 of the *Charter*, if it is conducted in the absence of articulable cause, a standard based on something less than reasonable grounds. Although the police did not have reasonable grounds, Justice Scott, writing for the unanimous Court, concluded the police had an articulable cause to stop and detain the accused on the basis of the tip along with the spotting of the vehicle exactly as predicted. The officers could exclude coincidence as a reasonable possibility at this time. The detention was not capricious, despotic, or unjustified. The arrest, despite its unlawfulness for lack of

reasonable grounds, did not constitute an arbitrary detention.

Right to Counsel

Manitoba's s.76.1(1) of the *Highway Traffic Act* allows the police to stop motorists while s.25(12) obliges the driver to produce his driver's licence when requested. In this case, stopping the accused and demanding his driver's licence was authorized under statute. However, he was also asked where he was going and his answer provided further support of the tip. Section 76.1(1) does not provide authority for the police to conduct investigative measures of this nature. Thus, the accused was entitled to forthwith be advised of his right to counsel before being questioned by the officer.

Exclusion of Evidence

Despite the ss. 8 and 10 *Charter* breaches, the evidence was admissible. The trial would not be rendered unfair by its admission. The violations were not serious and the exclusion of the evidence would bring the administration of justice into disrepute. The appeal was dismissed and the accused convictions stood.

Complete case available at www.canlii.org

PROBATION SEARCH CONDITION UNREASONABLE, COURT LIMITS TIME FRAME

R. v. Woroby, 2003 MBCA 41

The accused plead guilty to possession of child pornography and was sentenced to a $10,000 fine and supervised probation, including a condition that he allow the police or Probation Services to search his home computer without a warrant to ensure he was complying with other conditions of the probation order, such as not having internet access. Despite agreeing to the condition at his sentencing hearing, the accused appealed to the Manitoba Court of Appeal arguing, in part, that the condition permitting warrantless searches prima facie violated his right to be secure from unreasonable search and seizure protected under s.8 of the *Charter*. The condition, he submitted, removed the necessity of judicial authorization requiring reasonable grounds. Crown Counsel took the position that the condition was reasonable in order to protect society, especially children.

The right to privacy in one's home is a highly protected *Charter* right. However, a person on probation has a reduced, but not non-existent, expectation of privacy. Further, probation is primarily a rehabilitative tool; it is not simply punishment. Any conditions must be rationally connected to the offence or they will be unreasonable. In this case, it was ruled by Justice Hamilton, for the unanimous Manitoba Court of Appeal, that the search condition was "intended to protect society by giving teeth to the condition that the [accused] not access child pornography." Thus, the condition was rationally connected to the offence and could well assist the accused's rehabilitation.

However, a condition that nonetheless violates the *Charter* will be unreasonable. A search meets the reasonableness test if a reasonable law authorizes it and the manner in which the search is carried out is also reasonable. The search was authorized by law since the accused voluntarily consented to the condition, but the manner in which the search was to be carried out was unreasonable. Although a feature of random searches is essential because evidence can be easily deleted from a computer, the condition allowed for searches at night. It would be reasonable to limit the time frame when the searches could be undertaken to a time consistent with when search warrants should be carried out under the *Criminal Code* (s.488). As a result, the Manitoba Court of Appeal amended the search condition to only allow searches between 6 am and 9 pm.

Complete case available at www.canlii.org

TRAFFICKING BY OFFER DOES NOT REQUIRE INTENT TO ACTUALLY SELL

R. v. Murdock,
(2003) Docket:C3795 (OntCA)

The accused offered to sell an undercover police officer crack cocaine but later withdrew the offer. He was arrested several minutes later but did not have any drugs in his possession. At his trial, the accused denied offering to sell drugs to the officer, testified that he knew he was dealing with an undercover police officer from the beginning, and told the court that the officer made several requests to purchase drugs. The accused was convicted of trafficking in a narcotic contrary to s.5(1) of the *Controlled Drugs and Substances Act* (*CDSA*). The accused appealed to the Ontario Court of Appeal contending, among other arguments, that the offence of trafficking by offer is unconstitutional under s.7 of the *Charter* unless the Crown proves that he had the intention to actually sell or give the drug offered.

The Ontario Court of Appeal dismissed the accused's appeal. Trafficking by offer is a conduct offence; there is no requirement that consequences flow from the prohibited act. In other words, the Crown only need prove that the accused actually intended to make a genuine offer; not that he actually intended on selling the drug.

The definition of "traffic" found in s.2 of the *CDSA* includes "to offer to [sell, administer, give, transfer, transport, send or deliver the substance." Therefore, the offence of trafficking by offer is made out when:

- (actus reus) the accused offers to traffic in a drug; and
- (mens rea) the accused intends the offer be taken as true and genuine. It is not necessary to prove that an accused actually intended to sell the drug. However, an offer made in jest would not attract culpability because it would not be a genuine offer.

Complete case available at www.ontariocourts.on.ca

DETAINEE NOT DILIGENT, s.10(b) NOT BREACHED

R. v. Richfield,
(2003) Docket:C39427 (OntCA)

The accused was arrested by police for failing to provide a roadside screening test and was advised of his right to counsel. He indicated he understood his right and asked to speak to a specific lawyer. He was also read the police caution and breathalyzer demand and was transported to the police station. The officer called the lawyer's number and left a message about the accused's arrest with a live answering service. An hour passed without a call back from the lawyer and it had been one hour and 45 minutes since the arrest. The accused was offered duty counsel but only wanted to speak to his lawyer. He was told a demand for samples was forthcoming and if he wanted legal advice he should get it now. Further, the function and availability of duty counsel was explained. Being attentive to the two hour evidentiary presumption under the *Criminal Code*, the police requested breath samples and the accused complied.

At his trial, the judge excluded the breathalyzer results under s.24(2) of the *Charter* after holding that the police breached the accused's right to counsel under s.10(b). In his view, the accused was denied the counsel of his choice and he was acquitted. The Crown appealed to the Ontario Superior Court of Justice but the earlier ruling finding a breach was upheld. However, the appeal judge allowed the breathalyzer readings under s.24(2) and a new trial was ordered. The accused appealed to the Ontario Court of Appeal.

Absent cases of urgency or danger, a detainee must be provided a reasonable opportunity to

exercise their right to counsel. Furthermore, the police must not elicit evidence, including breath samples, from the detainee until they have been provided the reasonable opportunity, which will depend on all the surrounding circumstances. Reasonableness does not entail an absolute right to counsel of choice but will be determined by the context of the situation. However, when the detainee is provided the opportunity, they must exercise their right diligently. The existence of a 24 hour duty counsel is crucial and must be considered when assessing reasonable diligence. The availability of duty counsel may affect the length of the time in which the police will have to continue holding off from eliciting evidence.

In this case, the Ontario Court of Appeal acknowledged that the police could have been more diligent in facilitating the accused's contact with his lawyer, like calling back or trying to locate a home number. However, despite this lack of effort by the police, they did not make any demands of the accused while they waited for over an hour and offered duty counsel when the lawyer had not called back. When told his lawyer did not call back, the accused did not ask to make another call to him or another lawyer, nor take up the offer of duty counsel. In the circumstances, the Ontario Court of Appeal ruled that the accused had not been reasonably diligent in exercising his right to counsel. Thus, there was no s.10(b) *Charter* breach and no need to consider admissibility of the evidence under s.24(2). The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

RIGHTS VIOLATED BY FORCING CONTACT WITH LAWYER

R. v. Hesketh, 2003 BCPC 173

The accused was arrested for impaired driving and informed of his right to counsel under the *Charter*. The officer was certain he understood and the breathalyzer demand was then read. While at the police station, the officer asked the accused if he wanted to call a lawyer. He responded, "Don't need one. No way. No breath samples, period." He again was asked if he wanted a lawyer and this time replied, "What's he going to do for me?" The officer felt the accused was unsure of himself and a call was placed to Legal Aid. The accused spoke with a lawyer and subsequently provided two breath samples. Thirty one minutes had elapsed from the time of arrival at the police station and the taking of the first sample. He was charged with impaired driving and over 80mg%.

At his trial in British Columbia Provincial Court, the accused argued that the samples of breath were not taken as soon as practicable as required under the *Criminal Code*. He submitted that a 31 minute delay in taking the breath samples was created by the officer when he forced the accused to speak to Legal Aid despite his clearly expressed decision not to speak to a lawyer. Thus, it was suggested, the accused's rights under s.10(b) of the *Charter* were violated and that the certificate of breath analysis should be excluded under s.24(2). The Crown contended that the accused's responses were equivocal and what the officer did was reasonable.

In excluding the certificate, Justice Lenaghan concluded that the accused's s.10 right was breached and that the samples were not taken as soon as practicable. He stated:

> It must be borne in mind that the right to counsel is an individual constitutional right and that the decision to exercise it or not to exercise it is one that is exclusively that of the subject individual. It cannot be appropriated by another person, regardless of how well-intentioned that other person might be. This is not to say that a police officer can never contact counsel on behalf of an accused person or arrange for some third-party to do so. Where a police officer encounters an accused person who, by words or actions, expresses a lack of understanding of his right to counsel or is uncertain as to whether he or she ought to exercise that right, the law requires that officer, in my view, to take

> further steps to ensure that the right is understood and that any decision not to exercise it is an informed decision.
>
> The situation is different, however, where an accused person indicates an understanding of the right to counsel and expresses a clear intention not to exercise that right. In such circumstances, in my view, a police officer must respect the decision of the accused person, regardless of his view of the wisdom of that decision. [paras. 42-43]

In this case, the officer testified he was "absolutely certain" the accused understood his rights. The accused's answer, "Don't need one. No way. No breath samples, period," was clear and unequivocal. In arranging the telephone call to Legal Aid, the officer "was acting contrary to that clearly expressed decision and thereby unjustifiably delaying the taking of breath samples from the [accused]." The breath samples were not taken as soon as practicable.

Complete case available at www.provincialcourt.bc.ca

OBSTRUCT NOT MADE OUT ON REFUSAL TO SUBMIT HELMET FOR INSPECTION

R. v. Hayes,
(2003) Docket:C3613 (OntCA)

The accused, who was stopped at a police roadcheck targeting members of a motorcycle gang holding an annual summer gathering in the area, repeatedly refused to remove his helmet and submit it for inspection. He was warned he would be charged with obstructing a peace officer if he continued to refuse. He was subsequently arrested for obstruction, his helmet was removed, and found to have a safety sticker.

At his trial, the accused testified that he did not remove his helmet because he believed he was not obliged to do so. The trial judge acquitted him because he was not convinced the helmet was "equipment" subject to inspection under s.82 of Ontario's *Highway Traffic Act*. The Crown appealed and the acquittal was set aside. The Ontario Superior Court of Justice concluded that the helmet was "equipment" and subject to inspection. In his view, the officer was obstructed when the accused failed to remove the helmet. The accused then appealed to the Ontario Court of Appeal.

Section 216 of the *Highway Traffic Act* allows the police to stop motorists and also creates an offence for failing to do so. Section 104(1) requires a motorcyclist to wear a helmet that complies with the regulations. Although there is no specific penalty provision for failure to wear a helmet under s.104(1), the general penalty provision of s.214(1) would apply. Section 82 provides the police with the general statutory authority to examine vehicles and equipment, including helmets the Court of Appeal ruled, and also imposes a duty on motorcyclists to remove their helmets and submit them for inspection. However, failure to submit for inspection can result in a charge only if written notice has been provided. In this case, the Court held that the police were not entitled to use the obstruct power of arrest to enforce a provincial offence that already had a statutory enforcement regime defined by the legislature. Justice McCurtry stated:

> The problem with the Crown's argument is that it overlooks the fact that s.82(3) addresses precisely the same misconduct that forms the basis of the charge of obstruct police: the refusal to submit the helmet for inspection. Under s.82(3), a person who fails or refuses to submit their vehicle and its equipment to an inspection is subject to a fine of not more than $1,000. In other words, the legislature defined the enforcement mechanism for failing to submit for inspection as a fine under the HTA. The officer did not even attempt to use this enforcement mechanism, as he was empowered to do, which would have required him to give the [accused] a written notice for an inspection (s.82(4)).

> Thus, the [accused] did not obstruct the police in the performance of his duty. If the [accused] had interfered with the officer's attempt to issue written notice for a vehicle inspection, the offence of obstruct police could have been made out. However, since the officer did not attempt to enforce his power to inspect the helmet under s. 82(3) by issuing the written notice as required by s. 82(4)…he was not entitled to invoke the far more serious offence of obstruct police or the Criminal Code arrest powers. [para. 42]

The appeal was allowed, the conviction was set aside, and an acquittal was entered.

Complete case available at www.ontariocourts.on.ca

ROUTINE VEHICLE STOP ABITRARY, BUT JUSTIFIED BY STATUTE

R. v. Pelletier, 2003 NBCA 67

A police officer randomly stopped the accused's vehicle for a routine check. Her documents were checked and the officer detected a smell of alcohol on her breath. A breath sample into a roadside-screening device was demanded and the accused failed. This provided reasonable grounds and she was arrested for impaired driving and subsequently provided two breath samples over the legal limit at the police detachment. She was charged with operating a motor vehicle with a blood alcohol concentration over 80mg%.

At her trial in New Brunswick Provincial Court, the accused was acquitted. In the judge's view, she had been arbitrarily detained contrary to s.9 of the *Charter* and the evidence of the technician's certificate was excluded under s.24(2). It was held that the officer did not have sufficient cause before he stopped the vehicle. The Crown appealed and the New Brunswick Court of Queen's Bench overturned the acquittal and ordered a new trial. In the appeal judge's view, the trial judge erred because s.15(1)(d) of New Brunswick's *Motor Vehicle Act* did authorize random (without reason) stops of motorists to conduct routine checks:

> s.15(1)(d) *Motor Vehicle Act*
> 15(1) The Minister and such persons as the Minister may designate are deemed to be peace officers for the purpose of this Act and have the power…(d) when on duty, to require the driver of any vehicle to stop and exhibit his licence and the registration certificate for the vehicle and submit to an inspection of such vehicle, and the registration plates and the registration certificate thereon or to an inspection or test of the equipment of such vehicle…

The accused appealed to the New Brunswick Court of Appeal arguing that a stop conducted pursuant to this legislation authorized officers to only check licences, registration, and insurance. She further submitted that the police could not use this section to find other evidence of a crime. New Brunswick's top court disagreed and denied the appeal. The police officer intercepted the accused during a routine check authorized by s.15(d) of the *Motor Vehicle Act*. It was during this lawful stop that the officer detected the odour of alcohol on the accused's breath. At this time, her detention was no longer without cause and therefore was not arbitrary. Leave to appeal was denied.

Complete case available at www.canlii.org

INVESTIGATIVE SEARCH RESULTS ADMISSIBLE UNDER s.24(2) *CHARTER*

R. v. Omelusik, 2003 BCCA 319

After stopping the accused for excessive speeding, a police officer noted a number of $20 bills in the accused's right hand and a strong smell of marihuana coming from inside the vehicle. The accused was directed to step from the vehicle and he was told he was under investigation for possession of a narcotic. In moving the accused's "kangaroo" top to look for

weapons in his waistband, the officer felt a soft object in the front pouch and pulled out a bag (15 cm x 15 cm) containing marihuana. He was arrested and the officer continued his search, finding some "decks" of cocaine in his sweat pants pocket. Believing the amount of marihuana found was insufficient to account for the odour of marihuana in the vehicle, the officer searched the immediate area of the driver's seat. Through the open door the officer saw a large clear plastic bag under the front seat. It contained marihuana and cocaine packaged consistent with trafficking. As well, the accused's cell phone rang incessantly during the arrest.

At trial in British Columbia Provincial Court, the judge accepted the evidence of the police officer. She concluded that the officer had an articulable cause for the detention and incidental search and that no s.8 *Charter* breach occurred. Furthermore, she ruled there was no s.10 violation. The accused had unsuccessfully argued that he was not given an opportunity to use his cell phone at the scene to call a lawyer and that the police did not immediately provide him his *Charter* rights at the time of detention; it was only after he had been arrested that he was given them. The trial judge opined that the accused could not be given privacy in contacting a lawyer until he was at the jail and that the brief delay in advising of his rights was inconsequential; no incriminating statements were taken. Even if she were wrong about the breaches, the trial judge would have admitted the evidence under s.24(2).

The accused appealed to the British Columbia Court of Appeal arguing that the trial judge erred in finding no *Charter* breaches and the evidence should be excluded and the accused acquitted. Among other grounds, it was his view that the police are not entitled to search for contraband during an investigative detention based on articulable cause. Moreover, he also submitted that the odour of marihuana alone could not provide sufficient grounds for detention.

Justice Donald, writing for the unanimous court, assumed, without deciding, that there was no right to search the kangaroo pouch incidental to investigative detention. However, he held that the trial judge's s.24(2) analysis was sound. In addressing the argument concerning the smell of marihuana, by itself, providing sufficient grounds justifying detention, Justice Donald stated:

> Whether the smell of marihuana is enough for a lawful arrest, or in this case detention, depends on the circumstances... In the present case, the trial judge accepted [the officer's] evidence that the odour was of cut marihuana, not marihuana smoke, and that, together with the other circumstances, was sufficient, in my view, to justify detention. It followed that, for the officer's safety, he needed to search the [accused] for weapons and, in the course of that, he came upon the drugs in the pouch which gave ample grounds for his arrest. [references omitted, para. 20]

The evidence was admissible under s.24(2) and the appeal was dismissed.

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

ENTRY TO COMMUNICATE WITH OCCUPANTS LAWFUL DESPITE FOREKNOWLEDGE OF GROW

R. v. Charters & Leger, 2003 BCPC 204

The police in a very small and isolated community received several calls that a cougar had been sighted in the town. An officer went about the community to warn parents and residents in the area and to remind them to secure their garbage. He attended the accused's residence after a neighbour informed him they permitted their dogs to run at large. While warning the accused Charters on the balcony of the home about the cougar and the concern of the dogs running at large, the officer heard the basement door open

and close. At this time he noted a strong odour of cannabis consistent with growing marihuana. The officer walked down the stairs of the balcony and spoke to the accused Leger. While warning him about the cougar and the dogs, the officer noted the accused Leger had a green plant like substance consistent with marihuana of his wool sweater. A search warrant was subsequently obtained and both accused were charged with producing marihuana and possession of marihuana for the purpose of trafficking.

During their trial *voire dire* in British Columbia Provincial Court, the accused argued that the results of the search were inadmissible because the police violated their s.8 *Charter* rights to be secure against unreasonable search and seizure because the officer may have had some prior knowledge of a possible marihuana grow operation before he entered onto the property. However, Justice Doherty found no such breach. Even though the officer may have had some prior knowledge of the grow operation it made no difference. He had a legitimate reason to be on the property; to warn the residents of cougar sightings. Furthermore, if he were wrong in his analysis, the judge would have admitted the evidence under s.24.

Complete case available at www.provincialcourt.bc.ca

IN MEMORIAL

On September 20, 2003, OPP officers were involved with a fleeing suspect vehicle on March Road, near Golden Line Road in Mississippi Mills Township. A collision occurred involving a stolen jeep, a pick-up truck and an OPP Motorcycle Unit. As a result of this collision, 54-year-old Senior Constable John Paul Flagg succumbed to his injuries in Almonte Hospital.

Senior Constable Flagg began his career in July 1968 as a cadet. More recently he was posted to the Kingston Detachment and for the past few years he has worked with the Eastern Region R.I.D.E Unit, stationed out of Quinte.

"John was an extremely dedicated police officer with a passion for traffic safety," said OPP Commissioner Gwen Boniface. "He was very personable and always the gentleman. Once again, we grieve the loss of another fellow officer."

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

Note-able Quote

"Setting an example is not the main means of influencing others; it is the only means" – Albert Einstein

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