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

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On September 27, 2003, 24-year-old Surete Du Quebec Constable Patrick Levesque was killed in an aircraft accident while transporting a prisoner from Madelaine Island to Gaspe. The prisoner had been arrested for violating his parole and was being returned to Gaspe for a court appearance. The Piper Navaho plane crashed into a wooded area approximately two kilometers from the airport in Gaspe. The wreckage was found the following morning. The prisoner and the civilian pilot of the airplane were also killed.

On September 26, 2003, 29-year-old Canadian Forces Military Police Corporal Stephen Gibson was killed when his unmarked patrol car was struck from behind on the Trans-Canada Highway near Medicine Hat, Alberta. Corporal Gibson was acting as an escort for the Terry Fox Run and was driving slowly behind the runners, in the right lane, when a tractor trailer struck his patrol car from behind at a high rate of speed.

Corporal Gibson had been transferred to CFB Suffield only five days prior to the accident. He was killed on his first day of duty as a military police officer after graduating from the Military Police Academy in Borden, Ontario.

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

'LEGALLY BLIND': KEEPING CURRENT IS CRITICAL

Policing a democracy is no easy task. The rule of law is a bedrock principle and the police must respect the limits of the authority they are granted. There are many sophisticated nuances in applying and enforcing the law and ultimately decision making requires sound judgment, often in an atmosphere of violence with little time for reflection. There is no benefit of hindsight and often there is no opportunity for a second opinion, academic reflection, or peer review.

One example of the complexity in the law enforcement role is the increasing body of case law that is continually developing. Following the developments is much like watching a growing plant, where a new branch will sprout and an old, dying one will fall. Beautiful to some, distasteful to others. And of course, some things never change. In its 1997-1998 Annual Report[1], the Commission for Public Complaints Against the Royal Canadian Mounted Police noted that policing is becoming more complex in terms of the legal regime that governs the rights of the accused and the admissibility of evidence. And further, the Commission stated:

[1] Available online at www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_ e.aspx?articleid=403 [November 27, 2003]

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HIGHLIGHTS IN THIS ISSUE

Plus 44 Case Summaries

Unless otherwise noted, all articles are authored by Sgt. Mike Novakowski, MA (Abbotsford Police). The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed are not necessarily the opinions of the Justice Institute of British Columbia. "**In Service: 10-8**" welcomes your comments on or contributions to this newsletter. If you would like to be added to our electronic distribution list contact Sgt. Mike Novakowski at the JIBC Police Academy at (604) 528-5733 or e-mail mnovakowski@jibc.bc.ca

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> RCMP officers need to keep up to date on developments in criminal law, especially those that affect the use of police powers, acceptable methods of gathering evidence, and the rights of accused persons. In reviewing complaints, the Commission frequently concludes that the police officer in question was unaware of an important element of the law he or she was attempting to enforce. This shortcoming is not confined to junior officers of the Force; some supervisors have given unsound advice to police under their command because they failed to consider all relevant provisions of a law.

This observation is not restricted to the RCMP. In his 2001 report, "Evaluation of the Training Provided by the Police Academy at the Justice Institute of British Columbia", Dr. Radford noted:

> Worthy of special mention was that more than 70% of the police officers interviewed made spontaneous reference to the need for regular and useful legal updates.

The Courts, as well, have sometimes been critical of the police demonstrating a lack of legal knowledge. In some cases, judges have recognized that if the police did not know the law, they at least ought to have known it. Just as ignorance of the law is no excuse for the citizen[2], it is also no excuse for the police[3]. And nor should it be. In *R. v. Houle* (1985) 24 C.C.C. (3d) 57 (AltaCA), a police officer was attempting to enforce a law that he honestly and reasonably believed existed, but had been repealed a few days earlier without the officer's knowledge. The Alberta Court of Appeal was required to decide whether the officer was nevertheless acting within the lawful execution of his duty for the purposes of resisting arrest, obstruction, and assaulting a police officer charges. In holding that the officer was not so engaged, the court held:

> In balancing the two competing interests that must be considered in determining the extent of the peace officer's duty, namely, the

[2] See s.19 of the *Criminal Code*

[3] See *R. v. Profeit*, [1999] Y.J. No. 46 (YTTerCrt), *R. v. Houle* (1985), 24 C.C.C. (3d) 57 (AltaCA)

> protection of police authorities as against individual liberty, I would resolve the competition in favour of the citizen. I would not interpret police duties and powers as extending to the enforcement of non-existent law. I would not extend the duties to embrace actions taken in ignorance of the law -- an ignorance which does not excuse the citizen and should not protect the peace officer

This issue of an officer's legal knowledge and understanding has also been addressed many times when courts examine whether an officer was acting in good faith. For example, in the recent case of *R. v. Lam*, 2003 BCCA 593, a 28 year police veteran testified that the law regarding consent searches was indecisive, or as he described it, like a "bowl of Jell-O…that seemed to change". The court disagreed. In the majority's view, "there was no reasonable basis for any uncertainty" because the Supreme Court had clearly laid down the rules for a valid consent in 1994. Similarly, the comments of Justice Stuart[4] in 1999 are clear:

> Measuring the good faith of police depends significantly on their honest, reasonable basis for belief in understanding the law. An honest but mistaken belief that is not sustained by reasonable efforts to appreciate the law precludes any claim to good faith. Good faith requires taking reasonable efforts to understand and be current in their knowledge of the law.
>
> Evidence of good faith emanates from what police forces do to provide continuing education and from what the specific officer has done. Regular upgrading courses within the police department and supervision by lawyers or specialists within the force are essential measures in establishing good faith. The officer involved in the case must take full advantage of the services a police force provides to advance the basis of his/her knowledge of the law.

Police are professionals, and one of the underpinnings of a profession is a specialized field of knowledge[5]. Like it or not, the police make decisions every day that require careful and prudent deliberation that will impact people's lives, in some cases forever. Errors can be costly. When the cops screw up, cases, careers, and even lives can be at stake. "There is an old saying, 'Doctors bury their mistakes while lawyers send theirs to prison'. Police officers do a little of both"[6]. As professionals, the police owe it to themselves, their families, their organizations, and their communities to pursue a path of continuous learning that keeps pace with today's demands.

This is one reason why the "***In Service: 10-8***" newsletter was created. It is a quick way to stay on top of your game. Of course, it is not the end-all-be-all. It is simply one method of bringing that golden legal nugget from the courts to you, officers who day in and day out hit the streets. Nearly all cases are cited with web addresses where the entire case decision can be accessed for your reading pleasure. Stay current and stay safe!!!

POLICE LEADERSHIP 2004 CONFERENCE APRIL 5-7, 2004

Register soon, spaces are filling up! 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***.

[4] ***R. v. Sawicki*** **[1999] Y.J. No. 55 YTTerCrt**

[5] Tinsley, P. (2002). Codes of Ethics and the Professions. *Canadian Association of Chiefs of Police*. Fall, 2002.

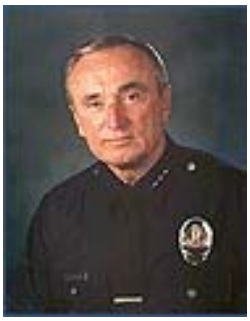
[6] Holden, R. (1986). *Modern Police Management*. Englewood Cliffs, NJ: Simon & Scuster, Inc. at p.243.

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 2000 and 2002 conferences were sold out. Early registration is $325 before March 1, 2004.

Keynote speakers:

Chief William J. Bratton NEW



Appointed the 54th Chief of the Los Angeles Police Department, William J. Bratton oversees the operations of one of the largest major municipal law enforcement agencies in the United States. His responsibilities include the supervision of 9,304 sworn and 3,055 civilian employees with an annual budget of $927 million. A strong advocate of transparent community policing that embraces partnership, problem solving and prevention, he initiated a major re-engineering of the Los Angeles Police Department, moving towards a decentralized police bureaucracy with stronger area commands that are more responsive to local community needs, and better trained and motivated police officers. Chief Bratton's vision includes a comprehensive and assertive strategy for dramatically reducing crime, disorder, and fear in the largest metropolitan city on the West Coast. Particular emphasis has been placed on gang-related crimes and the culture that creates it.

Chief Bratton is a former New York Police Commissioner who led that department to 39% decline in serious crimes and a 50% reduction in homicides. He also initiated the internationally acclaimed COMPSTAT system - a computer driven management accountability process that is an integral part of his decentralized management philosophy. It emphasizes a "management from the middle down" style that prioritized empowerment, inclusion, accountability, and the use of timely and accurate crime analysis to drive the organization.

Chief Bratton is a graduate of the FBI National Executive Institute and was a Senior Executive Fellow at Harvard University's John F. Kennedy School of Government. He is a past president of the Police Executive Research Forum, a frequent guest lecturer, writer and commentator, and is the co-author of his critically acclaimed Random House autobiography "Turnaround." Among his many other honours and awards, Chief Bratton holds the Schroeder Brother's Medal, which is the Boston Police Department's highest award for valour.

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.

Advanced Seminar/ Increment Course

Like years past, Police Leadership 2004 will be offering an additional two seminar days in conjunction with the Conference for an extra $75. Participants will attend the JIBC on April 5, the Westin Bayshore April 6 and 7 for the conference, and return again to the JIBC on April 8, providing a full 4-day course. **Dr. Darryl Plecas** (EdD) and **Dr. Greg Anderson** (PhD) will be instructing and facilitating the additional 2 days. Keeping in line with the conference theme, Day 1 of the advanced seminar will provide a general introduction and background to issues involving personal and organizational wellness. This experience will heighten the participant's awareness of key concepts, and allow them to take in and assimilate the information presented during the conference with a higher level of understanding. The day following the conference will provide participants an opportunity to review the material presented during the conference during focus groups. This day will also end with a discussion of specific issues emerging within policing today, including information on the physical demands of police work, use of force, firearms training and multi-tasking. Interested police officers are advised to check with their departmental training officers to determine whether the course is eligible for increment status.

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

www.policeleadership.org

or contact the Police Leadership 2004 Conference Coordinator Sgt. Mike Novakowski at 604-528-5733, toll free 1-877-275-4333 ext. 5733, or e-mail at mnovakowski.jibc.bc.ca.

CURRENT POLICE LEADERSHIP 2004 CONFERENCE SPONSORS

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If you, or your business, are interested in becoming a **Police Leadership 2004 Conference** sponsor, please contact the Police Leadership 2004 Conference Coordinator Sgt. Mike Novakowski at 604-528-5733, toll free 1-877-275-4333 ext. 5733, or e-mail at mnovakowski.jibc.bc.ca.

MISTAKEN LEGAL INTERPRETATION ERADICATES ARTICULABLE CAUSE

R. v. Chamberlain, 2003 NBQB 347

A police officer stopped the accused after observing a vehicle stop briefly at a railway crossing with flashing warning lights and then cross the tracks while the lights continued flashing. An odour of alcohol was detected and the accused failed a roadside screening test. Breathalzyer readings were subsequently obtained and the accused was charged with driving while over 80mg%.

At trial the Crown suggested that the police reasonably believed that the accused was committing an offence under s.182(1)(a) of New Brunswick's *Motor Vehicle Act*, which reads:

> s.182(1)(a) *Motor vehicle Act*
> Any person driving a vehicle approaching a railroad grade crossing shall stop such vehicle within fifteen metres, but not less than five metres from the nearest rail of such railroad, when
> (a) a clearly visible electric or mechanical signal device, designed to give warning of the approach of a railroad train, is exhibiting a warning signal,
> and shall not thereafter cross over the railroad track or tracks until the imminent danger from traffic on the railroad has ceased to exist.

Although the *Act* requires drivers to stop at a railway crossing with a flashing signal, it does not obligate them to remain stopped until the lights stop flashing. Provided there is no longer imminent danger from railway traffic, the driver may proceed through the flashing lights.

The trial judge concluded that the officer erroneously believed the accused had to remain stopped at the flashing warning lights in the absence of imminent danger. Thus s.182(1)(a) could not be relied upon as statutory authority to justify the stop. Since there was no other reason to stop the accused, the officer lacked an articulable cause and his right under s.9 of the *Charter* to be free from arbitrary detention was breached. The breathalyzer results were excluded under s.24(2) of the *Charter* and the charge was dismissed.

The Crown appealed to the New Brunswick Court of Queen's Bench arguing, in part, that the trial judge erred in applying the law on articulable cause.

Articulable Cause

A police officer may lawfully detain a motorist at common law provided the police have an articulable cause (aka: reasonable suspicion) on which to justify the detention. The Crown submitted that the officer honestly, but erroneously, believed an infraction had occurred when he saw the accused cross a railroad track with warning lights flashing. This, it was contended, was sufficient to meet the articulable cause threshold. The accused, on the other hand, suggested that there was no objective basis for the officer's subjective, but mistaken, suspicion. Justice Guerette, of the Court of Queen's Bench, agreed with the accused:

> There is only one "fact" before this Court (and before the Court below) which the Crown alleges constitutes articulable cause: The fact that the police officer honestly believed the [accused] was committing an offence. That assumption was based on an erroneous interpretation of the law. The [accused] was not committing an offence and otherwise was not demonstrating any behavior which would lead a police officer to suspect that an offence was being committed.
>
> The police officer, though acting honestly, did not have any "objectively discernable facts" on which to base his conclusion about the [accused]. If it were otherwise, it would encourage willful ignorance of the law on the part of the police. The objective standard is a key component of articulable cause and is there precisely to review the conduct of police officers when they arrest and detain people they "honestly" believed were committing a crime.

The Crown had failed to provide sufficient evidence of an articulable cause and the detention was unlawful. The appeal was dismissed.

Complete case available at www.canlii.org

COUNSELLING REQUIRES INTENT THAT CRIME BE COMMITTED

R. v. Hamilton, 2003 ABCA 255

The accused sold a package of files to 20 people over the internet, including an undercover police officer. Five of the 200 files in the package contained material related to constructing bombs, breaking and entering, visa hacking, and generating credit card numbers. The accused was charged with counselling four indictable offences not committed under s.464 of the *Criminal Code*. At his trial the accused testified that he did not read all of the files and did not encourage customers to commit crimes. No one receiving the files committed an offence as a result of receiving the information.

The judge concluded that the accused did not possess the requisite *mens rea* and acquitted him on all counts. In her view, the accused must not only intend to counsel the criminal act but must also intend that the counseled crime be committed. The Crown appealed to the Alberta Court of Appeal suggesting, in part, that the trial judge erred in interpreting the *mens rea* requirement. It was the Crown's position that the only *mens rea* required was that the counselling be intentional and proof of an intention that the counselled crime be committed was not required.

Counselling a Crime not Committed

Section 464 of the *Criminal Code* creates an offence for a person to counsel another to commit a crime if the crime is not in fact committed. Because there is no legislative direction on the *means rea*, it is presumed that a subjective form of *mens rea* is necessary. While the *actus reus* of the crime of counselling is that "the accused must pass on material or make statements that, when viewed objectively, "actively" induces or encourages a criminal offence", the most demanding standard of subjective *mens rea*, intention, is required. The lesser standards of recklessness or willful blindness will not suffice. Justice Conrad, for the unanimous Alberta Court of Appeal stated:

> In summary, intention is the appropriate level of mens rea for counselling under section 464 because it is the strictest standard. This section was never intended to catch within its net a professor teaching a class how to make bombs or an RCMP instructor teaching students how criminals create credit cards. Rather, it is aimed at those who encourage others to actually commit crimes. [para. 33]

Thus, the appeal court held that the counsellor must not only intend the acts of inducement, but also must intend that the counselled crime be committed. The appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

FINDING FUN IN FITNESS

Cst. Kelly Keith

Quality vs. Quantity

When it comes to working out (weights, aerobics, etc.), we must always keep in mind that the quality of the workout and the benefits we receive derive from the effort we put in. I am not a fan of many group exercises since the group is only pushed as hard as the weakest link, if you are mandated to stay together. It does not stand to reason that we write exams or compete at the weakest person's level, just as it does not stand to reason that we will make gains in physical fitness if we compete at the weakest link's level.

If I regularly run a 6 minute mile and the group pace is a 10 minute mile I will never improve my 6 minute mile pace and will not push my heart rate up to a level to make gains at a 10 minute mile pace. If I bench 200 lbs for 10 reps, however as a group we bench 140 lbs for 10 reps, again I will not make any gains. TO MAKE GAINS THE EXERCISE TIME YOU PUT IN MUST CHALLENGE YOU ! Group exercises are great if everyone in the group is able to push "THEIR" own physical abilities. I am a fan of circuit training for this very reason. You work as a group, however you are pushing your "OWN" physical abilities.

What if I want to run with my partner or work-out with a person who lifts less weight?

This can still be done very efficiently. If you are running, swimming, etc. with a partner that is not at the same aerobic level, simply ensure you include some wind sprints. For example, if you are on a 5 km run you can do you wind sprint ahead at every 1 km interval and then sprints back to re-join your partner. With a weight work-out, simply ensure you are working at the weight that pushes your strength to its limit and not to your partner's. You can still do the same exercises and both make gains!

How do I rate if I had a quality work-out?

As Charles Staley so elegantly stated, "If we rate our performance based on feeling fatigued and terrible after the work-out we could simply apply for a sparring partner for Mike Tyson."

Can Quality be judged by what our goals are?

If it is a pure strength workout you are after then our goals will be to lift a heavier weight. In other words, 2 reps of 185 lbs is a higher quality workout than a set of 8 reps with 165 lbs - even though 165 lbs may feel more difficult!

If flexibility is your goal, you need to have an accurate measure of where you're at and each session attempt to push at least 1 mm past this point. If endurance training is your goal, use a heart monitor. The higher the heart rate the harder you're working. A heart monitor is extremely important if you are serious in improving your aerobic conditioning.

Keeping a Journal of your fitness is an excellent way for you to be accountable for your gains!

Charles Staley's 5 tips on improving your skills training:

1) Practice your skills while you're fresh and concentration levels are high;

2) Shorter, more frequent sessions are preferable to longer sessions;

3) Make sure you have a method to assess both the quality and quantity of you training;

4) Once a skill is stable, it can be maintained with a lower volume of training; and

5) Fatigue is largely specific - if you are having a hard time practicing a skill that has a large balance element, switch and work on a skill that has a different quality, such as a technique that required a high degree of speed.

Succinctly, in order to make Physical Gains we need to push ourselves to new limits. This requires QUALITY TRAINING rather than QUANTITY. Shorter quality workouts vs. longer less frequent workouts will ensure you make the hard earned gains you are after!

Don't be a Kelly

I wish sometimes that **" I would do as I say, rather than do what I do "**. I was training for an adventure race in Port Angeles and had trained quite hard for the race, putting in many hours. I have always had tight hamstrings, and have many times been laid up due to pulling them. Well my hamstrings were feeling fine while I was training

so I began to neglect my stretching routine. I continued to train hard and one week before the race I pulled my hamstrings, and could not enter the race - If anyone should know better it's me! So my point—train your weak body parts first and do not neglect stretching!

If I had kept up my stretching routine, this injury would most likely never have happened. My hamstrings should be my first priority BEFORE I start any exercising. Just because my hamstrings felt good on a certain day is absolutely no excuse for not stretching them, subsequently I paid the price.

Nutrition tidbit

Kashi makes a great cereal called Kashi Crunch. This cereal is great tasting right out of the box and the ingredients are very nutritious. If you're looking for a healthy, sweet tasting, and nutritious snack - put some in a plastic baggy, add a small amount of almonds, and enjoy. As well Natures Path makes a cereal called Optimum Power Breakfast. It contains a great combination of protein, carbohydrates, and flax and also tastes great. Give them a try!

Note-able Quote

"All that is required for evil to prevail is for good men to do nothing."-Edmund Burke

JI GETS NEW LOGO

As you may have noticed from viewing the front of this newsletter, the Justice Institute of British Columbia now has a new logo.

JUSTICE INSTITUTE
of BRITISH COLUMBIA

SECURITY GUARD NOT ACTING AS POLICE AGENT

R. v. Chang, 2003 ABCA 293

Concerned about possible illicit activities in a mall parking lot near some after hours clubs, a uniformed private security guard approached a parked vehicle with its lights on. Two persons were in the vehicle and the accused, occupying the driver's seat, quickly hid something in his hand. Concerned about her safety, the security guard asked what he was hiding. He showed the guard an open pill bottle containing gel caps, but labeled ephedrine "tablets". The guard was familiar with ephedrine, but had never seen them in this form. The guard called police who arrived on scene within minutes. The officer seized the 44 pills for analysis and the accused was subsequently charged with possession of ecstasy for the purpose of trafficking under s.5(2) of the *Controlled Drugs and Substances Act*.

At trial, the Alberta Court of Queen's Bench justice concluded that the *Charter* applied to the security guard's actions. In his view, although the security guard was not acting under the direction of the police, she was familiar with police procedure and was acting as an agent of the state when she questioned the accused about the item in his hand. Furthermore, the guard failed to advise the accused of her suspicion, tell him why she was asking, or advise of him of his right to counsel. The evidence was excluded under s.24(2) of the *Charter* and the charge was dismissed. The Crown appealed the acquittal to the Alberta Court of Appeal arguing, in part, that the trial judge erred in finding that the guard was acting as an agent of the state.

Police Agent?

Unless a private citizen is acting as an agent of the state, performing a specific state function, or their actions are "part of government", *Charter* scrutiny is not triggered. Despite her

familiarity with police procedures, in this case the security guard was not acting under police direction and police intervention did not occur until after the guard had obtained the drugs. The guard's inquiries with the accused arose from her own safety concerns and her private parkade patrol duty at the mall, rather than the performance of a state function like initiating criminal charges. Comparing the role of the security guard to that of a school principal, the unanimous Alberta Court of Appeal held:

> In our view, the security guard's responsibility for protecting mall property and well-being is analogous to that of a principal's responsibility for enforcing school discipline. Given that responsibility and the finding of no prior police contact specific to this case, it was an error of mixed fact and law to conclude that the security guard was acting as an agent of the state when she inquired about the item in the respondent's hands. Nor could it reasonably be inferred that her mere familiarity with police procedure disclosed a motivation to initiate criminal charges. Hence in our view, contrary findings of the trial judge in that regard do not warrant deference, and cannot be sustained. We are satisfied that the actions of the security guard in acquiring possession of the drugs are not subject to Charter scrutiny. [para.18]

However, the action of the security guard in handing over the pill bottle and its contents to the police constituted a seizure under s.8 of the *Charter*. In other words, although the *Charter* was not engaged when the guard received the pills, it was triggered when the guard gave the pills to the police since at the time of transfer the accused continued to have a reasonable expectation of privacy in them. The Court stated:

> …the [accused's] voluntary surrender of the pills did not convey ownership to the security guard entitling the police to rely on the guard's transferral to them. Hence, although the security guard was not an agent of the police, and her acquisition of the pills did not constitute a seizure, nonetheless in our view, the "transfer of control" of the bottle and contents did constitute a seizure by the police within the meaning of s.8 of the Charter. [para. 41]

Effect of Admission of Evidence?

Having found a breach, the Alberta Court of Appeal examined whether the evidence should be excluded under s.24(2). In this case, the court concluded that the evidence should be admitted. The pills were real, non-conscriptive evidence existing prior to and independent of the *Charter* violation; its admission would not render the trial unfair. The breach was not serious and the police obtained the pills in good faith. The exclusion of the evidence, not its inclusion, would "diminish the reputation of the justice system".

Common Law Exclusion?

In a recent Supreme Court of Canada decision, *R. v. Buhay*, 2003 SCC 30, it was hinted that evidence could be excluded under a judge's common law discretion to suppress even where a private citizen's actions did not attract *Charter* protection. In this case however, the appeal court concluded that the "analysis of the common law exclusion would inevitably reach the same conclusion as the s.24(2) analysis" rendering the evidence admissible.

The appeal was allowed and a new trial was ordered.

Complete case available at www.albertacourts.ab.ca

CHARTER BREACH MUST BE MORE THAN TENUOS TO WARRANT EXCLUSION

R. v. Pettit and Pranic, 2003 BCCA 522

Police obtained a drug warrant under the *Controlled Drugs and Substances Act* to search a home that was unoccupied when police arrived. A marihuana grow operation was found in the basement. A copy of the search warrant was placed on the kitchen table. Near the

end of the search both accused returned to the home and were promptly arrested at the door before they entered the house. The accused Petit demanded to see the warrant and to call a lawyer. He was handcuffed and placed in the rear of the police car. An officer retrieved the warrant from inside the house and held it against the Plexiglas safety shield in the police car and showed it to Petit.

The police ignored Pranic's request to see the warrant and neither accused was provided the opportunity to contact counsel until at the police office. The warrant was put in Petit's effects and was placed on the counter for him to take upon his release. However, for reasons uncertain, he did not take it. It was subsequently delivered to him at his residence a couple hours later. Both accused were charged with producing marihuana.

At their trial, the judge concluded that, although the search warrant had been properly issued on the basis of an anonymous tip, personal police observations at the address, and Hydro consumption records, the accused's rights under s.8 and s.10(b) of the *Charter* were violated. In his view, the police did not properly "produce" the warrant as required by s.29(1) of the *Criminal Code*, which reads:

> s.29(1) *Criminal Code*
> It is the duty of every one who executes a process or warrant to have with him, where it is feasible to do so, and produce it when requested to do so.

The trial judge found that the accused Petit had not been given "the opportunity to properly consider, inspect or use the document." He stated:

> A warrant to search is a complex document with large, small and extra tiny commercial print and spaces for typed or script inserts. Only close examination could disclose whether it was authorized by a justice of the peace, whether the search was taking place at the authorized place, whether the search was commenced within the authorized time frame and whether the search was being conducted by authorized peace officers, among other things.

The accused Pranic's s.8 right was also violated because the police altogether ignored her request to see the warrant.

The s.10 breach arose, according to the trial judge, because the accused were not provided access to counsel at the scene. The house had been secured, there were telephones inside the home, and the police also had access to cellular telephones. The two cooperative, non-violent arrestees could have been afforded a secure private telephone, either in the house or while locked in the police car. As a result, the trial judge excluded the evidence under s.24(2) of the *Charter* and the accused were acquitted.

The Crown appealed to the British Columbia Court of Appeal. In its ruling, the appeal court justices unanimously granted the appeal and ordered a new trial. Without addressing whether the police breached the provisions of s.29(1) of the *Criminal Code*, the court examined the s.24(2) decision of the trial judge. For evidence to be excluded under s.24(2), the evidence must have been obtained in a manner that violated the rights of the applicant seeking exclusion. Generally, the evidence must flow from the breach (a causal link) or be temporally connected. In this case, there was no relationship between the police conduct resulting in the *Charter* breach and the evidence, and the temporal connection was tenuous at best. Unlike a *Charter* violation that occurs at the outset of police activity such that it could be characterized as intimately connected with a search, the search here was virtually complete before the s.29 *Criminal Code* default. Justice Donald stated:

> With respect, I do not see how the [accused] can fit themselves within the two aspects of the purpose for s. 29(1) [to allow the occupant of the searched premises to know: (1) why the search is being carried out, so as to enable the occupant to properly assess his or her legal position; and (2) that there is, at least, a colour of authority for the search and that forcible

resistance is improper]. When they returned home the search, which had been lawfully conducted, was over and they were placed under arrest. I think it is unrealistic in those circumstances to speak of the respondents' assessing their legal position in relation to the search. Forcible resistance was out of the question not only because it would have been after discovery of the grow operation but also the respondents were under police restraint.

… I cannot find a sufficient connection between the failure to produce the warrant properly and the obtaining of the evidence. There is no real temporal link because the default came after the evidence was lawfully obtained. Nor can there be any causal link because of the sequence of events…

While it was necessary for the trial judge to consider the breaches of s. 8 and s. 10(b) together in deciding the exclusion issue under s. 24(2)…, my view is that the s. 10(b) breach added nothing to the linkage between the violations and the obtaining of the evidence. The delay in providing the opportunity to contact counsel occurred after the search and so seeking advice as to the legality of the search would have served no immediate purpose. When the whole of the relationship between the breaches and the evidence is examined it falls well short of establishing that the evidence was obtained in a matter that infringed rights under the Charter. [para. 19-21, references omitted, emphasis added]

Justice Esson agreed with the disposition of the appeal by Justice Donald, but felt it necessary to express his reservations in *obiter dicta* about the correctness of the trial judge's decision on the s.29(1) *Criminal Code* issue. In his view, the accused's request to "see" the warrant was construed by the officer as a "request or demand to be shown the warrant", and not necessarily a request "to be given an opportunity to read the warrant more closely to satisfy the obligation under s.29(1)." (emphasis added)

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

ACCUSED MUST PROVE EXISTENCE OF CURFEW NOTE

R. v. Gus, 2003 BCPC 0349

The accused, who was the subject of a probation order not to be out of his residence between 11 pm and 7 am unless he was in possession of written permission from his conditional sentence supervisor or probation officer and to produce it to a peace officer on demand, was checked by police walking on a city street at 2:55 am. One of his arguments at trial in British Columbia Provincial Court was that the Crown needed to prove that he did not have written permission to be outside his residence during his curfew. Justice Rodgers rejected this submission. In the judge's view, if the accused sought to use the exception contained in the probation order the onus was on him to prove the exception existed. In other words, the accused was required to prove the existence of written permission to be outside his residence.

Complete case available at www.provincialcourt.bc.ca

POLICE MUST CHOOSE WORDS CAREFULLY

R. v. Leclair, 2003 MBPC 10037

The accused was stopped by police and after blowing a fail into a roadside screening device was read his s.10(b) *Charter* rights. The accused acknowledged understanding and replied, "Sure", when asked if he would like to call duty counsel or another lawyer. The accused was then transported to the police station where he was placed in an interview room. A police officer pointed out the Legal Aid duty counsel telephone number on the wall and dialed the number. As well, the officer provided a telephone book and told the accused that when he was done speaking with a lawyer he was to bang on the door and the

breath test would then be taken. The officer left the room and closed the door for privacy.

After approximately 20-25 minutes the accused banged on the door and the officer was told that the line was busy despite several attempts. The officer himself dialed the number and also received a busy signal. The accused was then told that he would have to provide a breath sample whether he spoke to a lawyer or not and that it was in his best interest to do so. He was also advised that if he refused, he would be charged with refusal which carries the maximum penalty. The accused made no further attempts to speak to a lawyer and he blew into the breathalyzer and failed.

At his trial in Manitoba Provincial Court the accused argued that his right to counsel was violated because his waiver was invalid. He submitted that his waiver was not based on an informed decision because the police told him it would be in his best interest to blow, that he had to do it regardless of whether he spoke to a lawyer, and that a refusal would carry the maximum penalty. The Crown contended that the accused was provided a reasonable opportunity to access counsel but was not reasonably diligent and subsequently waived his right.

Justice Chartier agreed with the accused. A proper waiver of the right to counsel requires that an accused be properly informed of their right to counsel, that they are aware of their jeopardy, and that they appreciate the consequences of deciding for or against speaking with a lawyer. In this case, the waiver was invalid. Although the accused was properly informed of his right to counsel he was not aware of the jeopardy he was facing. The police told him that "either way he had to blow or he'd be charged with refusal, which carries the maximum penalty". In the judge's view, "a reasonable person would be left, as a result of this comment, with the impression that it would be in his/her best interest to provide the breath samples." In finding a s.10(b) *Charter* breach, the judge stated:

> Let me indicate that I do not want, in any way, to leave the impression that I find that the Police were acting in some oppressive or underhanded fashion. This is a situation where the Police have to choose their words carefully. The fact of the matter is that there is no maximum penalty that exists for refusing to provide a breath sample and that in certain circumstances an Accused is entitled to refuse to provide a breath sample. [para. 27]

Since the certificate of breath analysis was conscripted evidence, it was excluded under s.24(2) of the *Charter* because its admission would bring the administration of justice into disrepute.

Complete case available at www.canlii.org

DOMINANT PURPOSE NEVER CHANGED: PRESUMPTIVE CARE & CONTROL ESTABLISHED

R. v. Schnell, 2003 SKCA 96

The accused left a friend's house after consuming 9 to 10 ½ ounces of wine and drove to the farm of her estranged boyfriend. After being told by the ex-boyfriend that he did not want to see her, she turned up the window of her car, started the motor to stay warm, and passed out. Her former boyfriend called police and the officer arrived to find the accused asleep in the driver's seat with her head leaning against the driver's window, her feet by the pedals, the engine running, the transmission in park, and the door locked. The emergency break was not engaged. The officer woke the accused and she subsequently provided breath samples over the legal limit.

At trial in Saskatchewan Provincial Court the accused was convicted of care and control while over 80mg%. Relying on the presumption found in s.258(1)(a) of the *Criminal Code*, the trial judge

found that the accused never relinquished care and control of the vehicle; her intent was not to wait at the former boyfriend's farm, but to move the vehicle as soon as she could. The "vehicle could have easily been put into gear, deliberately or inadvertently, by simply shifting the lever on the steering column…", the judge said.

The accused appealed to the Saskatchewan Court of Queen's Bench and her conviction was overturned. In the appeal judge's view the element of dangerousness required for care and control to warrant a conviction was not established beyond a reasonable doubt. The Crown then appealed to the Saskatchewan Court of Appeal.

In restoring the conviction, the Saskatchewan Court of Appeal concluded that the accused did not rebut he presumption found in s.258(1)(a) of the *Criminal Code*. This section creates a presumption that where it is proved that a person occupied the driver's seat of a vehicle they shall be deemed to have care and control, unless they establish that they did not occupy the seat for the purpose of setting the vehicle in motion. Justice Tallis, for the unanimous appeal court, stated:

> In this case the evidence demonstrated that [the accused's] dominant or controlling purpose before the critical overlap period [2 hours before the first breath sample and the time the officer arrived on the scene] was to eventually set the vehicle in motion. She passed out either before or during the critical overlap period. She took no action that shows a change in her dominant or controlling purpose before she passed out….Since there was no action demonstrative of a change in the dominant purpose, the Crown was entitled to rely on the presumption to establish "care and control".

The appeal was allowed and the conviction was restored.

Complete case available at www.canlii.org

TWO-YEAR JAIL TERM FOR 25 YEAR OLD DOMESTIC ASSAULT NOT UNFIT

R. v. W.J.T., 2003 NSCA 108

The accused was convicted during a jury trial of assaulting his wife in 1978. He punched her during an argument, rupturing her spleen, which had to be surgically removed and left her with a permanent impairment. His relationship with his family was described by the sentencing judge as one "with a high degree of brutality". In sentencing him to a two-year sentence, the judge did not consider the passage of time as a mitigating factor because the accused scared his wife into not coming forward sooner. She was under his domination and control and the fear still reigned over her even when she left the home. It was not until she was approached by police that she told what happened. Three aggravating sentencing factors were identified by the judge:

- the force of the blow resulted in permanent injury;
- the victim was his spouse—she was isolated and subjected to his unrestrained violence; and
- after striking his wife his concern was not for her recovery, but was for himself and that she not reveal how she was injured.

The accused appealed his sentence to the Nova Scotia Court of Appeal arguing that the sentence was erroneous (outside the normal range for crimes of this nature). In dismissing the appeal, the Court was not satisfied that the trial judge failed to appreciate or apply proper sentencing principles. He considered the circumstances of both the offence and the offender as well as the mitigating and aggravating factors. The sentence was not unreasonable, unfit, or manifestly excessive.

Complete case available at www.canlii.org

COMMUNITY POLICING…STARTING INSIDE THE DEPARTMENT

Dr. Kevin Gilmartin, PhD
John J. (Jack) Harris, MEd

Police administrators continue to face increasing social, financial and organization pressures to re-evaluate the police role in the community and make a commitment to community policing. Law enforcement agencies that are seen as social forces interacting and in partnership with the community stand in stark contrast to law enforcement agencies that are seen as free standing, isolated enforcers of social order. Community partnerships are better able to define problems and areas of need, than are law enforcement agencies working alone and reactively viewing the community through patrol car windows.

Police administrators, who typically agree with the philosophy of community policing, continue to reassess organizational roles in terms of partnership and community based problem solving. The "partnership," however, is often easier to see and accept by people at the top of an organization, than by line-level personnel. Law enforcement executives often find themselves making a commitment to community policing and a community partnerships with little buy-in or even active resistance from other department members.

Resistance From Within

Despite the fact that many officers believe in community policing, it can be a hard sell to line personnel. Administrators often interpret this resistance as, "officers just fighting change". While this may be partially accurate, there is another aspect that is often overlooked. When it comes to solving community problems, law enforcement executives are quick to admit their organization alone doesn't know what is best for the community. With this in mind, line personnel are encouraged to establish a "partnership with the community" by becoming problem solvers, being less authoritarian and by using more creative, proactive, innovative and non-traditional methods. At the same time however, traditional authoritarian-based, paramilitary management practices are unchanged and remain a deep tradition within many law enforcement organizations. So deep in fact, many supervisors and managers don't even realize they are still using them. With this glaring inconsistency, officers often ask, "If this stuff is so good for and more effective with the community, why isn't it good for us?"

Starting Inside The Department

For community policing to become a reality, organizations must adopt a philosophy and implement management practices that are consistent for the entire community - both inside and outside of the department. "Problem solving starts at home" is not just a cliché; it underscores the importance of community, partnership and collaborative problem solving inside the department.

If community policing is to become more than a passing buzzword, police executives must accept the fact that "problem solving starts at home." Police administrators must initiate changes in how they conduct business internally, at the same time they are asking their officers to change the way they conduct business on the street. Within any law enforcement agency, there are ample opportunities to apply community policing, partnership and problem solving techniques to internal issues.

It is not unusual to see line personnel develop a cynical view of community policing and adopt a "let's wait and see how long this will last, this time around" attitude. For the law enforcement

profession to change from reactive responders to proactive problem solvers, administrators must model the desired behaviours and ensure that needed skills are taught and developed.

Managing law enforcement organizations from a strictly autocratic chain-of-command perspective will yield exactly what that management style is designed to produce - a unified, organized and reactive force that responds to the direction of the rank structure; reacting and obeying orders as defined by a higher authority. While, to some, this might sound appealing, this management approach can produce intense feelings of resistance, victimization and passive sabotage to organizational change. It also produces rigidity, stifles creativity, forces decision making upwards, and discourages self-initiated problem solving - all the things that community policing hopes to change.

The Need For Balance

The nature of police work requires law enforcement professionals to respond to many tactical situations with military-like accountability and direction. Situationally, this approach is necessary for the effective delivery of police services. However, when this is the prevalent or the only management style, line personnel see themselves at the lower end of the continuum of authority - a continuum that denotes the degree of importance within the agency. An expectation of passive and competent obedience, while a trait valued in military operations, can be disastrous when trying to solicit input and involvement from line personnel in collaborative problem solving efforts. If department members are to see themselves as partners in the joint venture of community problem solving, they must also see themselves as stakeholders - social equals in defining and solving internal department problems - in their own department.

"Situational Leadership" (Blanchard & Hersey) emphasizes the importance of management flexibility and the use of management styles that are consistent with the situational demands being addressed. Police administrators must create an atmosphere where situational leadership becomes the norm and where "Situational Followership" is cultivated - that is where employees can understand and distinguish between situations where strict compliance is required and where team building, collaborative problem solving skills are appropriate.

Decisions based solely on an authoritarian management system might yield structured compliance but not creative contributions and solutions, a trait necessary for community policing to be successful. The belief that, "the brass wants us to listen to the community and see what their problems are, yet they won't listen to what our problems at the department are," is not just grumbling from a few isolated malcontents, it is the reality for many officers. For police administrators, the task of making department members stakeholders is predicated on the belief that all members of the department have a contribution to make to department problem solving and service delivery, beyond just respectful compliance to orders and directives.

The Need For Change

Can police administrators initiate significant changes in law enforcement/community interaction without precipitating major malcontentism or invalidating a very necessary chain-of-command protocol? The answer is yes . . . if police administrators are willing to re-evaluate and redefine their management practices and executive roles as they relate to the department decision making and input processes.

For officers to believe they are stakeholders in their department and for community policing to become a reality, police managers will more likely have to make greater changes than will line personnel. In an authority-driven organization, problem definition and proposed solutions are usually judged by whom make the recommendations, rather than the accuracy of

the definition or the effectiveness of the solutions.

Situations where there are high demands and low control cause major emotional distress for those involved. Law enforcement personnel who have a heavy emotional investment in the job and little or no control over factors affecting that job will become the most distressed. They often express their distress with passive resistance and sabotage, knowing that open dissention can bring sanctions for insubordination.

To create an atmosphere of cooperation and reduce the sense of victimization, people either have to reduce their level of emotional investment in the organization or believe they have a meaningful degree of control or input into their job roles. Talk about empowering department members, partnerships and collaborative problem solving usually occurs in the context of working with the community outside the department. However, these concepts are often mere "buzzwords" or are simply ignored when they are applied to the community inside the department. Line personnel are quick to see the discrepancy and realize that, despite what is being said, they have very little power in terms of their role in department problem solving.

Collaborative problem solving and teamwork does not require police managers to relinquish their power or status. Unfortunately, internal collaborative problem solving, partnership and empowerment are often seen as a threat to management's authority, status and position.

Police managers have real power and authority within the organization. Creating internal partnerships requires managers to accept the fact that, collaborative, department stakeholders can better define and solve internal problems. Managers must learn to situationally give up some of their authority-based decision making. Participative decision making has to and can effectively co-exist in a police agency with chain-of -command decision making.

Being a stakeholder means having a real say and an investment in the process. For community policing to become a reality, law enforcement executives must create an internal atmosphere of "problem solving begins at home." Better interpersonal, problem solving and group dynamic skills (including, team building, conflict and anger management, mediation techniques and communication skills) must become a requirement for all law enforcement personnel, regardless of rank. Until police administrators are willing to create an atmosphere of internal partnership, community policing will remain just a trendy buzzword.

While tactical decisions require tactical compliance, organizational input on less exigent matters must be solicited and valued. Partnerships based only on rank and status will yield at best compliance, not genuine buy-in or creative investment. Group processes that value input and permit open, candid discussion can exist side-by-side with the traditional paramilitary command structure without compromising organizational functioning or discipline. This does, however, require higher-ranking personnel to redefine the manner in which they manage and interact with their employees. Rigid, rank- or status-driven decisions produce reactivity. Open, respectful group processes can enhance the quality of police service and increase the sense of ownership by line personnel in the mission.

Making It Work

Commanders, who are comfortable with and benefit most (in the short-term) from rank-driven, reactive compliance, may see this change as a threat to their authority. In the long-term, however, these changes and a real sense of internal partnership will result in an overall improvement in department effectiveness and will make an administrator's tasks easier to complete. A workforce committed to the organization's long-term goals is far superior to a workforce of enthusiastic obedience by newer members, passive compliance by mid-career personnel and

open cynical negativity by veterans who gave up years ago on the idea of being stakeholders or that their input would be valued.

Teaching police managers to interact with non-managers in group discussions on a equal level and without personalizing criticism can be a difficult task. Creating cross-functional teams that run parallel to the command structure is an important challenge for police executives who really want community policing to be an integral part of the department. A commitment to "problem solving starts at home" has to become a reality before community policing can become a meaningful part of a department's culture.

Law enforcement executives who make "Community Policing…Starting Inside the Department" a management reality can expect to see positive internal and external changes. On the other hand, law enforcement executives who continue with business as usual inside the department while espousing the value of community policing outside the department, can look forward to continued internal resistance and misunderstanding and will not realize the full benefits of community policing.

Editor's note: "In Service: 10-8" would like to thank Dr. Kevin Gilmartin of Gilmartin, Harris, and Associates for permission in reprinting this article. This and many other excellent articles are available at the website of www.gilmartinharris.com. Dr. Gilmartin will be a keynote speaker at the Police leadership 2004 Conference.

Note-able Quote

It is one thing to have the time in a trial over several days to reconstruct and examine the events which took place…. It is another to be a policeman in the middle of an emergency charged with a duty to take action and with precious little time to minutely dissect the significance of the events, or to reflect calmly upon the decisions to be taken—Ontario Superior Court Justice Power[7]

[7] Chartier v. Greaves, [2001] O.J. No. 634 (OntSCJ)

COUNSELLOR MUST INTEND OFFENCE BE ACTUALLY COMMITTED

R. v. Janeteas,
(2003) Docket: C33474 (OntCA)

The accused met a woman, who was having serious marital difficulties, and her mother during a business transaction and soon learned that the women wanted the husband harmed or even killed. To obtain some hard evidence to take to the husband, who was a doctor, the accused actively encouraged the woman and her mother on the telephone to have the woman's husband harmed or killed and that he was willing to make the necessary arrangements as they wished. The accused tape recorded these conversations and met with the doctor to warn him. The doctor paid the accused $35,000 in cash. The accused was subsequently arrested and charged with counselling murder not committed and two counts of counselling unlawfully causing bodily harm not committed.

At his trial, the accused testified that he never intended that any harm come to the doctor, rather he simply wanted to record the women's plans so he could obtain some hard evidence to take to the husband. The woman denied telling the accused that she wanted her husband killed and reported the accused's activities to police. The accused was convicted by a judge and jury and received an 18-month conditional sentence. He appealed to the Ontario Court of Appeal arguing that the trial judge improperly instructed the jury on the necessary *mens rea* by telling them that the only intent required was that the accused spoke the words with the intent that his advice or counselling be accepted.

The question on appeal was whether the mental state of the counsellor was irrelevant as to whether the offence was (or was not) to be committed. Crown argued that the only necessary

mental element is that the accused intended to speak the words constituting the counselling while the accused argued that in addition, the Crown must prove the accused intended the counselled crime to occur.

Comparing the inchoate crime of counselling to that of attempts (which requires an intent to commit the desired offence) and conspiracy (which requires an intent to commit the offence that forms the subject matter of the agreement), the Ontario Court of Appeal ruled that the requisite mental element of counselling requires that the counsellor actually intend the offence be committed. This level of intent was not properly conveyed to the jury nor was there evidence to support it. Therefore the conviction was quashed and acquittals were entered.

Complete case available at www.ontariocourts.on.ca

NO KNOCK ENTRY VIOLATES *CHARTER*: EVIDENCE EXCLUDED

R. v. Lau, 2003 BCCA 337

A police officer received an anonymous Crime Stoppers tip of a possible residential marihuana grow operation involving two Asian males in their 30's. The tip reported that an odour of marihuana could be smelled coming from the home from time to time, the venetian blinds were closed, and there were two vehicles associated to the house. Following a number of visits to the house, the officer noted all but one small window was covered by venetian or vertical blinds. This small window had the blinds raised about 18" and had condensation on the bottom half. The officer also smelled growing, bulk marihuana on one or two occasions. A search warrant under s.11 of the *Controlled Drugs and Substances Act* was obtained.

Prior to executing the warrant, a briefing was held to discuss the entry. Despite not knowing whether there were or were not weapons present, it was decided a battering ram would be used to surprise the occupants and gain quick control in an effort to ensure the safety of all involved, both the police and the occupants. The police entered the home by battering ram without knocking and announcing their presence and had their guns drawn. The accused was found seated in the living room watching television. A two-stage marihuana production operation consisting of 252 plants was located.

At his trial, the British Columbia Supreme Court justice found the police violated the accused's rights under s.8 of the *Charter*. Following precedent, in the judge's view, the use of the battering ram was unreasonable in the circumstances. However, he admitted the evidence under s.24(2) of the *Charter*. The accused appealed to the British Columbia Court of Appeal arguing that the trial judge erred in failing to exclude the evidence.

The British Columbia Court of Appeal agreed. Section 14 of the *Controlled Drugs and Substances Act* "permits the police to enter a home with a certain degree of force, without announcing their presence, if the circumstances make it necessary for them to do so." A knock and announce waiver requires a significant likelihood of danger to the police or loss of evidence if they do announce their presence. General experience of danger is not enough by itself to justify a no knock entry. In this case, there was no evidence that the police made any enquiries to determine the level of danger at the premises they searched. Instead, the police were acting under a blanket policy that was contrary to legislation. Justice Ryan, for the unanimous appeal court, wrote:

> It is important to acknowledge that the motivation behind the police policy in this case is not open to debate. That it is necessary to ensure the safety of the police and of the occupants of a home when the police undertake operations to enforce the laws of this country is beyond question. But good motives do not permit the police to formulate policies which are contrary to legislative

> requirements. The difficulty in this case is that s. 12 of the *Controlled Drugs and Substances Act* does not permit the formulation of a blanket policy for searches under s. 11 of the *Act*. By s. 12 Parliament has required that the use of force be as is necessary in the circumstances. Therefore, each case must be considered independently. The officers in this case did not advert to this requirement. Rather, they based their decision to enter the premises in the manner that they did on a policy which, contrary to the *Act*, requires surprise entries with respect to every marijuana grow operation (unless the police know children or old people are present) without regard to the circumstances which prevail in the situation at hand. Good faith cannot be founded on a policy which is made contrary to the dictates of the legislation. [para. 39]

The method of entry was obtrusive and the accused's privacy interest in his dwelling was high. The breach was serious, flagrant, and not committed in good faith. The evidence was excluded under s.24(2) of the *Charter* and the conviction was set aside and an acquittal was entered.

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

POLICY BASED NO KNOCK ENTRY BREACHES COMMON LAW RULE

R. v. Schedel & Schedel, 2003 BCCA 364

A police officer detected a marihuana grow operation at a home. He could smell growing marihuana, heard fans running, and saw coverings on the basement windows. The officer informed a BC Hydro technician who conducted an investigation. He subsequently told the officer that a theft of electricity was occurring at the residence. The officer applied for and was granted a *Criminal Code* search warrant, which included an order allowing the technician to assist in the dismantling of the electrical diversion. There was no reference to drug offences nor did the police have any information about who might be in the house, who it belonged to, or who occupied it.

A team of eight officers was assembled and the warrant was executed when police entered the home using a battering ram on the closed front door; the back door was open. No prior police warning was given and the officers entered with their guns drawn. After entry, police announced themselves and that they had a search warrant. The accused and two visitors were arrested for possession and production of a controlled substance, handcuffed, and ordered to lie on the floor. A marihuana grow operation and a quantity of harvested marihuana was found in the basement. All four persons were transported to the police station, strip searched, booked into cells, and later released. The visitors were never charged but the two accused were charged with production of marihuana, possession of marihuana, and fraudulent consumption of electricity.

At their trial, the judge concluded that there were several *Charter* breaches including a s.8 *Charter* violation protecting residents of dwellings from unreasonable search and seizure. This was the most serious violation and occurred when police failed to knock and announce at the time of their entry. The police had a policy and practice of entering without notice or announcement; arguing it was the safest method of entry for both the police and the occupants and because weapons had been occasionally found at marihuana production operations in the past.

The police testified that unannounced entry creates the necessary surprise to ensure safety and does not allow the occupants any choice but to comply with the level of force presented. Unless there was evidence of the presence of children or elderly people, the approach taken by the police was to breach the door. In the trial judge's view there was no information specific to the premises that warranted the discarding of the knock and notice rule. However, he found that

the breaches were not sufficiently serious to warrant exclusion of the evidence. The police at the time were operating under an established policy that had not yet been ruled illegal. In any event, the grow operation would have been discovered whether they announced themselves or not. Thus, the accused were convicted.

On appeal to the British Columbia Court of Appeal, the evidence was excluded. In this case, "the police had no knowledge of who occupied the house and no information of any specific risk." Generally, when a house is to be searched, the police must first make a formal demand to open the door before an entitlement to enter or use force arises. This demand can be discarded, however, if rapid action is necessary to prevent the loss or destruction of evidence, or if circumstances demonstrate a real threat of violent behaviour. It is not within the unfettered discretion of the police to deviate from the knock and announce rule. Where the police depart from the requirement to comply with this common law rule, they must establish why they used the force they did or enter without first announcing before they entered. It will not be sufficient to justify their manner of entry by what they find after they enter by using an *ex post facto* analysis. The police must have a real concern and identify specific circumstances upon which to base that concern before they enter without first knocking and announcing.

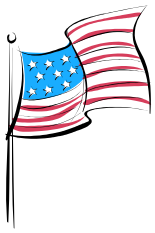
The policy relied upon in this case to use unjustified force was an abuse of the common law and *Charter* rights of the accused and seemed "to run contrary to common sense as well as the clear letter of the law." The court ruled that "the means by which the search was carried out were so clearly unreasonable, and the *Charter* breach so serious, that the evidence must be excluded."

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

Note-able Quote

Be wise in the way you act toward outsiders; make the most of every opportunity—Colossians 4:5

CANADIAN 'AMERICA DAY' RECEIVES FIRST READING



On September 16, 2003 Bill S-22, an Act respecting *America Day* received first reading in Canada's Senate. The *Act*, if passed, will recognize September 11th of each year under the name of "America Day". The preamble to this proposed *Act* reads:

> WHEREAS the surprise attack on innocent lives from all corners of the globe and representing all religions, in New York City on September 11, 2001, changed the history of the United States, Canada and the world;
>
> AND WHEREAS Canadians lives were among those lost:
>
> AND WHEREAS it is essential to ensure that history does not repeat itself;
>
> AND WHEREAS it is fitting to commemorate September 11 as a day of remembrance and reflection, on which to consider our common values and differences…

ENTRY INTO TRAILER CONSENTUAL: POLICE OBSERVATIONS LAWFUL

R. v. Pedden, 2003 BCCA 498

A victim, known to have a problem with alcohol abuse, reported to a city police officer that she had been sexually assaulted in the accused's trailer. She was referred to the RCMP, who had jurisdiction in the area, and a full statement was obtained where it became apparent that the victim did not know exactly what had happened. She said that after meeting a man named "Brian" at a pub the previous day, he picked her up and took her to his trailer. They ate ribs and drank alcohol. She remembered being straddled, having the accused attempt to pour alcohol down her throat, and having clear tape placed over her mouth. There is

a long gap in her memory and then she recalls waking up at home only wearing her outer clothing. She did not think she had been sexually assaulted because she had no injuries nor did she feel any pain. She would not go to the hospital for an examination but felt that something had happened to her because of the strange gap in her memory.

A uniformed officer attended the accused's trailer to see if a "Brian" lived there and to get his side of the story. The officer was not there to conduct a search and testified that he did not know if there was an assault or whether someone was partying, passed out, and then forgot where they were. The officer knew the accused's full name because he queried the licence plate of the vehicle parked at the trailer. The accused was home when police arrived.

Outside the trailer, the accused told the officer that he remembered the victim. He acknowledged meeting her at the pub and drinking together. The officer told the accused that she had come to the police with a story and that he wanted to ask a few questions. The accused said sure and agreed to allow the officer to step inside the trailer to discuss the matter. The officer asked to talk inside because he did not want to let others in the trailer park overhear the conversation.

Standing just inside the door, the officer was able to see inside the trailer. The accused admitted the complainant had been at the trailer, and said she had became drunk and upset, urinated in her pants, and then vomited. He says he drove her home and did not see her again. The officer informed the accused that the complainant had lost some personal items. The accused said she left nothing at the trailer and invited the officer to look around. The officer declined, however he could see some rib bones in an ashtray on the kitchen table and a video camera mounted on a tripod in the living room. The officer then left.

Unsure of whether he in fact had a crime, the officer intended to re-interview the complainant. While at the detachment, the officer learned that another officer had an open sexual assault investigation file in the accused's name resulting from an anonymous tip to Crime Stoppers. The tip reported that the accused was picking up women, drugging them, and videotaping sexual assaults against them. Based on this information, the police applied for and obtained a search warrant to search the accused's trailer. The warrant was executed and videotapes and other physical evidence were located. Two other victims were identified and the accused was convicted in British Columbia Provincial Court of sexual assault causing bodily harm, sexual assault x 2, unlawful confinement x 3, administering a stupefying or overpowering drug to commit an indictable offence x 3, assault with a weapon, and uttering threats.

The accused appealed his convictions to the British Columbia Court of Appeal arguing that the police violated his *Charter* rights and that the evidence, including the videotapes depicting the sexual assaults, was inadmissible. He suggested, among other arguments, that the officer should have advised him of his *Charter* rights under s.10(b) when he attended the trailer to speak to him and that the warrantless entry at this time breached the accused's right under s.8 of the *Charter* to be secure against unreasonable search and seizure.

The British Columbia Court of Appeal rejected these grounds of appeal. Section 10(b) only arises on arrest or detention. Since the officer neither arrested or detained the accused when he attended the trailer to question him there was no need to provide s.10(b) rights. Moreover, the officer was not there to conduct a search. He was there to talk to the accused and determine what had happened. He did not trick his way inside, rather he was demonstrating concern for the accused's privacy in suggesting they talk inside the trailer. The officer had no reason to believe there might be any evidence inside the trailer.

The presence of the rib bones only had the potential of circumstantially confirming the complainant had been there, a fact admitted by the accused. The accused had consented to the officer's entry and had also invited him to look around. Thus, there was no illegal or unreasonable search. The appeal was dismissed.

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

ROADSIDE 'FAIL' READING CONSIDERED IN ASSESSING ACCUSED's CREDIBILITY

R. v. Fox, 2003 SKCA 79

After stopping the accused at about 3:30 am for driving a truck without licence plates, the officer noted an odour of liquor on his breath. No other indicia of alcohol consumption were observed. The accused failed a roadside screening device, was arrested, and a demand for breath samples was made. Two breath tests were taken resulting in readings of 130mg%.

At his trial in Saskatchewan Provincial Court the accused testified he consumed a maximum of six cans of beer between 10:30 pm and 1:30 am. An expert in human absorption and elimination of alcohol provided an opinion that the accused's blood alcohol level at the time of driving, based on his weight, alcohol elimination and absorption rates, and drinking pattern, would only be 60mg%. Furthermore, the expert testified that at the time of the first test his reading should have been about 53mg%. Although the trial judge accepted this evidence as rebutting the presumption of the breathalyzer's accuracy, he ultimately rejected it and concluded that on the whole of the evidence, including the fail on the roadside screening device, that the accused was guilty.

The accused appealed to the Saskatchewan Court of Queen's Bench which ordered a new trial. The appeal judge agreed that uncorroborated evidence of low alcohol consumption by itself can rebut the presumption of accuracy, but the trial judge's reliance on the roadside screening device warranted a new trial. The Crown appealed this judgment to the Saskatchewan Court of Appeal.

Section 258 of the *Criminal Code* creates two presumptions:

- the presumption of identity; and
- the presumption of accuracy.

The Presumption of Identity

The presumption of identity concerns the blood alcohol content at the time of driving. Provided the preconditions of s.258(1)(c) of the *Criminal Code* are met, the accused's blood alcohol content at the time the samples are taken is presumed to be the same as when the accused was driving. A person can challenge this presumption while still accepting readings as accurate, such as through late or bolus consumption of alcohol. Thus, a challenge to this presumption accepts the reading at the time of test, but argues that the reading does not properly reflect the blood alcohol level at the time of driving. Once the presumption of identity is rebutted, the Crown is required to prove blood alcohol level at the time of driving by other means, usually by calling an expert to interpret the breathalyzer reading back to the time of driving.

The Presumption of Accuracy

Section 25(1) of the *Interpretation Act*, applied to s.258(1)(g) of the *Criminal Code*, provides that the facts recorded in the certificate of analysis are, in the absence of any evidence to the contrary, deemed to be established. A challenge to this presumption disputes the reading at the time of test. In this case, the accused argues that the 130mg% reading is incorrect because he did not consume enough alcohol to justify that level on the breathalyser. Thus, he challenges the presumption of accuracy, not the presumption of identity. However, once the presumption of accuracy is rebutted, the evidentiary aspect remains. In other words, "once an accused

successfully rebuts the presumption of accuracy, the certificate is no longer deemed to establish the blood alcohol content at the time of testing…but the certificate remains part of the evidence, and it is some evidence of the facts contained therein."

Rebutting the Presumption of Accuracy

After reviewing much jurisprudence in this area Justice Jackson, delivering the judgment of the Saskatchewan Court of Appeal, ruled that evidence of low alcohol consumption by itself could be capable of rebutting the presumption of accuracy. It is not necessary to establish by direct evidence breathalyzer malfunction, operator error, or contamination.

The Roadside Screening Device Reading

Because the roadside test is compelled and there generally is no right to counsel before providing the sample, the readings cannot be used to decide whether the accused is over 80mg%. However, the judge was permitted to use the roadside screening result to test the credibility of the accused that he only consumed six beer. Justice Jackson wrote:

> The roadside screening test is not being used, on its own, to convict the accused. It is, instead, some evidence which the court can consider to test the accused's statement that he or she had little to drink and to test the inference which flows from that statement that the breathalyzer was not working properly.
>
> The Criminal Code does not preclude the use of the roadside test in this manner. Parliament permits the police officer to obtain this evidence to confirm suspicion that the driver may be over .08. While the accused has no option but to provide the sample, it is difficult to see where there may be an abuse of authority in the way such abuse may arise when a confession is obtained. This is not compelled action by means of a state official against an individual as one would see with respect to a confession. In this case, Parliament has made the decision that individuals must provide a roadside breath sample.
>
> Once having obtained the result of the test, it forms part of the officer's reasonable and probable grounds to demand samples of the accused's breath. The procedure in this jurisdiction is that the arresting officer details all of the evidence from the initial contact with the accused until a demand is made, for the purposes of laying the foundation for his or her reasonable and probable grounds to have made the demand. Thus, the evidence is before the court as part of the record.
>
> Until the accused takes the stand and swears that he or she consumed little or no alcohol, the Crown does not know what the accused's defence will be. In a system which requires full Crown disclosure and no defence disclosure, it is not unreasonable for the Crown, at that point in the trial, to ask the court to consider the evidence of the roadside screening device to weigh the accused's credibility….[para. 79-82]

Here, there was no evidence the roadside screening device was malfunctioning. The officer was trained in its operation and the device was calibrated to register a fail with a reading of 100mg% or greater. Justice Jackson concluded that the trial judge did not err in rejecting the accused's testimony based on the whole of the evidence, including the strength of the certificate and the roadside "fail" reading. The appeal was allowed, the order granting a new trial was set aside, and the conviction was restored.

Complete case available at www.canlii.org

WARRANTLESS PLAIN VIEW SEIZURE LAWFUL

R. v. Gibson, 2003 BCSC 1572

A citizen called police to report that an unoccupied neighbouring house had its front door wide open, its lights on, and marihuana

plants could be seen inside the house through the open doorway. The police attended and found the front door broken open, lights on, footprints in the fresh snow leading up to the front door and around the perimeter of the house, but no marihuana plants could be seen. With firearms drawn, the officers entered the house to search for any suspects who may have broken into the house. They smelled marihuana and found a grow operation in one of the rooms. No one was found in the house nor were there any signs anyone had been recently living there. A car drove into the driveway and after admitting ownership of the room and the plants, the accused was arrested. The marihuana plants were then seized without a warrant.

During the *voir dire* to determine the admissibility of the evidence the accused conceded that the initial police entry and preliminary search was lawful, but argued that the police could not lawfully seize the plants and grow equipment without a warrant. In his submission the initial search could only provide grounds to support a search warrant application, but could not replace the warrant requirement for a lawful seizure. Thus, the police violated his s.8 *Charter* right to be secure against unreasonable search and seizure. On the other hand, the Crown submitted that the seizure was reasonable under both the common law plain view doctrine as well as incidental to arrest.

Justice Halfyard rejected the incidental to arrest submission because the arrest was effected outside the residence and he was "not prepared to say that the room inside the house [fell] within the purview of "[the accused's] immediate surroundings." However, the plain view doctrine was applicable. The plain view doctrine requires the following essential ingredients:

- "the police officer had lawful, prior justification for his or her intrusion into or presence at the place where the evidence was found;
- "the police officer discovered the evidence inadvertently while in the course of exercising a lawful police power or performing a lawful police duty;
- "the evidence was in plain view in the sense that it was detected through the unaided use of the police officer's senses; and
- "it must have been immediately apparent to the police officer that the evidence was probably connected with criminal activity.

In this case all of the elements were established. The accused failed to establish a *Charter* violation and his application for exclusion was dismissed.

Complete case available at www.bccourts.bc.ca

HYDRO INSPECTION ON PROPERTY DOES NOT REQUIRE WARRANT

R. v. Benham, 2003 BCCA 241

After two blown power pole transformers outside the accused's residence, an employee of B.C. Hydro's Security Division attended the pole to determine what caused the problem by checking the wires running to the residence. He discovered an excessive amount of electricity being used, likely the cause of the two transformer failures. He re-attended two days later with a colleague to check the meter on the outside of the residence. At this time an electrical bypass was discovered. The police drug unit was notified and a *Criminal Code* search warrant to investigate the theft of electricity was obtained. While executing the warrant the police discovered a grow operation and subsequently obtained a second warrant to search the premises under the *Controlled Drugs and Substances Act*. Police seized 506 marihuana plants and 130 cuttings worth an estimated $170,000 if sold by the pound and $425,000 if sold by the gram.

At his trial, the accused challenged the constitutional validity of the British Columbia *Hydro and Power Authority Electric Tariff* which gives B.C. Hydro employees access to its equipment (meters and other apparatus) on the premises of its customers. The trial judge ruled against the accused and he was convicted of possession of marihuana for the purpose of trafficking, cultivation of marihuana, and theft of electricity from B.C Hydro. The accused was sentenced to a nine month conditional sentence, was ordered to pay restitution in the sum of $8,511.03 to B.C. Hydro, and his grow equipment was forfeited.

The accused appealed to the British Columbia Court of Appeal arguing, in part, that the entry of the B.C. Hydro employees under the regulation violated his s.8 *Charter* right to be secure against unreasonable search and seizure. The regulation reads:

> The Authority's agents and employees shall have, at all reasonable times, free access to the equipment supplied with electricity and to the Authority's meters and apparatus and the wires leading therefrom on the customer's premises to ascertain the quantity or method of use of service.

One of the accused's submissions contended that when Hydro employees use the regulation to gather evidence for a criminal theft of electricity prosecution, it should be rendered unconstitutional because it does not contain prior (pre-search) judicial authorization. He asserts that the second visit by Hydro employees onto the property was to investigate a theft of electricity and breached his s.8 *Charter* rights. The information from this visit could therefore not be used to obtain the *Criminal Code* search warrant. Since this warrant was invalid, the discovery of the grow operation was tainted and the subsequent drug warrant was also invalid. In the accused's view, all of the evidence was inadmissible and he should have been acquitted. The Crown suggested that the regulation allowing access by B.C. Hydro employees did not breach s.8.

Justice Low, writing the unanimous judgment, rejected the accused argument. He stated:

> The relationship between B.C. Hydro and its customers is contractual. The terms of the contract are dictated by statute and regulation. When a person signs up for electrical service to his home, as the [accused] did, he or she agrees to be bound by the terms of the contract. It is apparent that equipment of the supplier of the service must be on the premises of the consumer. It would be commercially unrealistic for the supplier to be denied access to that equipment. The Tariff regulation under attack provides for access "at all reasonable times" for meter reading and to ensure that the customer is using the service properly. In addition to the possibility of theft, there are obvious safety issues that B.C. Hydro must address. Under s. 38 of the *Utilities Commission Act* …B.C. Hydro is under a duty to provide a service to the public that is "adequate, safe, efficient, just and reasonable". [para. 18]

Although the excessive amount of electricity being consumed at the accused's residence caused the employee to suspect that there was a marihuana grow operation at the residence, B.C. Hydro still had a legitimate commercial interest and safety concern in investigating the anomaly that appeared to be a theft of electricity. The search in this case was conducted by a B.C. Hydro employee in accordance with a regulatory scheme involving minimal intrusion. The employee examined equipment owned by B.C. Hydro situated outside the residence in plain view, the information obtained was neither intimate nor private, and customers have imputed the right of Hydro to enter to check equipment. Thus, there is a low expectation of privacy when B.C. Hydro employees enter onto their customer's property to check equipment.

Investigating the theft of electricity, although a criminal offence, does not take the activities of B.C. Hydro employees outside the properly circumscribed regulatory context into a context with purely law enforcement objectives. Provided

Hydro limits their entry to inspect equipment they own and investigate matters relevant to their commodity, the absence of pre-search authorization does not render the regulation unconstitutional. The appeal was dismissed.

Complete case available at www.bccourts.bc.ca

HIGHWAY SAFETY REAL FACTOR IN STOPPING CAR

R. v. Coates,
(2003) Docket: C35204 (OntCA)

Two Ontario police task force members investigating a rash of violent robberies were patrolling the area where the robberies had occurred, looking for suspicious vehicles or individuals. At 2 am. they noticed a Quebec plated vehicle near a commercial area where tourists would not be expected. While the car was stopped at a red light, one of the officers observed that the driver and passenger were not speaking to one another and did not appear to "belong together". The passenger looked very nervous and was not wearing his seat belt. Both occupants also avoided eye contact, staring out the front windshield.

When the light turned green, the police followed and the car made an abrupt lane change near an intersection as if to avoid police contact. The police continued to follow and stopped beside the car at a red light. Once again, despite the efforts of the police to make eye contact, the passenger stared straight ahead and refused to look over or acknowledge the police. When the light turned green, the car remained stationary for several seconds before it turned left. The police activated the emergency equipment and stopped the car.

A black sock-like object was thrown from the front passenger window. One of the officer's nudged the object with his foot and several silver bullets fell out, forming the belief there was a strong possibility there was a firearm in the car. However, as a safety precaution the police decided to act as if they were unaware of the bullets.

The accused, who was the driver, was asked for his licence, ownership papers, and insurance and told he was being stopped because his passenger was not wearing a seatbelt. When asked where he was going, the accused replied "McDonald's". The officer did not believe him because they had just passed a McDonald's. An officer shone his flashlight into the car and noted power cords of the type associated with radar detectors and binoculars under the passenger seat. The officer asked if there was a radar detector in the car and for the passenger to step out of the car. A balaclava and an unfolded city map were observed on the back seat when the passenger door was opened.

The passenger was escorted back to the police car, pat-down searched, and placed in the back seat for officer safety concerns. The accused was then arrested for having, or being about to commit, an indictable offence. He was searched and five .38 calibre bullets, a small tape recorder, papers, and a large quantity of cash were found in his waistband. He was re-arrested, but neither he nor his passenger were given their right to counsel. A quick interior search of the car revealed two full-face balaclavas, a radar detector in the glove box, a roll of duct tape in the armrest, and the open city map. In the trunk, the police found a gym bag, panels for a bulletproof vest, a camouflage jacket, and a video camera. A follow up search warrant was obtained and the police subsequently recovered a .38 calibre handgun containing hollow point ammunition under the back seat along with other items from the car.

At the accused's trial the judge accepted the officer's evidence that the unrestrained passenger was not a pretext for the pullover, but was a real factor in stopping the car. The police had an articulable cause in the circumstances to stop the car and there was no s.9 *Charter* breach. The accused was convicted of carrying

ammunition without lawful excuse in a careless manner and possession of a restricted firearm under the *Criminal Code*.

The accused appealed his conviction to the Ontario Court of Appeal arguing, among other grounds, that the police did not have an articulable cause to stop the car and therefore he was arbitrarily detained under s.9 of the *Charter*. The search and seizure that followed was therefore unreasonable and the evidence should have been excluded.

The Stop

A stop will not be arbitrary and thus comport with the requirements of s.9 if the police have an articulable cause to justify the detention. In referencing previous case law on articulable cause, Justice Weiler for the unanimous court wrote:

> [A]rticulable cause is "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is implicated in the activity under investigation." In ascertaining whether articulable cause exists the court must have regard to the facts and circumstances as a whole, rather than isolating each in turn and must be satisfied that there are bona fide clearly expressed and factually objective reasons justifying not only the detention of the suspect but also the extent and nature of the investigation. [para. 3]

In this case the police provided two clearly expressed specific factors as grounds justifying the stop under s.216(1) of Ontario's *Highway Traffic Act*; the seatbelt infraction and the abrupt lane change (which the officer associated with the possibility of an impaired driver). The trial judge concluded that these factors were not used as a pretext for the stop and it was not unreasonable for him to conclude that highway safety was one of the real reasons for the stop. As well, the police had an articulable cause to briefly detain the accused for investigative reasons other than highway safety matters. Justice Weiler stated:

> In the context of the investigation of the recent robberies, the time of night, the area of the stop, and the other observations demonstrating that the [accused] and his passenger were acting suspiciously and evasively, the police had articulable cause to detain the [accused] for brief investigative purposes. [The officer] had an objective factual basis that gave rise to his suspicion and this basis rose above the level of a mere hunch. The existence of other lawful police purposes such as investigation of other criminal activity and intelligence gathering, in addition to highway safety concerns, does not taint the lawfulness of the stop [para.26, references omitted]

The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

PLAYING N-A-M-E GAME RESULTS IN CONVICTION

R. v. Hyde, 2003 BCSC 368

Occasionally, it takes a full reading of an entire case to get a clear picture of what exactly has transpired in court. This is one such case. The full Supreme Court of British Columbia excerpt as reported is provided for your reading pleasure:

> [1] THE COURT: This is an appeal from a deemed conviction for speeding against a municipal sign under the Motor Vehicle Act, s. 146(7).
>
> [2] The circumstances of the conviction are unusual. The matter was set for trial and then adjourned to May 28th, 2003. It came before a Justice of the Peace in traffic court in Port Coquitlam. The transcript of the proceedings in court at the time the matter was scheduled to proceed reads as follows:
>
> THE COURT: David Hyde.
> UNIDENTIFIED SPEAKER: Yeah, I'm here in relation to that matter, sir.
> THE COURT: Thank you.

[3] Other matters were then spoken to. The transcript continues:

THE COURT: David Hyde. Are you ready to proceed, Mr. Hyde?
UNIDENTIFIED SPEAKER: I am the -- I am the -- I'm here concerning that matter and I am -
THE COURT: Are you David Hyde?
UNIDENTIFIED SPEAKER: I am the secured party, sir.
THE COURT: Are you David Hyde or not?
UNIDENTIFIED SPEAKER: But I don't know what name you've got written up there.
THE COURT: Well, I've got David Hyde. If you're not David Hyde, you can leave the court area. You are David Hyde?
UNIDENTIFIED SPEAKER: I can't answer that without seeing the words you have written there.
THE COURT: Okay, then just move. Okay, you can move now. I'm going to declare that the charge is not disputed because Mr. Hyde is not present. So you're free to go. Okay?
UNIDENTIFIED SPEAKER: Well, sir, I'd like to read what I have to say.
THE COURT: Well, no. All I want to know is if you're David Hyde.
UNIDENTIFIED SPEAKER: If -- if it is the same name as the sheet outside, no, I'm not that man.
THE COURT: That's not what I'm asking. I'm asking if you are David Hyde. Are you David Hyde or not?
UNIDENTIFIED SPEAKER: I am the secured party and I am the creditor –
THE COURT: Okay, I'm going to take that as a no. You're free to go. Officer, would you escort this gentleman, who does not want to admit his identity, out of the courtroom. I'm going to treat it as not disputed due to the non-appearance of Mr. Hyde.

[4] Mr. Hyde informed me today that on the court docket his name was spelled in capital letters. He identified himself today as David, spelled capital D, lower case a-v-i-d, capital J, lower case o-h-n, capital E, lower case d-w-i-n, capital H, lower case y-d-e.

[5] It is Mr. Hyde's position that he has registered as a trade name the name DAVID JOHN EDWIN HYDE in capital letters. He takes the position that the effect of so doing is to create an identity other than himself, which is DAVID JOHN EDWARD HYDE, all in capital letters. He has registered this trade name, and a number of other permutations and combinations of his name, with the Secretary of State for Canada and Secretary of State for Foreign Affairs and International Trade for Canada. He is of the view that, because the judge was reading from a name in capital letters when he read out the name David Hyde, he was not reading the name of the person David Hyde. He concludes from that that he was not required to answer that name because his name was not called.

[6] He takes one further position on this application, and that is that when the judge endorsed the court record, he endorsed "No one responded to the call for David Hyde. One disputant did step up, but would not not agree that he is David Hyde." Mr. Hyde today submits that the court record, by use of a double negative, has confirmed the positive; that is, that the disputant that stepped up did agree that he was David Hyde.

[7] The official record of the court proceedings is the transcript from which I quoted earlier. That transcript clearly indicates that the appellant's name David Hyde was called out in open court at the time that the case, which had been adjourned from another day, was scheduled to proceed. That is the regular procedure of the court. Mr. Hyde takes a technical position that is without merit. It is clear that his name was called. I am satisfied that he was present and would not answer.

[8] In all of the circumstances, I am satisfied the Justice of the Peace was fully justified in treating the traffic ticket as not disputed and entering a deemed conviction. Accordingly, I am going to dismiss Mr. Hyde's appeal. (EXCERPT CONCLUDED)

'GIVE ME THE FIVE YEARS & SHUT UP!'

R. v. Galt, 2003 BCPC 0160

Once in a while an accused wants to go to jail. Read this exchange that occurred in British Columbia Provincial Court between Justice Angelomatis and an accused who pleads for 5 years in prison.

[1] THE COURT: There is an unusual fact pattern in this case and that is that Mr. Galt committed a robbery which he brandished a cloth over part of his hand, pretending there was a gun. What is unusual about this matter is that he subsequently turned himself in to the police.

[2] There, however, in the background of Mr. Galt is a great deal of self-pity and a great deal of under-reporting and a great deal of minimizing what he has done. I am concerned about some of his past crimes, but I am not sentencing him for those past crimes. The incidents he mentions with respect to the sexual assaults, what he tells the probation officer and what he tells the psychiatrists are evidently at odds with the police reports. I do not know which is correct and, as I say, I am not punishing him for those crimes.

[3] However, reports by his collateral associates, namely stepsisters, sisters and family, show that he has had a continuing history in the past of being a bully and being oppressive and belligerent and aggressive and violent towards people.

[4] I am troubled by one of the things that is in the pre-sentence report, but again, I am not sentencing because of this. On page 11 on the faxed report, he says that he was coerced by - and he says it is not the Hell's Angels - but he was coerced by persons to commit a crime. He says that he owed his captors $1800 for uncut cocaine worth, in his opinion, $3,000. That cocaine had been seized by the Vancouver Police. So I take it that that cocaine was cocaine that he would have possessed, whether for his own use or for trafficking. But he goes on to say, "During those two days, I made over 15 grand for them and this was the last job." What I take from that - and I am not sentencing for it - is he has done other robberies, other crimes in that two-day period that he is not being called to account for. If he truly was repented and he truly was remorseful, I would have thought he would have made a clean breast of it all.

[5] He has, in here, made a statement that he wishes to reconnect with society and to get some treatment and, to his credit, he understands and acknowledges that the only place he is going to get this is in the federal system.

[6] The Crown has indicated that they want three years. I would have given him more, regardless of the fact he turned himself in, but I am going to acquiesce in what, in effect, is a joint submission. Mr. Flerlage feels it should be at the lesser end of federal time, i.e. two years, two-and-a-half years. Three years is what the Crown asked for, three years is what I am going to give him. I feel that a sentence of five to six years would have been eminently justified.

[7] However, I take some solace in the fact that he is only 34 years old. I see there is present, in the gallery, acquaintances or relatives, so he does have some support system. I also feel that he has the background, I would think, to reconnect. He has evidently First Nation roots. He is not proud of them or, if he is proud, he has not acknowledged them and does not seek help from the First Nations. The First Nations are now in a voyage of discovery, in that their historical oppression has been recognized, the government gives them money, there are programs where First Nations persons can avail them of it, and Mr. Galt clearly is not someone who has his own inner resources to find redemption or to be reformed and rehabilitated on his own resources. He should use whatever resources he can find.

[8] THE DEFENDANT: Christ, give me the five years and shut up!

[9] THE COURT: Yeah, well, you know, if that is what you want to hear, that is what you want to hear. You are indicating you have not seen the path, you have not seen the light, and you are not going to unless you start --

[10]THE DEFENDANT: Well, you haven't even listened to a f.... thing that was said here today.

[11]THE COURT: I have read it all, and I do not think you have read it and you have not understood it very well.

[12]THE DEFENDANT: I read both.

[13]THE COURT: Okay. And in there, you seem to be blaming everybody but yourself.

[14]THE DEFENDANT: You haven't read nothin'. You're f.... daft.

[15]THE COURT: Okay. Okay, good. I will leave it. He has expressed himself. Three years.

[16]THE DEFENDANT: F.... goof!

[17]THE COURT: See, I should have given him four!

[18]I will find hardship. There is no way he is going to pay the victim surcharge.

[19]Maybe I should torture him more with reasons for judgment. Do you want to bring him back?! (EXCERPT CONCLUDED)

'10-8' GOES PRIME TIME

"10-8" can now be seen Sunday at 8 pm. (PST) on ABC. Of course, we are not referring to a television version of the "**In Service: 10-8**" newsletter, but a new fall police drama series by the same name, "10-8". This series takes place in the Los Angeles County Sheriff's Department and explores the relationship between Sheriff's rookies and their training officers. For more information, check out www.ABC.com.

Note-able Quote

Character is much easier kept than recovered— Thomas Paine

CONSENT SEARCH OBTAINED FOLLOWING TRAFFIC STOP

R. v Sewell, 2003 SKCA 52

A Saskatchewan police officer stopped a British Columbia license plated vehicle on the TransCanada highway to issue a warning ticket after the driver failed to slow as he entered a reduced speed zone. When asking the accused for his drivers licence and vehicle registration, the officer noted his eyes were red and that he was slow to react to the questions. When asked where he was coming from and going to, the accused replied he was travelling from Toronto to British Columbia. Concerned about his sobriety and with safety, the officer asked the accused to come back to the police car. The accused was placed in the rear of the police car, but could not exit unless the officer allowed him to do so. A computer check was conducted and CPIC reported a conviction for theft while PIRS indicated he was a suspect in a marihuana cultivation.

After giving the accused a warning ticket, the officer told him he was done with the traffic stop, that he was free to go, and his documents were returned. However, the officer acquired a new suspicion that the accused may be transporting or in possession of illegal contraband. The officer told the accused he would like to discuss his trip. He advised him he did not have to say anything, that if he did talk it could be used as evidence, and also of his rights to a lawyer and legal aid. The accused was nervous and shaking. The officer discussed contraband and smuggling on the highway. The officer asked if there were any weapons, tobacco, alcohol, drugs or money in the vehicle. The accused replied no, but his carotid was pulsing very hard.

The officer admitted at trial that he asked all these questions with a view in obtaining consent to search the vehicle. The officer asked the

accused if he minded him looking through his truck, a Ford Escape. He replied, "Yeah, I guess you can go through it." The accused was assured that he could stop the search at any time. Both left the police car and the officer again told the accused he could withdraw his consent at anytime without consequence. After entering his vehicle to put away the documents, the accused unlocked and opened the back door. Smelling a strong odour of raw marihuana, the officer took hold of a duffle bag tucked in amongst other luggage and pulled the bag closer. At this point the accused informed the officer he was withdrawing his consent. He was arrested for possession of marihuana, advised of his right to counsel and given the police caution. The accused was searched and $2,280 in cash was found in his pocket. In the duffle bag, police located 3 kgs. of marihuana.

At trial the accused was convicted of possession of cannabis marihuana for the purpose of trafficking under the *Controlled Drugs and Substances Act*, but appealed to the Saskatchewan Court of Appeal. Although he conceded the initial stop and detention for speeding under Saskatchewan's *Highway Traffic Act* was lawful, he argued that the continued detention in the back of the police car once the traffic matter was concluded was arbitrary under s.9 of the *Charter*, which in turn played a determinative role in the s.8 *Charter* breach for which he was seeking a remedy.

He submitted that the initial search was involuntary and compelled by the physical detention in the rear of the police car and the imminent possibility of further police sanction. The Crown contended however, that the initial search was conducted with informed consent and once the accused revoked that consent, the officer had the authority to arrest the accused and continue a search incidental to arrest. For the purposes of its decision, the Court examined the search question in two phases; the first phase (pre-arrest) consisted of the search up to the point where the officer reached for the duffle bag and was asked to stop searching and the second phase (post arrest) where the officer searched the duffel bag, the vehicle, and the accused subsequent to the arrest.

The Pre-Arrest Search

The Saskatchewan Court of Appeal found it unnecessary to decide whether the detention was arbitrary under the *Charter* because "it is not the existence of "arbitrariness" that ultimately determines whether the consent was voluntary and thus valid". Even if the detention was arbitrary, it is still possible to give valid consent. Adopting the Wills[8] test (an Ontario Court of Appeal decision) for informed consent, the court noted that the Crown must prove, on a balance of probabilities, that:

i. there was a consent, express or implied;
ii. the giver of the consent had the authority to give the consent in question;
iii. the consent was voluntary…and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
iv. the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
v. the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested, and
vi. the giver of the consent was aware of the potential consequences of giving the consent. [para. 17, references omitted]

In this case, the Court had no problem holding that conditions i, ii, or iv were met. As for condition v, the Court stated:

> The officer told the [accused] twice that he could stop the search at any time. Indeed, at a critical point, the [accused] asserted his right to stop the search. Obviously, he always new he had the right to refuse his consent to search. [para. 20]

[8] R. v. Willis (1992) 70 *C.C.C.* (3d) 529.

And for condition vi:

> The evidence also leaves no doubt about the presence of requirement (vi). Before obtaining the [accused's] consent, the officer took considerable pains to alert the [accused] to the potential consequences that could befall him should some contraband be found in his vehicle as a result of a search. The [accused] characterizes those efforts not as a drawing to the [accused's] attention the potential consequences that could befall him, but as a form of compulsion that vitiates the consent he gave the officer. It is my view that there is no good reason whatever not to accept the officer's reasons and explanation for his describing to the [accused] what has happened in the past to persons he found transporting contraband. It was the officer's way of outlining the potential consequences of the [accused's] giving his consent to a search. In other words, the officer was endeavouring to comply with requirement (vi). I, therefore, have no difficulty in finding the Crown satisfied the onus placed on it respecting requirement (vi). [para. 21]

This left condition iii; was the consent voluntary? The type of police oppression or coercion to vitiate the voluntary nature of consent requires more that the sense of oppression and compulsion even experienced and sophisticated persons will feel when stopped by the police. It requires oppression or coercion procured by intimidating conduct or by threats of force and must be more than the oppression or coercion inherent in every detention by police. Justice Bayda held:

> In the present case, the arbitrary detention (if that is what it was) of the [accused] in the backseat of the police car is a factor to consider in deciding whether there was oppression or coercion …but it is only one factor. By far, the most important factors are whether there was any "intimidating conduct" or "force or threats of force" by the police officer and whether that conduct or force or those threats of force procured the consent. The evidence in the present case reveals no such conduct, force or threats of force. In the light of that, the only conclusion one can draw is that the consent given by the [accused] in the backseat of the car was "voluntary…."
>
> Another important factor to consider is the nature of the consent. It was revocable and, thus, had a continuous quality. There was not a one-shot feature to it. Because it could be withdrawn at any time, there was, in a sense, a fresh consent every moment or every few seconds from the time it was first given until it was eventually withdrawn. Given that quality, the force, such as it was, of the [accused's] contention that the consent was given in the context of an arbitrary detention while in the backseat of the police car, was considerably reduced, if not entirely dissipated, by his failure to withdraw the consent after he left the police car and before the search began. The [accused] was then not under any detention, arbitrary or otherwise, as the officer earlier told him he was "free to go." But he remained and allowed his consent to continue, and actively assisted the officer in the search by opening some bags. Moreover, the fact that at one point in the search the [accused] withdrew his consent is strong evidence that he was not under the influence of any sort of threat, intimidation or coercion. [paras. 27-28, references omitted]

The Arrest

The Saskatchewan Court of Appeal then went on to consider the legality of the arrest. Having found the search up until the point the accused withdrew his consent lawful, the court found the odour of marihuana sufficient to warrant the arrest of the accused as a person found committing a criminal offence under s.495(1)(b) of the *Criminal Code*, which reads:

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

Justice Bayda wrote:

> It is clause 495(1)(b) that governs in this case. The [accused] at the time of his arrest was committing an offence (consisting of possession of marijuana) and the officer found

him to be committing that offence. This is, therefore, not a case of the officer needing the "reasonable grounds" contemplated by clause 495(1)(a).

The question arises whether it is fair to conclude that the officer had, for the purposes of s. 495(1)(b), "found" the [accused] committing the offence at the time of the arrest given that the officer had only smelled the marijuana but had not seen it. In my respectful view, it is fair to so conclude. In order for a person to know or believe that there is marijuana in the immediate vicinity, he or she would have to rely on one or more of his or her five senses. (Admittedly, one cannot "hear" marijuana, but one can "hear" someone telling one of the presence of marijuana.) Normally it is the sense of sight alone, often the sense of sight coupled with the sense of smell, and at times the sense of smell alone that alerts one to the presence of marijuana. If, through experience, a person's sense of smell for marijuana is as highly developed as his sense of sight for marijuana, it undermines logic to discount or discard the knowledge acquired through his sense of smell but accept the knowledge acquired through his sense of sight. Knowledge is knowledge, whether acquired through one sense, more than one sense, or all the senses. In the present case, it is fair and reasonable to infer from the officer's testimony-testimony that was not disputed-that he had knowledge of the presence of marijuana in the vehicle, as a result of his smelling the marijuana in question, without having seen it.

The [accused] raised the question whether the officer's presence at the back of the [accused's] vehicle where he could smell the marijuana should be adjudged an unlawful presence given that it occurred only because of "a non-consensual search" brought about by coercion, an arbitrary detention and a denial of the [accused's] right to retain and instruct counsel. The short answer to the question is that the search was not a "non-consensual search" for the reasons I have outlined and the officer's presence was, therefore, not unlawful. In those reasons I specifically dealt with the issues of coercion and arbitrary detention. As for the contention that the [accused] was denied his right to retain and instruct counsel, it is apparent from the officer's testimony that he did, indeed, advise the [accused] of that right while both were in the police car immediately after the officer had concluded dealing with the Highway Traffic matters. The [accused] at no time asserted this right. This contention comes to naught.

Even if I were to find that the officer's presence at the back of the vehicle was unlawful for the reasons contended by the [accused], I would be hard pressed to find that the officer lacked authority to arrest the [accused] for an offence he found him committing. By way of analogy, I offer this set of circumstances. A police officer unlawfully enters a dwelling house. That unlawfulness is rooted in a breach of one of the occupant's Charter rights. He finds the occupant pointing a gun at another person who is strapped to a chair in a distraught state. Is the officer precluded from arresting that occupant for committing the offence of forcible confinement on the ground that he, the officer, unlawfully entered the dwelling house? I would find it very odd, indeed, if a breach of the occupant's Charter right brought about such a result. [paras. 35-38]

Post Arrest Search

Since the arrest was lawful, the officer was entitled to search the contents of the vehicle and the person of the accused as an incident to the arrest. Furthermore, the police had reasonable and probable grounds to continue the search[9].

The accused's s.8 *Charter* right was not violated and therefore it was unnecessary to consider exclusion under s.24(2). However, the appeal was allowed on other procedural grounds.

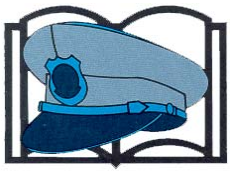
Complete case available at www.canlii.org

[9] In compliance with the earlier Saskatchewan Court of Appeal search case *R. v. (D.)I.D.* (1987), 60 Sask. R. 72 (C.A.).

DID YOU KNOW…

…that Los Angeles Police Department employees may receive a $500 bonus if they refer an officer for lateral transfer to the department and that officer is subsequently hired. (The Beat, Volume XLIX No.8, August 2003)

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



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

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"Could you please e-mail [the newsletter] to me at the Police Station so that I can print it and put it out for the other members to read it. I read a few articles and they are very interesting and relevant." **Police Constable, New Brunswick**

****

"I look forward to each new issue you put out however sometimes at work it gets hoarded by someone. This way I can read it at home at my leisure." **Police Constable, British Columbia**

****

"We here at the…Criminal Intelligence Section have had the opportunity to see some issues of your publication. We would very much appreciate it if we could be added to your distribution list." **Police Sergeant, British Columbia**

****

"I am a "fan" of your "In Service: 10-8 Newsletter" and look forward to reading them as they come into our Training office." **Police Constable, British Columbia**

****

"The newsletter is greatly appreciated." **Police Constable, RCMP British Columbia**

"I am an instructor…[and one] of my cadets sent me a copy of your monthly newsletter and to put it mildly I was very impressed." **Police Corporal, RCMP Saskatchewan**

****

"Just reading through your latest newsletter…you do one hell of a good job - keep it up, and thanks." **Canadian Fisheries Officer**

****

"I was just back at my home agency…and came across a couple issues of your publication. Two things, this is an excellent publication. I have been off the road now for a number of years and I may be heading back there in the not so distant future. I haven't been able to read the publications from cover to cover yet but you bet I will and I feel confident they will bring me up to speed on what to do and not to do when I get back in uniform. Thanks!" **Police Officer, British Columbia**

****

"Could you please add me to your list of recipients for the "In Service 10-8 material…[they are] terrific articles…" **Police Constable, RCMP British Columbia**

****

"I have had the opportunity to access your publication and find it tremendously informative. Keep up the excellent work." **Inspector, RCMP British Columbia**

****

"Once again, on behalf of all of us here, thanks very much for a very informative and topical publication. Keep up the great work! We really appreciate it!" **Federal Wildlife Officer, Environment Canada**

****

"Thanks again from eastern Canada! We still enjoy your news letter. I print it off faithfully to supply our shift NCO's and place a copy on our training board. We also have linked to your website. Keep up the great work…it is truly appreciated!" **Police Corporal, New Brunswick**

CLASS 93 GRADUATES

The Police Academy is pleased to announce the successful graduation of recruit Class 93 as qualified municipal constables on November 14, 2003.

ABBOTSFORD
Cst. Atousa Arjangpour
Cst. Katie Asplin
Cst. Derek Baker
Cst. Chris Brown-John
Cst. Karen Twardy

DELTA
Cst. Chris Anzulovich
Cst. Ray Basran
Cst. David Ogilvy

NEW WESTMINSTER
Cst. Rochelle Desranleau
Cst. David Dorazio

PORT MOODY
Cst. Brad Sheridan

VICTORIA
Cst. Wayne Cox
Cst. Theresa Tuttle

VANCOUVER
Cst. Daniel Ballinger
Cst. Mark Bouchey
Cst. Russell Brown
Cst. Rebecca Chandler
Cst. Darren Edwards
Cst. Kairns Graham
Cst. Natasha Holdal
Cst. Shane Kolb
Cst. Todd Lefebvre
Cst. Trever Lowe
Cst. Eugene Lum
Cst. Michael MacPherson
Cst. Bruno Raffele
Cst. Erin Riste
Cst. Sukhvinder Sunger
Cst. Drew Turner
Cst. Sean Ward

Congratulations to Cst. David Ogilvy (Delta), 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. Natasha Holdal (Vancouver) received the Abbotsford Police Association Oliver Thomson Trophy for outstanding physical fitness. Cst. Rebecca Chandler (Vancouver) and Cst. David Ogilvy (Delta) received the Vancouver Police Union Excellence in Academics award for best academic test results in all disciplines. Cst. Derek Baker (Abbotsford) 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. Trever Lowe (Vancouver) was the recipient of the Abbotsford Police Recruit Marksmanship award for highest qualification score during Block 3 training. RCMP Chief Superintendent Stu Cameron, OIC Human Resources, was the keynote speaker at the ceremony.

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

collected by Constable Ian Barraclough

The Curse of the Mummy

When Bill Sokolik buzzed a stranger into the Edmonton-based Jehovah's Witness Kingdom Hall last September, the first thing through the door of the church was a 24 inch long Samurai sword. An apparition straight out of Curse of the Mummy followed. Anthony Alan Burton, the man who then entered to terrorize and rob the Jehovah's Witness church had lengths of hospital gauze wrapped over the top of his head. His face was covered with silicone caulking putty and he had smeared pink foundation makeup over the putty. To add to the effect, his eyes were obscured by a large pair of glasses.

"I am the evil that you have read about," the 42-year-old Burton yelled out to the terrified worshippers in the hall that Tuesday night. "This is the face of evil." When Burton burst into the hall, children and women began screaming. Burton ignored their screams and instructed some of the men to collect cash and credit cards. To add emphasis to his words, Burton slashed a chair seven times with his sword, then grabbed a churchgoer and put the blade to the man's neck before releasing him.

At the back of the church, a woman pulled a cellphone from her pocket and dialled 911. Police arrived within five minutes. Pistol in hand, the first officer through the door of the church was Rick Franchuk, a self-described "constable-for-life." Franchuk yelled out to Burton to drop the sword. Burton instead tried to grab a woman but missed. He grabbed another woman by the shirt but let go when a churchgoer seized his arm. "I don't want to," he yelled when Franchuk

demanded again that he drop the sword. "Shoot me! Shoot me!"

Franchuk held his fire. Burton finally dropped his sword but still wouldn't surrender. "That's okay. I have more knives and weapons," he said. Burton finally surrendered and police found a medieval-style mace in the pocket of his knee-length overcoat. Fastened to his leg with electrical tape was a 30-cm kitchen knife.
During his sentencing hearing, Burton's lawyer produced reports from three psychiatrists and one psychologist which described how his client had been clinically depressed at the time of his madcap robbery attempt. Burton had run out of his medication several days earlier. (Edited and excerpted from an article in The Edmonton Journal)

Radar Gun almost Vaporizes Two Traffic Cops

Two traffic patrol officers in the United Kingdom got more than they bargained for last month while trying out a state-of-the-art radar gun. The traffic cops were on patrol checking for speeding motorists on the A1 motorway in Northern England using a brand new hand-held radar device.
While trapping unwary motorists on the Edinburgh to London highway, the radar gun suddenly malfunctioned.

As one of the unnamed officers used the device to check the speed of an approaching vehicle, he was shocked to find that his target had registered a speed in excess of 400 miles per hour! The £8,000 radar gun then seized up and could not be reset by the bemused policemen.

The radar had in fact latched on to a NATO Tornado Strike aircraft approaching them from the North Sea. The fighter plane was taking part in a simulated low-flying exercise over Southern Scotland. After an official investigation by the Chief Constable of the Lothian & Borders Police force to the RAF liaison office, it was revealed that the traffic cops had had a lucky escape.

The tactical onboard computer of the Tornado not only detected and jammed what it believe was "hostile" radar equipment, but then automatically armed and zeroed in an air-to-ground missile ready to "neutralize" the perceived threat. Luckily the Dutch pilot was alerted to the missile status and was able to override the automatic protection system before the missile launched.
Lothian & Border Police Department have declined to comment, although it is understood that traffic cops in the vicinity will be more careful in future when pointing their radar guns.
Edited and excerpted from an article from the Berwickshire Gazette

Smuggling your service pistol over the border, not such a good idea.

A Detroit police officer accidentally shot himself in the leg when he tried to hide his gun after his car was pulled over by Canada Customs while crossing from the United States. Michael Allen, 22, was heading to Windsor in the early hours when a customs officer at the Ambassador Bridge directed the off-duty Detroit policeman to take his car to an inspection area.

After parking the car, Officer Allen is believed to have pulled his service Glock pistol from a leg holster in an attempt to hide it under the car's front seat. While attempting to conceal his pistol the trigger was pulled discharging a .40 calibre bullet which immediately went through a bone in his leg.

Officer Allen was rushed to hospital where he underwent an eight-hour operation to save his leg. The Detroit cop is facing numerous charges under the Criminal Code and the Customs Act, although none have yet been filed. Windsor police said he should have simply checked his gun in and picked it up on the way back.

Edited and excerpted from an article at www.Canada.com

From Police Blotters

(1) In Tennessee in September, Thomas McGouey, apparently set on committing suicide, painted a bull's-eye on his body before arranging a standoff in which he pointed a gun at police officers so they would kill him in self-defence. McGouey's scheme failed because Knox County sheriff's deputies, who fired 28 shots at him, missed with their first 27 rounds, and only managed to graze his shoulder with the last shot fired. (Knoxville News-Sentinel).

(2) Wayne Leonard Hoffman, 45, was arrested for impaired driving at a gas station in Minnetonka, Minnesota where he was "attempting to add air to his vehicle's tires using a vacuum cleaner" (Lakeshore Weekly News).

(3) Two Wyoming men were feuding over a parking space at a K-Mart when one drove alongside the other and spit at him through his open window. According to the police occurrence report, "As the victim saw the projected body fluid travelling through the air, he dropped his jaw in shock, and the phlegm landed square in his mouth where he swallowed it in a gag reflex." (Jackson Hole News & Guide).

(4) NYPD officers Paul Damore and Farrell Conroy were briefly suspended without pay for their conduct in the 45th Precinct station house in the Bronx, when they got into a fistfight over which one would get drive their patrol car. (NYPD News).

Note-able Quote

Whatever your grade or position, if you know how and when to speak, and when to remain silent, your chances of real success are proportionately increased—Ralph C. Smedley

FULL OFFENCE REQUIRES OVERLAP OF *ACTUS REUS* & *MENS REA*

R. v. Williams, 2003 SCC 41

The accused and the complainant had a relationship with each other that included sexual intercourse. During the relationship the accused took a medical test and discovered he was HIV positive. Although he was told of his duty to disclose his status to his sexual partners, he did not tell the complainant. Five days later, the complainant took an HIV test for unknown reasons and tested negative. She told the accused of the negative test and the relationship continued for another year. After 18 months the relationship terminated. Over two years later the complainant took a second test after she became concerned she was displaying HIV symptoms. This time she tested positive.

The accused was charged with aggravated assault, criminal negligence causing bodily harm, and common nuisance. At his trial, the accused conceded that he infected the complainant and that she would have never consented to sex had she known he was HIV infected. However, HIV has an incubation period and it was quite possible that even when the complainant tested negative the first time, she may have already contracted the virus from the accused.

The judge convicted him of aggravated assault and common nuisance, but acquitted him of criminal negligence causing bodily harm. On appeal, his conviction for aggravated assault was allowed and a conviction for attempted aggravated assault was substituted by the majority of the Newfoundland Court of Appeal. The Crown further appealed to the Supreme Court of Canada arguing that the accused should have been convicted of aggravated assault, not simply an attempt.

Aggravated Assault

The offence of aggravated assault reads:

> s.268(1) *Criminal Code*
> Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Criminal offences require the coexistence of an *actus reus* and a *mens rea*. The *mens rea* for aggravated assault requires:

- the same *mens rea* required for assault;
  - intent to apply force intentionally; or
  - intent to apply force recklessly; or
  - being wilfully blind to the fact that the victim does not consent; and
- objective foresight of the risk of bodily harm.

The *actus reus* of aggravated assault requires:

- proof of physical contact inflicted by the accused on the complainant,
- the absence of valid consent. In this case, although the complainant consented to sexual intercourse, she never consented to sexual intercourse with an HIV positive partner. Without the accused disclosing his HIV status, properly informed consent was not given. When a person intentionally, recklessly, or through willful blindness places a partner at significant risk, the consent to sexual intercourse is vitiated; and
- one of the aggravating consequences (wounding, maiming, disfiguring, or endangering the life).

To obtain a conviction for aggravated assault in this case, the prosecution would have to prove that the *mens rea* (knowledge of the accused's HIV status) coincided with the *actus reus* (endangerment to life of the complainant). In other words, the accused's knowledge of his HIV status must overlap with when he infected the complainant. If he infected the complainant before he was aware of his HIV status, there was endangerment but no intent. If the complainant had already been infected before the accused was aware of his status, there was intent, but a reasonable doubt concerning endangerment. In this case, it was unclear whether the victim contracted the virus before or after the accused became aware of his status and there was insufficient evidence to prove that further exposure to unprotected sex between infected partners increases risk. Thus, without proof as to the actual timing of the victim's infection, there was no way of knowing whether the *mensa rea* and *actus reus* coexisted.

An attempted crime, on the other hand, requires the intent to commit the complete crime (*mens rea*), but an incomplete *actus reus* (provided sufficient steps beyond mere preparation have occurred). The Court compared these circumstances to a gunman firing a bullet into a sleeping figure when in fact the intended victim is already dead from natural causes. In this case, the Crown was able to prove the *mens rea* for the period after the accused became aware of his HIV status. After this time he continued to engage in sexual intercourse knowing that he was HIV positive. However, the Crown failed to prove endangerment at the time the accused was aware of his status. Since the accused "took more than preparatory steps", the *actus reus* for attempt had been satisfied. The accused's conviction for attempted aggravated assault and common nuisance was affirmed and the Crown's appeal was dismissed.

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

POLICE ACTING AS BOTH TRAFFIC WITNESS & PROSECUTOR CHALLENGED

R. v. Cooper et al, 2003 BCCA 547

Justice Hall of the British Columbia Court of Appeal has granted leave to appeal in a case in which several persons are appealing their traffic convictions by arguing that it is unconstitutional

for a police officer to act as both a witness and the prosecutor at trial. The Supreme Court of British Columbia had earlier dismissed their appeal after ruling that the practice of the police acting as both a witness and the prosecutor, along with the applicable provisions of ss.64 and 65 of the *Offence Act*, had in some way violated the right to a fair trial protected under s.11(d) of the *Charter*, but was saved by s.1 (justifiability analysis). Stay tuned!

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

SLOW DRIVING WARRANTS DETENTION

R. v. Kalinowsky, 2003 SKQB 435

The police stopped the accused after he was observed driving 70km/h in a 100 km/h zone. While being asked for his licence and registration an officer detected an odour of alcohol and the roadside screening device demand was given. At trial in Saskatchewan Provinical Court the accused was convicted of impaired driving, but appealed to the Saskatchewan Court of Queens Bench arguing that he was arbitrarily detained under s.9 of the *Charter* even though the issue wasn't raised at trial. The accused conceded that s.40(8) of Saskatchewan's *Highway Traffic Act* authorizes the police to stop vehicles associated with the lawful execution of their duties but submitted he could not be stopped because he was not in contravention of any rules of the road. In fact, he was driving slower than the posted speed limit. Nevertheless, Justice Pritchard ruled that the police were justified in stopping the vehicle:

> …I am satisfied that the officers had lawful authority to detain [the accused] as they did. They stopped him because he was travelling 30 kilometers less than the posted speed limit. Even though travelling at this reduced rate of speed is not an offence, it implicitly gives rise to a concern about road safety. A driver operating a vehicle at such speed may be tired, ill, have night vision problems or simply be distracted. It is also possible that the vehicle may be encountering mechanical problems or the driver is overcompensating because his or her faculties are impaired by alcohol or drugs. Whatever the cause, public safety could be at risk. Indeed, if officers fail to investigate a vehicle when they notice it travelling significantly slower than normal on the highway, and if shortly thereafter the vehicle is involved in an accident, the officers might be seen as having been derelict in their duties.
>
> Travelling on a highway at 30 kilometers below the speed limit amounts to a substantial reduction in speed. I am satisfied that this noticeably reduced speed on the highway, particularly at night, was sufficient for the officers to have had a genuine concern for road safety. [para. 7-8]

The appeal was dismissed.

Complete case available at www.canlii.org

LOWERING SPEED BRACKET DISCRETIONARY

R. v. Scott, 2003 NBQB 380

Although the accused was charged and convicted with speeding 25 km/h or less over the speed limit contrary to s.140(1.1)(a) of New Brunswick's *Motor Vehicle Act*, the police officer's radar evidence was that he was travelling 28 km/h over the limit. The accused appealed to the New Brunswick Court of Queens Bench arguing, in part, that the police officer had no discretion in issuing a ticket for a speed lower than what he was actually travelling. However, Justice Turnbull disagreed stating:

> The police have considerable discretion in charging the lesser offence, which carries the lesser penalty. The gravamen of the offence is speeding. [The officer] testified he would not have given a ticket in this case if he himself had been driving over the speed limit. This is not dereliction of duty. It is all part of police discretion. [para. 6]

Complete case available at www.canlii.org

DID YOU KNOW…

…that in British Columbia pay toilets are illegal. Section 5 of the *Public Toilet Act*, a provincial statute, creates an offence for an owner, occupier, or person in control of a public place or building (such as a church, theatre, stadium, hospital, railway car, ferry, campsite, etc.) to have a toilet contained in a closet, receptacle, compartment, washroom, or restroom that is locked and requires the deposit of a coin or payment of money for its use.

DNA WARRANT PASSES CONSTITUTIONAL MUSTER

R. v. S.A.B., 2003 SCC 60

After learning she was pregnant, the 14-year-old victim told her mother that the accused, who had been living with the family for several months, had sexually assaulted her. The victim had an abortion and the police seized the fetal tissue for DNA testing. The police obtained a DNA warrant under the provisions of the *Criminal Code* and subsequently seized a DNA sample from the accused to compare with the fetal tissue to determine whether he was the father. In effect, the procedure was a paternity test. The accused was arrested and charged with sexual assault and sexual exploitation.

At his trial, the Alberta Court of Queen's Bench justice found the DNA warrant provisions did not violate s.8 of the *Charter* (search and seizure). However, he did rule that the accused's s.7 *Charter* protection against self-incrimination was violated, but saved by s.1. As a result, the DNA evidence was admissible and the accused was convicted of the sexual assault only. On appeal to the Alberta Court of Appeal the majority found that neither s.8 nor s.7 of the *Charter* were violated. The conviction was upheld.

The accused launched a further appeal, this time to the Supreme Court of Canada, arguing that the *Criminal Code* DNA warrant provisions violated the *Charter* including s.8 (search and seizure) and s.7 (principle against self-incrimination). In the unanimous nine member court judgment, the Supreme Court of Canada dismissed the appeal and ruled that the DNA warrant scheme properly balanced an individual's rights with those of effective law enforcement.

DNA warrants require a system of pre-search authorization issued only by a provincial court judge in cases were designated offences are committed. Furthermore, the degree in which the warrant interferes with bodily integrity is not particularly invasive and is relatively modest—buccal swabs, skin prick, or plucking of hairs. Samples are only collected for a limited forensic purpose—comparing information to an existing sample and no information concerning medical, physical, or mental characteristics is revealed. In fact, misuse of information is explicitly prohibited under the DNA warrant scheme. In summary, Justice Arbour, writing for the court, held:

> I can therefore conclude that, in general terms, the DNA warrant provisions of the *Criminal Code* strike an appropriate balance between the public interest in effective criminal law enforcement for serious offences, and the rights of individuals to control the release of personal information about themselves, as well as their right to dignity and physical integrity.

Now specifically dealing with the alleged breach of s.8 of the *Charter*, the accused argued that DNA warrants were unreasonable on the following three grounds:

- The legislation is not minimally intrusive. In his view, DNA warrants should be an investigative last resort, similar to that used in wiretap authorizations;
- The legislation operates only on reasonable grounds. It was submitted that a standard

higher than reasonable grounds should be adopted for searches and seizures that violate bodily integrity and force self-conscription; and

- The legislation always allows an *ex parte* application.

Minimally Intrusive

The accused argued that DNA warrants should be an investigative last resort, similar to that used in wiretap authorizations. The Court dismissed this ground of attack and stated:

> I see no reason to import, as a constitutional imperative, a similar requirement in the case of DNA warrants. There are obvious differences between the use of wiretaps as an investigative tool, and recourse to a DNA warrant. Wiretaps are sweeping in their reach. They invariably intrude into the privacy interests of third parties who are not targeted by the criminal investigation. They cast a net that is inevitably wide. By contrast, DNA warrants are target specific. Significantly, DNA warrants also have the capacity to exonerate an accused early in the investigative process. Although it would have been open to Parliament to provide for the use of forensic DNA analysis as a last resort investigative technique, I can see no reason to require, as a condition for constitutional compliance, that it be so. Moreover, as the Court of Appeal noted, the s. 487.05(1) requirement of showing that the warrant is "in the best interests of the administration of justice" would prevent a judge from issuing a warrant where it is unnecessary to do so.

Reasonable Grounds

Reasonable grounds is the ordinary constitutional standard for search warrants and the degree of intrusiveness in the proper execution of a DNA warrant compares favourably to strip searches. Strip searches, which are inherently humiliating and degrading, are valid if conducted on the basis of reasonable grounds. The Court found no reason to adopt a standard higher than reasonable grounds for DNA warrants.

Ex Parte Applications

DNA warrants may be obtained *ex parte*, which means only one party (police) need be present when the warrant is applied for. Although the DNA provisions allow for *ex parte* applications, they do not preclude a judge from having the other party present. The Court held:

> Requiring an *inter partes* hearing for a search warrant that is part of the investigative process could unnecessarily draw out and frustrate the criminal investigation. However, the majority of the Court of Appeal was correct to observe that the reference to *ex parte* proceedings is not mandatory. Indeed, s. 487.05(1) does not deprive a judge of the option of requiring a contested hearing in a suitable case. An issuing judge may find it advisable to require notice in order to ensure reasonableness and fairness in the circumstances. But, as with most investigative techniques, the *ex parte* nature of the proceedings is constitutionally acceptable as a norm because of the risk that the suspect would take steps to frustrate the proper execution of the warrant.

Principle Against Self Incrimination

The Supreme Court also rejected the argument that the DNA warrants violated the principle against self-incrimination protected in s.7 of the *Charter*. Justice Arbour ruled:

> The question, then, is whether the DNA warrant provisions at issue in this case impermissibly violate the principle against self-incrimination, thus rendering any search or seizure performed under them unreasonable, contrary to s. 8. In my view, a consideration of the principle's underlying rationales indicates that they do not. First, unlike cases involving testimonial compulsion, there is no concern with unreliability. On the contrary, one of the benefits of DNA evidence is its high degree of reliability. The second rationale -- protection against the abuse of power by the state -- requires a somewhat deeper analysis. ...the degree to which the principle is engaged will depend in part on the extent to which coercion was used by the

state in obtaining the statements; the extent to which the relationship between the accused and the state was adversarial at the time the conscriptive evidence was obtained; and the presence or absence of an increased risk of abuses of power by the state as a result of the compulsion....

The adversarial nature of the relationship between the state and the individual and the degree of coercion in the present context are undoubtedly high. ... A person has little choice but to comply with the request for blood, hair or saliva made under a valid DNA search warrant. Further, the context in which the bodily samples are taken is obviously adversarial, there being reasonable grounds to believe that the target of the warrant was a party to an offence. However, while these factors are highly engaged, it is important to note that under the DNA warrant provisions, there are a number of safeguards in place to prevent abuse of those provisions by the state. In particular, the prior judicial authorization, circumscribed by strict requirements of reasonable and probable grounds and stringent limits on the potential use of the collected DNA evidence, ensures that the power to obtain bodily samples is not abused. It is also important to acknowledge that, as previously noted, the degree of intrusion both physical and informational is limited.

In sum, a consideration of the rationales underlying the principle against self-incrimination suggests that this is one of those cases...where "the factors that favour the importance of the search for truth . . . outweigh the factors that favour protecting the individual against undue compulsion by the state".

To conclude, the legislative scheme delineated in ss. 487.04 to 487.09 is sensitive to the various interests at play. On balance, the law provides for a search and seizure of DNA materials that is reasonable. In light of the high probative value of forensic DNA analysis, the interests of the state override those of the individual. Forensic DNA analysis is capable of both identifying and eliminating suspects, a feature that seriously reduces the risk of wrongful convictions. The DNA provisions contain procedural safeguards that protect adequately the multiple interests of the suspected offender. The DNA warrant scheme therefore complies with s. 8 of the Charter. I turn now to the final issue, the expert's evidence. [paras.58-61, references omitted]

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

TOP COURT EXAMINES CIVILIAN ARREST

R. v. Asante-Mensah, 2003 SCC 38

The Supreme Court of Canada recently examined the use of force in the context of a civilian arrest. In this case, an airport security inspector effected the arrest of a taxi driver under s.9 of Ontario's *Trespass to Property Act* (*TPA*). He was scooping fares without a permit at Toronto's Pearson International Airport. The accused's unattended vehicle was observed parked at the curb and inspectors watched him emerge from the terminal. The accused was touched on the shoulder, told he was under arrest for trespassing, and informed he would be detained for police arrival. He tried to enter his vehicle but an inspector blocked his way. The accused then shoved his car door into the inspector, forcing him to back off. The accused entered his vehicle and drove away. He was subsequently charged with assault with intent to resist arrest and escaping lawful custody.

At his trial in the Ontario Court of Justice, the trial judge concluded that the inspector was entitled to arrest the accused but was not entitled to use force to effect the arrest because s.9 of the *TPA* did not permit it. Nor should such authority be inferred from the common law for provincial misdemeanors, said the judge. Furthermore, the judge held that citizens, arrestees, or both could be injured unnecessarily if such authority were read into the *Act*, thereby

making bad public policy. Since the use of force was not authorized, "the accused was entitled to resist an unlawful use of force designed to continue and preserve [his lawful] arrest and custody". The charge of assault with intent to resist arrest was dismissed, but the accused was convicted of escape lawful custody for this incident and a second similar incident that occurred three days earlier.

The accused's appeal to the Ontario Court of Appeal against the escape lawful custody convictions was dismissed. However, it allowed the Crown's appeal against the dismissal of the assault with intent to resist arrest charge. In the Court of Appeal's view, the *TPA* did include the authority to use reasonable force in effecting an arrest. The acquittal for the assault with intent to resist arrest charge was set aside and a conviction was entered. The accused appealed to the Supreme Court of Canada.

In a 9:0 decision, the Supreme Court of Canada dismissed the appeal. Section 9 of Ontario's *TPA* does not set out the procedure for arrest. It reads:

> s.9 *Trespass to Property Act*
> (1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes of reasonable and probable grounds to be on the premises in contravention of section 2.
> (2) Where the person who makes the arrest under subsection (1) is not a police officer, he or she shall promptly call for the assistance of a police officer and give the person arrested into the custody of the police officer.
> (3) A police officer to whom the custody of a person is given under subsection (2) shall be deemed to have arrested the person for the purposes of the provisions of the *Provincial Offences Act* applying to his or her release or continued detention and bail.

The Ontario legislature has used the term "arrest" in s.9 of the *TPA* as a term of art. The common law definition of arrest, a "well-understood legal procedure", is therefore incorporated into the *Act*, unless otherwise modified expressly or by necessary implication. At common law, an arrest is effected in two ways:

- actual seizure or touching of a person's body with a view to detention; or
- words of arrest followed by submission to the process.

"Arrest implies confrontation and confrontation creates a potential for the use of force by one party or the other", said the Court. In this case, something more than just mere touching or words of arrest were required to secure the accused's compliance. Moreover, "the right to use reasonable force attaches at common law to the institution of an arrest" and it is "the ability to use force [that] often provides the necessary precondition to [secure] the submission of the person arrested." Thus, something more than simply touching the accused or telling him he was under arrest was authorized in this case.

However, the Court noted that many trespasses are trivial and are best handled my means short of an arrest, thereby avoiding possible prosecutions against the arrestor for assault and civil claims for false arrest or excessive force. Also, the Court cautioned that the same latitude permitted to police officers who are under a duty to act in often difficult and exigent circumstances may not necessarily be shown to an occupier who is under no duty to act and instigates the confrontation with the trespasser. In summary, the Supreme Court of Canada concluded:

> In my view, "arrest" in the context of the [Trespass to Property Act] should be seen as a continuing status initiated by words accompanied by physical touching or submission and ending with delivery to the police, maintained as necessary with force that is no more than reasonable in all the circumstances.

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

'DIAL A DOPE' CELL PHONE CALLS ADMISSIBLE

R. v. Nguyen & Bui, 2003 BCCA 556

While speaking to a prostitute/drug user, two plainclothes police officers observed a "drug car" drive by their location. As they pulled the car over, a black object was observed thrown from the passenger window. The object was retrieved and found to be a small plastic film canister containing cocaine and heroin. As they approached the vehicle, police noted the passenger fidgeting with something in the pocket of the passenger door; a cell phone was seized from this location. A second cell phone was seized from the vehicle between the occupants while a third phone was seized from the driver's belt. Both accused were arrested.

One of the officers received four phone calls from the phone found in the passenger door pocket. One call was a hang up and the other three calls were orders for drugs. At the police station, another phone call ordering drugs was received and the voice was believed to be that of the prostitute/drug addict police were earlier speaking to. After receiving a call on the driver's cell phone ordering drugs, police agreed to meet the caller. A meet was made and a woman arrived at the location with $30.

At the accused's trial, the cellular phone calls were admitted into evidence. Also, an expert witness testified that the accused were involved in a "dial a dope" operation and were in possession of drugs for the purpose of trafficking. Both accused were convicted of possession of cocaine and possession of heroin for the purpose of trafficking. However, they appealed their convictions to the British Columbia Court of Appeal arguing, in part, that the trial judge erred in admitting the cellular telephone conversations because they were inadmissible hearsay.

British Columbia's top court dismissed the appeal. In ruling that the cell phone calls were not hearsay and could be admitted into evidence, Justice McKenzie stated:

> In my view, the conclusion that these telephone conversations are not hearsay rests on the circumstantial guarantee their trustworthiness and therefore meets the requirements of necessity and reliability of the evidence which, of course, is also the basis for the principal exception to the hearsay rule enunciated by the Supreme Court of Canada in the *R. v. Khan, [1990] 25 S.C.R. 531.*
>
> It follows that in my view the evidence of the telephone calls was properly admitted and I would reject that ground of appeal. [para. 17-18]

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

RCMP MUST DISCLOSE INFORMATION ABOUT POLICE MEMBERS

Information Commissioner of Canada v. Commissioner of the RCMP, 2003 SCC 8

A person had requested information in connection with litigation against a number of RCMP officers. The RCMP refused to disclose the records on the basis that it was personal information as defined in Canada's *Privacy Act*. A complaint was made to Canada's Information Commissioner who investigated the matter. The RCMP agreed to release only the current postings and positions of the active members and the last posting and position of one retired member, but no more. The Information Commissioner found that other job related information was not personal information and he ordered the records be disclosed. The RCMP refused and the Information Commissioner took them to Federal Court. The trial judge ruled that only current positions of active members and the

last position of former employees be released. This decision was upheld by the Federal Court of Appeal. However, on appeal to the Supreme Court of Canada, in a 9-0 judgment, Canada's highest Court ordered that the RCMP Commissioner disclose the additional information about the RCMP officers. In ordering the disclosure of the requested information, Justice Gonthier held:

> In my opinion, (1) the list of the RCMP members' historical postings, their status and date; (2) the list of ranks, and the dates they achieved those ranks; (3) their years of service; and (4) their anniversary dates of service, are all elements that relate to the general characteristics associated with the position or functions of an RCMP member. They do not reveal anything about their competence or divulge any personal opinion given outside the course of employment – rather, they provide information relevant to understanding the functions they perform. Put another way, the aspects of employment described above shed light on the general attributes of the position and functions of an RCMP member.

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

DISCLOSURE NOT ABSOLUTE: RESTRICTING VIDEO VIEWING PROPER

R. v . Papageorgiou,
(2003) Docket:C39011 (OntCA)

The accused sought a copy of the videotaped statement of a sexual assault victim. He had earlier viewed the video with his lawyer at his lawyer's office. However, his lawyer had since been discharged and the video statement was returned to Crown. The Crown agreed to allow the accused to view the tape at the Crown's office, but would not give him a copy of the tape due to its sensitive nature. The accused was convicted of sexual assault at trial but was successful on appeal. The Ontario Superior Court of Justice held that the accused's access to the tape was too restrictive and a stay of proceedings was entered. The Crown appealed to the Ontario Court of Appeal.

Although the Crown has a legal duty to disclose all relevant information to the defence, that duty is not absolute. Unless there is privilege attached to the information, the Crown must not withhold information in which there would be a reasonable possibility that non-disclosure would impair the right of an accused to make full answer and defence. However, the Crown may exercise some discretion in withholding information and the manner and timing of disclosure.

In this case, it was the form of further disclosure that was the issue. The Crown had disclosed the video, which was reviewed by the accused and his previous lawyer. But in sensitive cases involving sexual abuse, "the Crown's disclosure obligations are satisfied, and the public interest is fostered, by providing the self-represented accused with an opportunity to view the videotaped statement of the complainant at the Crown's office." Justice Weiler, for the unanimous court, stated:

> In our view, therefore, there was no breach of the Crown's disclosure obligations in this case concerning the complainant's videotaped statement. The statement had already been disclosed and, when the [accused] became self represented, the proposed additional access to the videotape was in conformity with the recommendations of the Advisory Committee's Report. The position of the Crown was reasonable in the absence of any evidence of prejudice to the respondent. [para. 14]

The stay of proceedings was set aside, the conviction restored, and the matter was sent back to the lower appeal court for further disposition.

Complete case available at www.ontariocourts.on.ca

ARRESTEE NEED ONLY UNDERSTAND GENERAL EXTENT OF JEOPARDY

R. v. Ekman, 2003 BCCA 485

The accused was arrested by police for murder and was given his *Charter* warning. He subsequently provided a statement to police which was admitted as evidence and he was convicted of attempted murder by a jury. The Crown appealed the attempt murder verdict arguing a new trial should be ordered on a first degree murder charge, while the accused submitted his conviction should be set aside. As part of his appeal to the British Columbia Court of Appeal, the accused contended that the police violated his s.10(a) *Charter* right in that they did not properly inform him of the reasons for his arrest. Although the accused conceded that the police are not required to be precise about the potential charge and are only required to advise an arrestee of the general nature of their arrest, he submitted that the police knew this was first degree murder and should have informed him as such. In his view, since the first degree murder charge has a different parole eligibility period than second degree murder, the police were required to tell him that he was being investigated for the most serious offence and that he could again consult with a lawyer.

In writing the judgment for the unanimous court, Justice Thackray concluded that, even though the police challenged the accused in the interview that the killing was planned and deliberate, the officer did not necessarily know what the ultimate charge facing the accused would be. Moreover, s.10(a) requires the police to advise an individual of the reason for their arrest so they can generally understand the extent of their jeopardy and thereby exercise their right to counsel under s.10(b) in a meaningful way. In this case, the British Columbia Court of Appeal agreed with the trial judge when she stated:

> In this case [the accused] knew from the time of his arrest that he was facing a charge of murder. Whether the charge is first degree or second degree murder, the sentence of life imprisonment under the Criminal Code is the same. [The accused] generally understood the extent of his jeopardy. I conclude there has been no violation of [the accused's] s.10(a) rights.

The accused's appeal against his conviction was dismissed, but the Crown's appeal, based on other arguments, was allowed. A new trial on the charge of first degree murder was ordered.

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

BREACH OF THE PEACE ARREST LAWFUL

R. v. Chasse, 2003 BCPC 101

Two police officers attended a residence to investigate a complaint of a domestic dispute in progress. On arrival, a female occupant of the home told them that she had earlier had a verbal altercation with the accused and that she had left the premises. She said that they both lived at the home and that earlier in the evening she became upset with the accused and threw some of his property onto the front lawn. There was no evidence of an assault and the police left.

Less than an hour later, the police received a call back. It was reported that the accused had returned to the home. This time, the police could hear a loud male voice yelling and swearing from inside the home. An officer knocked on the door and was asked what he wanted. He knocked again and the accused rapidly opened the door and stood in an aggressive posture with his fists balled up and arms at his sides, but away from his body. The officer caught a glimpse of the female down the hallway but she then disappeared out of

sight. The accused continued to be loud, angry and profane. Another officer attempted to enter the home to check on the welfare of the female, but the accused blocked the officer's entry. Fearing he had to control the situation, one of the officers arrested the accused for breach of the peace under s.31 of the *Criminal Code*. A struggle ensued and when the officer stepped back he injured his knee and lost his balance, grabbing onto the accused. The struggle continued and the officer was struck in the head. The accused was subsequently restrained following the deployment of the police baton and other defensive tactics.

The accused was charged with two counts of obstructing a peace officer and one count of assaulting a peace officer. These charges require proof that the officer was engaged in the execution of his duty. If an officer exceeds their powers, they do not meet this requirement. At his trial in British Columbia Provincial Court the accused argued the arrest was unlawful and therefore the police were not properly engaged in their duty. However, considering the definition of a breach of the peace, the judge concluded that the police believed on reasonable grounds that the accused was committing or was about to commit a breach of the peace. Justice Skilnick held:

> In summary, the existence of an apparent breach of the peace was made out by the loud, profane, angry and abusive behaviour of the Accused in circumstances where it was reasonable for the police officers to believe that harm might come to [the female].

The arrest was lawful and therefore the police officers were acting in the execution of their duties. The accused was convicted.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

Once the game is over, the king and the pawn go back in the same box—Italian proverb

ALCOHOL ODOUR JUSTIFIES ROADSIDE DEMAND

R. v. Tucker, 2003 MBPC 10027

The police were conducting routine Checkstop enforcement on a busy street near several bars and lounges when the accused was stopped driving. The accused had an odour of liquor on his breath, he admitted to consuming three beers, and said his last drink was 15 minutes earlier. There was nothing improper about his driving and the accused did not display any signs of impairment. The officer made a roadside screening device demand and the accused failed. A breathalyzer demand was subsequently made and readings of 100mg% and 90mg% were obtained. The accused was charged with impaired driving and over 80mg%.

At his trial in Manitoba Provincial Court the accused submitted that the officer had no grounds to demand a roadside sample because there were no signs of impairment. In rejecting this argument, Justice Sandhu stated:

> Having reasonable suspicion that the driver of a motor vehicle has alcohol in their body is sufficient to trigger the demand. Two police officers testifying as to alcohol on the breath of [the accused] constitutes a sufficient basis of fact to justify the demand.

However, the accused was acquitted of the over 80mg% and impaired driving on other grounds.

Complete case available at www.canlii.org

NON-RECORDED CONFESSION SUSPECT

R. v. White,
(2003) Docket:C3509 (OntCA)

The accused's car was boxed in by police and he was arrested on four outstanding bank robberies.

His wife, who was with him, was also arrested as an accessory after the fact. He saw her handcuffed and taken away in a police car. A detective searched the accused and testified he found several syringes, including used ones, in his socks and back pocket, but no record was made of this discovery nor did police keep them. At the time of his arrest the police testified the accused made some statements.

During the transport to the police station the detectives initiated conversation with the accused about his heroin addiction. The detectives then collaborated on their notes at the station. At the police station the accused was paraded before the desk sergeant and then taken to an interview room where his handcuffs were removed. He was strip searched and asked about the robberies; he was told police had photos of the robbery suspect who appeared to be him (but in fact the photographs did not identify anyone because the suspect was wearing sunglasses, a baseball cap, and in one photo a wig). The accused stated "I guess I'm done again. I don't know why people rat on me. I never hurt anybody." No contemporaneous notes of these statements were made.

After the strip search a detective, who was alone with the accused in the interview room, testified he confessed to the four robberies, identified himself in the surveillance photographs, and agreed to provide an audio recorded statement. These admissions were not recorded on tape, rather the detective wrote the questions and answers in his notebook. An audio taped confession was subsequently recorded by police. The accused's wife, whom police had no knowledge of her involvement, was released shortly after the taped confession was taken.

During the trial *voir dire* the accused denied committing the robberies, denied making incriminating statements during the strip search, and testified that the police told him that if he did not confess his wife would go down with him, her name would be publicized in the newspapers, she would lose her job, and Children's Aid would take her child.

Even though the detectives admitted at trial that they set out to interrogate the accused without recording equipment, the judge found the statements voluntary and that there were no inducements made. The accused was convicted of bank robbery x4 and wearing a disguise. The accused appealed to the Ontario Court of Appeal arguing, in part, that his statements should have been ruled involuntary and were thus inadmissible.

Justice Feldman, writing for the unanimous court, agreed. The Ontario Court of Appeal has previously ruled that statements will be inherently suspect when recording facilities are available but the police intentionally don't use them (R. v. Moore-MacFarlane (2001) Docket:C31374/C30881 (OntCA)). To overcome this suspicion when a recording is not made, a trial judge will need to determine, by carefully scrutinizing the circumstances surrounding the taking of the statement, whether the Crown has nonetheless proven voluntariness beyond a reasonable doubt. The Court stated:

> In my view, this is a case where the voluntariness of the [accused's] statements is suspect. This is because the police set out twice to interrogate the [accused] without using the available recording equipment, and because there is nothing in the evidence on the voir dire which could satisfy the court of the reliability of the account of the officers. In those circumstances, the statements during the strip search and the recorded confession following the unrecorded interview with [the detective] should not have been admitted. [para. 25]

The appeal was allowed and the convictions were set aside. A new trial was ordered only on one charge.

Complete case available at www.ontariocourts.on.ca

OFFICER's DISDAIN FOR *CHARTER* AMOUNTS TO BAD FAITH

R. v. Lam, 2003 BCCA 593

While patrolling a light industrial area at 8:30 pm a police officer queried the licence number of a van parked in a cul-de-sac and learned the owner was flagged "Caution Violence" and was awaiting disposition on an outstanding drug matter. The officer noted two people peering over the dash, parked behind the van and walked to the driver's side, observing three large black duffle bags in the back of the van. The accused produced a valid driver's licence but could not produce the registration, stating it was at home. The officer asked the accused what was in the bags and he replied it was his clothing. When asked to show the clothing, the accused took the key from the ignition, unlocked and opened the rear door, and then stood back.

The officer then asked to be shown the clothing. The accused, who was somewhat hesitant, moved to the closest bag and slowly unzipped it about 12 inches, then stopped. Since he could not see in the bag, the officer again asked the accused to open it. The accused reached in the bag and lifted some green plastic bagging. Back up officers arrived and the officer once again asked the accused to show him the clothing. The accused pulled out the green baggy, revealing some clear plastic bags containing marihuana. The accused and his passenger were arrested for possession for the purpose of trafficking. A search warrant was applied for, but refused. The following day a second search warrant was applied for and granted. Police subsequently found 108 lbs. of marihuana.

At his trial in the Supreme Court of British Columbia the officer testified he had many experiences dealing with marihuana wrapped in similar circumstances, but also conceded they resembled bags that ERT gear is carried in. He also testified that if he did not get the accused's consent he would seize the bags anyway and make a "no case seizure", leaving it to the accused to pursue a civil remedy. The judge concluded that the police had an articulable cause to question and detain the accused. Under the circumstances, the officer was conducting a spontaneous investigation and was entitled to ask the accused to open the bags to secure his safety. The search was justified and did not violate the accused's s.8 *Charter* right. Even if there was a breach, the trial judge said it was minimal and he would have nonetheless admitted the evidence under s.24(2) of the *Charter*. The accused appealed his conviction to the British Columbia Court of Appeal.

The appeal court justices unanimously agreed that the search incidental to this investigative detention was not undertaken with officer safety in mind, thus making it unlawful. Justice Esson, to which the majority agreed, stated:

> There were, as the trial judge found, circumstances faced by [the officer] which could be said to have entitled him to "secure his safety". But I see no reasonable basis in his evidence for holding that, in searching the bags in the way he did, he was motivated by a concern about weapons or by a concern to "secure his safety". He gave no evidence of having such a motive and indeed he was frank to say that his motive was to obtain evidence of an offence. More to the point, the manner of the search, i.e., persuading the suspect to open the rear door of the van and open the bags, is not a course consistent with a concern to secure one's safety. [para. 10]

Having found a breach of the accused's s.8 *Charter* rights, the appeal court was, however, divided on the issue of s.24(2) admissibility. The majority concluded that the admission of the evidence would bring the administration of justice into disrepute because of the officer's bad faith. First, "a "no-case seizure" is an extra legal concept that flies in the face of the *Charter* and cannot be condoned." Secondly, the officer's testimony reflected "a disdain for the Charter."

He described the law on consent as a "bowl of Jell-O", even though the rules for consent were clearly laid down in 1994 by the Supreme Court of Canada[10]. Fatal to this case was that the officer failed to inform the accused he did not have to open the bag if he did not want to.

In dissent, Justice Esson agreed with the trial judge that the evidence should not be excluded under s.24(2). He concluded that the reduced expectation of privacy in a motor vehicle, the non-conscriptive characteristic of the evidence, and the minimal nature of the breach did not warrant its exclusion. The majority allowed the appeal, excluded the evidence, and entered a verdict of not guilty.

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

SEARCH OF GLOVEBOX & TRUNK INCIDENTAL TO ARREST

R. v. Carlston, 2003 SKCA 106

A police officer, who was aware of an earlier break and enter at a business where a cash register drawer had been stolen, saw the accused's vehicle fail to stop at a stop sign. After activating the emergency lights, the vehicle accelerated to about 70 km/h in a 50 km/h zone and took what the police considered "evasive action". After stopping the vehicle the accused (driver) was unable to produce his driver's licence or registration. The officer shone his flashlight into the vehicle and saw two passengers and numerous items of property including a cash register drawer and several bottles of champagne. The accused was asked to exit the vehicle and it was noted he was wearing a jacket associated to an organized street gang. He did however, deny ownership of the cash drawer and champagne. Nevertheless, the officer arrested the accused for possession of stolen property.

The officer was aware of the accused's prior criminal record and, along with the jacket and presence of two male passengers, was concerned with his safety. The vehicle was searched without a warrant and the police found stolen property in the glove box and trunk that subsequently led to searches of other premises around the city and many more charges. The accused was ultimately charged with 29 criminal counts involving break and enter and theft.

At his trial in Saskatchewan Provincial Court, the evidence resulting from the vehicle and other searches was admitted and the accused was convicted of 22 counts. He appealed to the Saskatchewan Court of Appeal arguing, in part, that his s.8 *Charter* right protecting him against unreasonable search and seizure was violated as a result of the search of his vehicle and that the evidence flowing from this search should have been excluded. The Saskatchewan Court of Appeal dismissed this ground of appeal. Justice Jackson, writing for the unanimous court, found the use of the flashlight in the manner used by the police was a justified "plain view search". The arrest was proper and "[t]he vehicle searches flowed reasonably and properly from [the officer's] conclusion to arrest [the accused] as an incident of arrest and his fears regarding officer safety."

Complete case available at www.canlii.org

FAIL READING SUPPORTS GROUNDS FOR BREATH DEMAND

R. v. Braun, 2003 ABQB 273

A police officer stopped the accused at a Checkstop and detected an odour of alcohol from him and noted that his eyes were red and glassy. The accused admitted to having one rye and coke. The officer formed the suspicion the accused had consumed alcohol and made a roadside screening demand. A fail reading

[10] R. v. Borden [1994] 3 S.C.R. 145

resulted and the officer formed the opinion the accused was impaired by alcohol, arrested him, informed him of his *Charter* rights, and read the breathalyzer demand. Breath samples were subsequently obtained and the accused was charged with impaired driving and over 80mg%.

At his trial in Alberta Provincial Court the charges were dismissed after the judge refused to admit the breath certificates of analysis on the basis the police violated s.8 of the *Charter*. In his view, there were no other symptoms of impairment other than the fail reading and the officer did not testify as to the relationship between the roadside failure and his belief that the accused was impaired or over 80mg%. Thus, he did not have reasonable and probable grounds on which to base the breathalyzer demand. The Crown appealed to the Alberta Court of Queen's Bench arguing, in part, that the trial judge erred in finding a s.8 breach.

Justice Mahoney agreed with the Crown. He first outlined a number of principles regarding the use of the roadside screening device (RSD)[11].

- A breathalyzer demand requires reasonable and probable grounds that a person has committed an offence under s.253 of the *Criminal Code*;
- An RSD may be administered on a reasonable suspicion of alcohol in the body;
- A properly conducted test resulting in a fail reading will normally be enough for a breathalyzer demand (reasonable and probable grounds);
- A fail reading may also be considered with other symptoms of impairment to furnish reasonable and probable grounds;
- If the police officer suspects the RSD will not provide accurate results (eg. subject drinking within last 15 minutes) then the results will not furnish reasonable and probable grounds unless the officer waits until they feel the test results will be accurate;
- The police officer is under no obligation to make inquiries from the subject if there are circumstances that would provide inaccurate results on the RSD; and
- A police officer is entitled to disbelieve a person who says there may be circumstances that would produce an inaccurate reading (eg. alcohol consumed shortly before driving) and immediately require a roadside test.

Aside from the fail reading, there were other indicia of impairment. The accused had an odour of alcohol, his eyes were glassy and red, and he admitted he had one drink. This lead to the roadside demand which resulted in a fail reading, subsequently leading to the officer's opinion the accused's ability to operate a motor vehicle was impaired. This conclusion was sufficient to explain what the fail reading meant to the officer. Justice Mahoney stated:

> …the officer had other symptoms of impairment upon which he could very properly have based his conclusion that he had reasonable and probable ground for making the demand. The officer wished to have his suspicions confirmed by the Alco-Sur test. After the test the officer now has, the smell of alcohol, red and glassy eyes, an admission by the Respondent of alcohol consumption and a "red fail." This…is enough reasonable and probable grounds to make a demand. In fact…a "fail" result on a properly conducted authorized roadside screening test alone will normally be sufficient grounds to furnish the officer with reasonable and probable grounds to demand a breath sample. [para. 15, references omitted]

The trial judge was in error and the Crown appeal was allowed. A new trial was ordered.

Complete case available at www.albertacourts.ab.ca

[11] These principles were taken from the Supreme Court of Canada decision in *R. v. Bernshaw*, (1994) 95 C.C.C. (3d) 193 (S.C.C.)

SEARCH OF PERSON IN PREMISE REQUIRES MORE THAN MERE PRESENCE

R. v. Phan, 2003 ABQB 469

Several police officers executed a drug search warrant on a residence by breaching both the front and rear doors with steel battering rams. Two occupants, the accused and a female, were located in the kitchen of the house and were advised they were being detained (not arrested) under the *Controlled Drugs and Substances Act* (*CDSA*). They were told to lie on their stomachs and were handcuffed. The accused was pat frisked in the areas accessible to his hands for officer safety and his pant pockets were searched. Police found several small baggies of cocaine. The accused was charged with unlawful possession of a controlled substance under s.4(1) of the *CDSA*.

During his trial in the Alberta Court of Queen's Bench, a *voir dire* was held to determine the admissibility of the evidence. The accused argued that his *Charter* rights under s.9 (arbitrary detention), s.8 (search and seizure), and s.7 (liberty) were breached because the police did not have reasonable grounds to search him as required by s.11(5) of the *CDSA*. A police officer testified that they could search anyone found in a residence being searched under s.11(1) of the *CDSA*. This, he said, included strip searches and need not be restricted to officer safety. Section 11(5) of the *CDSA* reads:

> s.11(5) *Controlled Drugs and Substances Act*
> Where a peace officer who executes a warrant issued under subsection (1) has reasonable grounds to believe that any person found in the place set out in the warrant has in their person any controlled substance, precursor, property or thing set out in the warrant, the peace officer may search the person for the controlled substance, precursor, property or thing and seize it.

This section does not confer the authority to search anyone found in a residence being searched pursuant to a warrant, but in fact requires that the police have an independent belief based on reasonable grounds that the person found in the premises has the drug on them.

The Detention

Queen's Bench Justice Johnstone first examined the detention and found it justified and lawful under the circumstances; thus no s.9 breach was made out. The judge stated:

> Under the doctrine of investigative detention, the police are entitled to detain individuals even where there are insufficient grounds for arrest provided at a minimum there be an articulable cause, the functional equivalent of "reasonable suspicion" or "reasonable cause to suspect".
>
> It is clear that the objective standard is the minimum standard to which the police are held. This prevents the exercise of power in a capricious or arbitrary manner. Applying this objective standard to the facts in the case at bar leads me to the conclusion that there was a constellation of objectively discernable facts which gave rise to reasonable suspicion, and consequently, the officers had the authority to detain the Accused. The most compelling of these facts was that the Accused was found in a well known drug house. The search of the residence revealed a notebook with mathematical entries. The officers had the authority to detain the Accused in order to investigate their suspicions that an offence may have occurred. [paras. 17-18, references omitted]

The Search

A search may or may not be reasonable following an investigative detention. In some cases, a minimal search incidental to lawful detention, unusually consisting of a pat down or frisk, may be reasonable provided the search is to ensure officer safety. However, s.11(5) of the *CDSA* does not confer the authority for the police to

search anyone found in a residence that is the target of a search warrant. In finding a serious breach of the accused's *Charter* rights, Justice Johnstone held:

> There exist two competing values in this case. The first is the fact that police work is by its very nature dangerous and that ensuring the safety of police officers is a paramount consideration. The police in executing a search warrant do not know what will confront them when they enter, including the potential of occupants with weapons. On the other hand, an individual has the right to be free from unreasonable search and seizure. There is a temptation for authorities to sometime use such a search as an opportunity to obtain evidence of a crime. This is a temptation that is strongly resisted by the Courts.
>
> Individuals may be detained for investigative purposes and a cursory search such as a frisk or pat down as an incident to detention can be conducted to ensure officers' safety.
>
> I also recognize that the police must seek to collect evidence. I have already referenced s. 11(5) of the Act which gives police the statutory authority to search persons found in premises without arresting them, if they have reasonable grounds to believe that such persons have controlled substances on their person.
>
> It appears that the officers, although acting in good faith, were operating under a standard belief that anyone found within the searched premises could be searched. The search warrant itself became their reasonable and probable grounds for effecting such searches of the person of the occupants. However, it was insufficient to do so. Therefore, this faulty reasoning resulted in a serious Charter breach given the nature of the search. ... A standard operating police practice of automatically searching all those found within searched premises, without more, will inevitably result in the systemic violation of Charter rights. [paras. 24-27]

Exclusion of Evidence

Having found a breach of the accused's s.8 *Charter* rights, the Queen's Bench court considered whether the admission of the evidence would bring the administration of justice into disrepute. In excluding the evidence under s.24(2) of the *Charter* Justice Johnstone concluded:

> Although, as I had earlier indicated, the police officers were operating in good faith, there was no evidence adduced in the voir dire which would satisfy me that the peace officers believed that such reasonable and probable grounds existed; they simply relied on the warrant without more. The power to search someone found on the premises that were the subject of a search warrant imported a requirement pursuant to s. 11(5) that the officers have a reasonable belief that the person was in possession of a narcotic. The narcotics found were real evidence, but they could not have been discovered without the violation of Accused's rights. This was a serious violation and not an isolated, situation-driven incident. It indicates a fundamental misunderstanding of the law by the officers and perhaps a systemic problem given their reference to "standard" practice. [para. 29]

Complete case available at www.albertacourts.ab.ca

VOIR DIRE APPLICATION REJECTED IN FLIR CASE

R. v. Lewis,
(2003) Docket:42062-3 (BCSC)

The police obtained a forward looking infrared (FLIR) reading, which is capable of detecting heat radiating from a building, when they flew a helicopter in the public airspace near or above a barn. The accused sought to enter into a *voir dire* concerning the admissibility of the evidence of the FLIR, but was denied by British Columbia Supreme Court Justice Grist. The judge ruled that he was bound by the British Columbia Court of Appeal decision (R. v. Hutchings

(1996), 111 C.C.C. 3d 215 (B.C.C.A.)) that held there was no reasonable expectation of privacy regarding the escape of heat from a barn because no private, personal, or core biographical information is at risk or obtained by the FLIR.

COP DESERVES JAIL FOR CRIMINAL BREACH OF TRUST CONVICTION

R. v. LeBlanc, 2003 NBCA 75

The accused, an on-duty 23-year veteran police officer, responded to a residential fire in progress. He rummaged through the owner's effects and stole various items, including $83 destined for children's Christmas gifts. The owner was a single mother of modest means. During the investigation the accused falsely implicated members of the fire department in the theft. Ultimately, the accused was charged with theft under $5,000 and breach of trust under the *Criminal Code*, both proceeded by indictment. A preliminary hearing was held and he was ordered to stand trial. The accused eventually pled guilty to the breach of trust charge and Crown stayed the theft. In the meantime, between his committal to stand trial and his plea, the accused retired from the police department and received full pension benefits.

At his sentencing hearing, the accused was given a conditional discharge under s.730(1) of the *Criminal Code*. He was placed on probation with conditions, including restitution, community service, and making a charitable donation in the sum of $1000. The Crown appealed to the New Brunswick Court of Appeal arguing that the sentence was unfit. It submitted that the sentence imposed was contrary to the public interest, it was disproportionate to the gravity of the offence and accused's degree of responsibility, and the aggravating circumstances were not considered. In the Crown's view, a lengthy prison sentence was required in cases of this nature.

Justice Drapeau, writing the unanimous judgment for the New Brunswick Court of Appeal, concluded that the conditional discharge did nothing to denounce the crime. Rather, it trivialized the breach of trust offence and did nothing for deterrence. He stated:

> If one unbundles the several principles that come into play in shaping a fit sentence for conduct by an on-duty police officer amounting to criminal breach of trust under s. 122, general deterrence and denunciation overshadow all others. Those principles command more than lip service; they must impact upon the sentencing process and help shape its outcome.
>
> While some question the usefulness of lengthy custodial sentences as a deterrent for hardened criminals, no one has voiced any thoughtful objection to the view that such sentences likely have a beneficial behaviour-shaping impact on law enforcement personnel, who have more than a passing acquaintance with penal law and a keen insight into the unpleasant reality of prison life. The available anecdotal evidence suggests that very few law-enforcement officers buy into the argument routinely made by defence lawyers and occasionally accepted by some judges that non-custodial sentences, such as discharges and conditional sentences, are truly punitive in nature.
>
> Police officers have opportunities, practically on a daily basis, to cross the line and engage in prohibited conduct. The public trusts them to resist the temptation and relies upon the courts to deal firmly with those who stray.
>
> In my view, the conditional discharge granted at trial is woefully inadequate as a means of promoting respect by police officers, and other law enforcement personnel, of their oath of office. It is a sentence without any deterrent value. [para. 25-28, emphasis added]

As for a fit sentence, the court recognized that "only the most exceptional circumstances can

justify a discharge, absolute or conditional, for breach of trust by a police officer in the execution of his duties." Here, there were no exceptional circumstances and a substantial term of incarceration was warranted. However, there were some circumstances that mitigated a lengthy sentence in this case. There was an inordinate delay between the charge being laid (2000) and sentencing (2003). Furthermore, the accused fulfilled all of his probation conditions and the Crown, the spokesperson for the public interest, recommended a term of 1-3 months in jail. Even though a short sentence would not have been appropriate at the time of original sentencing, with these circumstances a significantly reduced duration of incarceration was now appropriate. The appeal was allowed, the conditional discharge was set aside, and the accused was sentenced to 3 months in jail.

Complete case available at www.canlii.org

PLAIN VIEW OBSERVATIONS ARISING FROM 911 CALL SUPPORT WARRANT

R. v. Carter, 2003 BCCA 632

After responding to a 911 call from the accused's apartment, police officer's could hear noises from inside the apartment that resembled someone handling a firearm. The police withdrew down the hallway and the accused exited his apartment and locked the door. He was detained outside the apartment building and told police that everything was all right inside. Nonetheless, the police entered his unit where they discovered a small marihuana grow operation. The premise was secured and a search warrant was obtained. The accused was charged with production of marihuana and possession for the purpose of trafficking.

At trial in British Columbia Provincial Court the accused plead not guilty. During a *voir dire* the trial judge found no breach of the accused's s.8 *Charter* right (search and seizure) and held the evidence to be admissible. In his view, the totality of the circumstances justified the police entry into the apartment to verify the information provided by the accused that everything was all right inside. In light of the trial judge's finding on the *voir dire* the accused changed his plea to guilty for the production of marihuana charge, mistakenly believing he could appeal his conviction and challenge the judge's evidentiary ruling on the s.8 issue. The Crown stayed the possession for the purpose of trafficking charge and the accused was fined $2,000.

The accused appealed to the British Columbia Court of Appeal arguing that the trial judge's ruling on the *voir dire* was in error and that there was a miscarriage of justice. Under s.686(1)(a)(iii) of the *Criminal Code*, an appeal court can only entertain an appeal from a guilty plea if there are grounds that there was a miscarriage of justice. With regards to the *voir dire*, the appeal court found the trial judge properly considered the circumstances when he found the police entry lawful. As for the miscarriage of justice argument, the accused submitted that there was a miscarriage because there were arguments remaining after the *voir dire* ruling that could have resulted in an acquittal, like attacking the validity of the issuance of the subsequent search warrant on the basis that the police could not use their observations after entry to support the warrant. In rejecting this contention. Justice Finch, for the unanimous court, stated:

> …In my view, the argument now proposed by the [accused] is not tenable. There is no authority holding that police officers may not testify to what was seen by them to be in plain view on an entry into premises consequent on a 911 call. Their entry was made in the performance of their duty to protect public safety and did not depend upon establishing grounds for obtaining a search warrant.
>
> The argument that the police could not rely on what they saw upon such entry in the

> information to obtain a search warrant is inconsistent with the provisions of s. 489(2)(ii) of the Criminal Code. To give effect to the [accused's] argument on this appeal would require a conclusion that s. 489(2) is constitutionally invalid. No such argument has been advanced on this appeal. No other ground for attacking the search warrant is suggested. In my respectful view, the argument that the search warrant could have been successfully attacked would be bound to fail. The evidence obtained pursuant to the search warrant would have been properly admitted and a conviction entered. There was, therefore, no prejudice to the [accused'] defence by trial counsel's failure to advance this new argument at trial. [para. 9-10]

The Court was not persuaded that there was a *bona fide* defence and therefore no miscarriage of justice occurred. The appeal was dismissed.

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

DETENTION IS MORE THAN BELIEF PERSON INVOLVED IN OFFENCE

R. v. Priddle, 2003 BCCA 637

After their dogs entered the bushy area of a park, the victim and his gay partner saw a man kick the dogs. The victim entered the bush area and was assaulted by the man, including being pulled to the ground and kicked about the body resulting in bruises and blood in his urine. The victim and his partner drove to the nearest telephone and called police. Two officers promptly attended the scene. An officer went into the bush and found the accused seated on a log. He appeared intoxicated so the officer shook him by the shoulder to get his attention. The officer then asked if the accused was having any problems with people and he replied, "Fucking faggots and their dogs". The accused was then brought out of the bushes and the victim and his partner identified him as the assailant.

At trial the judge conducted a *voir dire* and ruled that the accused was not detained by the police when he made the utterance. Therefore, s.10(a) or (b) were not engaged. In his view, the police were merely asking some preliminary investigative questions of a person probably responsible for the assault. The accused was found guilty of assault causing bodily harm. He appealed his conviction to the British Columbia Court of Appeal arguing, among other grounds, that the conversation with police should not have been admitted into evidence. The court dismissed the appeal. Justice Low, for the unanimous court, stated:

> …[The constable] was simply making preliminary enquiries of the [accused] to determine if he was involved in the incident under investigation. He took no steps to restrain the [accused] and did not tell him that he was under restraint. He had reason to believe that the [accused] was involved because he fit the description given by the two civilian witnesses, but that alone does not amount to restraint or to a reasonable belief on the part of the [accused] that he was then in the control of the police officer.
>
> It was only after the [accused] would not provide his name that the constable arrested him. But when the [accused] made the incriminating utterance the officer was only trying to get his attention, to learn who he was and to attempt to determine if he was involved in the incident. As the officer testified, he did not yet have the opportunity to detain the [accused]. Before the [accused] spoke in the manner he did, the constable was simply making reasonable enquiries of a person in the right location who generally fit the description of the person who committed the assault. [para. 7-8]

The appeal was dismissed.

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

Note-able Quote

Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary—Reinhold Niebuhr

GROUNDS FOR SEARCH WARRANT MUST BE TAKEN AS A WHOLE, NOT EXAMINED INDIVIDUALLY

R. v. Stewart, 2003 BCCA 636

A police officer received an anonymous tip that there was a marihuana grow operation at a residence and that a male person was occasionally seen at this location. The officer attended the scene, detected an odour of marihuana, and formed the opinion that the accused's residence was the source of the smell. A hand held FLIR unit was used and the officer concluded there was a "significant" heat loss generated from the interior of the basement. He then attended the power company office and obtained the electrical consumption records. However, these records were insufficient because the officer could not adequately compare the previous occupant's consumption to the current consumption because nearly two years had passed since the current occupant had assumed responsibility for the hydro.

The officer applied for and was granted a search warrant for the residence based mainly on the following four main areas:

- the anonymous tip;
- the odour of marihuana from the residence;
- the FLIR results showing a loss of heat from the residence; and
- the consumption of hydro greater than three times the normal of the average residence.

As a result of the search, the police found 2.5 kg of marihuana valued at $9,000 to $27,200 (depending on how it would be packaged), Ziploc bags, and a scale. At trial in British Columbia Provincial Court the accused argued that the search contravened s.8 of the *Charter* and that the evidence was inadmissible under s.24(2). The trial judge carefully considered the evidence and found—although there were some weaknesses in the grounds and individually each of the four main factors were insufficient—that when taken as a whole upon amplification during the *voir dire* the warrant was valid.

For example, he recognized that an anonymous tip by itself was insufficient to justify a search warrant. Also, the FLIR reading was of limited value because only a small portion of the house was examined. The word "significant" in describing the level of heat loss was excised from the affidavit because of shortcomings with the FLIR unit. Finally, the officer made an error respecting the hydro records but concluded the consumption was double the average and unusually high. The trial judge found the search warrant valid and the accused was convicted of possession of marihuana for the purpose of trafficking.

The accused appealed to the British Columbia Court of Appeal arguing, in part, that there were insufficient grounds for the search warrant. Thus, he contended that the warrant was invalid, the search illegal and a violation of his s.8 *Charter* right, and that the evidence should have been excluded.

When challenging the validity of a search warrant, the onus is on the accused to demonstrate that there was no basis for the decision of the issuing justice to grant the warrant. In other words, the reviewing judge does not substitute his opinion on whether a warrant should have been issued. Rather, a reviewing judge should not interfere if the record that was before the authorizing justice, amplified on review, was sufficient that the justice could have granted the warrant. Fraud, non-disclosure, and misleading or new evidence are relevant, but the issue remains whether there remains a sufficiently reliable basis for the decision to grant the warrant. In this case, Justice Oppal on behalf of the court dismissed the appeal. In his view, there was no error committed by the trial judge:

> …[The]…experienced trial judge, considered each of the issues raised by the [accused] and concluded that on the basis of the whole of the evidence and, in particular, the evidence on the *voir dire* the warrant was valid. I cannot conclude that he either misdirected himself on the law or that he was in error on the evidence. He carefully considered the [accused's] arguments relating to the misleading information contained in [the officer's] material. However, he found that the officer was correct in attributing the smell of marihuana to the [accused's] residence. He also concluded that while the FLIR results were misleading, particularly in reference to the word "significant" in describing the heat loss, that that the officer was acting in good faith. As well, he concluded that the word "significant" could be deleted from the information. He also found that [the officer] was acting in good faith when he obtained the records from West Kootenay Power. These are findings of fact made by the trial judge and ought not lightly be disturbed by this Court. Accordingly, in my view, the trial judge was correct in coming to the conclusion that the warrant was valid. [para. 16]

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

PRISONER FOUND WITH CONCEALED WEAPON WARRANTS CONVICTION

R. v. Kerr, 2003 ABCA 92

The accused was a prison inmate who was charged with second-degree murder and possession of a weapon dangerous to the public peace. The charges arose from an incident in the prison's eatery/dining area when the accused, fearing for his safety from other inmates, brought two homemade weapons (a knife made from a metal spoon and an ice pick fashioned from an oven rack) with him hidden in his pants. The deceased attacked the accused with a homemade knife and tried to stab him, but missed. The accused defended himself and stabbed the deceased, who subsequently collapsed and died.

At his trial the accused successfully argued that he acted in self-defense and he was acquitted of the murder charge. As for the dangerous possession of a weapon charge under s.88 of the *Criminal Code*, the trial judge concluded that the weapons were possessed for the purposes of self-defence and also found him not guilty of this charge. In his view, the prevalence of illegally concealed weapons in the prison entitled the accused to do the same in order to protect himself.

The Crown appealed to the Alberta Court of Appeal submitting that the trial judged erred. In dismissing the argument against the murder acquittal, the appeal court ruled that all the elements of self-defence had been established. However, the acquittal on the possession of a dangerous weapon charge was overturned. Section 88 of the *Criminal Code* creates a dual procedure offence. It reads:

> s.88(1) *Criminal Code*
> Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

In order to sustain a conviction under this section, the onus is on the Crown to prove beyond a reasonable doubt that the accused intended to possess the weapon for a dangerous purpose. The onus is not on the accused to prove a lawful purpose regarding the possession. Nor is it sufficient that what the accused did with the weapon was in fact dangerous, although it may be one factor establishing its purpose. Furthermore, in some cases, a weapon carried for a strictly defensive purpose may not warrant a conviction. A court must examine the circumstances ensuring to carefully weigh all of the relevant evidence including the nature of the weapon, how it was acquired, the manner, time, and place of its use, and the statements and actions of the accused.

In this case, the court found the actions of the accused in concealing the weapons, which is an offence in itself under s.90 of the *Code* but not relied upon by the Crown, was crucial in determining whether the purpose of possession was dangerous. In allowing the appeal and substituting a conviction, Justice Berger stated:

> It is trite that prisoners at the Edmonton Institution are precluded from possessing weapons of any kind for any purpose. A weapon openly brandished would be immediately confiscated and the offender charged with a disciplinary offence under the Prisons and Reformatories Act…In my opinion, the dangerous purpose requirement of s. 88 is found in s. 90 of the Criminal Code. That is because there is an arguable distinction between possession of a weapon for defensive purposes, say in one's own home where concealment is unnecessary, and possession of a weapon in a penitentiary setting. The very fact of concealment is sufficient to establish the ingredients of the crime set out in s. 90. Even if the intended purpose is self-defence, concealment of a weapon is itself a crime and the unlawful purpose is thereby made out. Had it been the [accused's] intention to deter the apprehended attack, it was open to him to display his weapons to the deceased in a timely manner. The act of concealment rendered it more likely that there would be a breach of the peace. While concealment facilitated the [accused's] counter-attack, it also contributed to an already dangerous situation of which the [accused] was fully aware. The decision to conceal his weapons evidences the [accused's] choice of reprisal over deterrence. His unlawful purpose, one that is dangerous to the public peace, is thereby made out. [para. 30]

Complete case available at www.albertacourts.ab.ca

Note-able Quote

Bad administration, to be sure, can destroy good policy; but good administration can never save bad policy—Adlai Stevenson

WHERE WE HAVE COME FROM: CONTACT AND COVER

Sgt. Dave Schmirler

With the start of a new British Columbia Police Academy recruit class, the training of a new generation of police officers continues. To one seasoned instructor, training begins with a review of where we have come from in policing.

One of the major concepts in officer safety training is founded in the concept of "contact and cover". This is taught early in the academy training, and for a recent class, even before they were transitioned from civilian attire to police uniform. To many police officers the concept of "contact and cover" is a staple of everyday work.

Even experienced officers make mistakes. In making contact with violators and dealing with subjects, we can focus on the individual and lose track of what is going on behind us, or with the other officers. How many of us can recite the terrible cost to two officers that resulted in a now accepted police tactic?

On September 14, 1984 it cost two officers their lives. It what is called the "Grape Street Park incident", two officers made contact with a small group of males in a well-known park in San Diego, California. Both officers had less than two years experience. The contact was centered on a liquor violation. Both officers had their attention focused on a subject and during the check; one officer attempted a pat-down of one of the adult males. The suspect resisted and pulled out a 9mm handgun. The suspect fatally shot one officer several times then shot the second officer. The second officer would die two days later. Neither officer had time to draw their weapons.

From this, and during an era when the San Diego PD was losing officers at an alarming rate, came

the concept of Contact and Cover. Police train to use contact and cover principles on all stops and contacts. One officer does all the contact, paperwork, radio, computer, etc., while the cover officer simply covers the contact officer by watching the action and surroundings from a position of advantage.

This concept is new to our recruit officers. Some of them young enough to speak of the North Hollywood shootout as something they "remember seeing".

The San Diego officers were Kimberly Tonahill, age 24 with 9-months service and Timothy Ruopp with 2 years service.

Remember them.

SCREENING DEVICE FAILURE SUPPORTS REASONABLE GROUNDS

R. v. Girouard, 2003 NBCA 84

A police officer found the accused in the driver's seat of a motor vehicle attempting to extricate it from a ditch. He detected the smell of alcohol on the accused's breath and demanded a roadside screening test. After several failed opportunities to provide a sample, the officer arrested the accused for refusing to provide a sample. He was transported to the police station where he spoke to a lawyer. After speaking to his lawyer, the accused asked the officer if he could provide a sample into the screening device. The device registered a fail reading, prompting the officer to read the breathalyzer demand. The accused again spoke to counsel and subsequently provided two breath samples resulting in readings in excess of 80mg%.

At his trial the judge concluded the fail reading on the roadside screening device provided the officer with the requisite reasonable grounds on which to justify the breathalyzer demand. The certificate of breath readings was admitted and the accused was convicted of care and control while over 80mg%. The accused's appeal to the New Brunswick Court of Queen's Bench on several grounds, was dismissed. The accused further appealed, this time to the New Brunswick Court of Appeal, again arguing, in part, that the roadside sample was not provided forthwith and that the fail result could not be used as reasonable grounds.

Forthwith

Section 254 of the *Criminal Code* allows a police officer to make a demand of a person operating or in care and control of a vehicle, reasonably suspected of having alcohol in their body, to forthwith provide a breath sample into a roadside screening device. The accused submitted that the more than one hour delay from the demand to the taking of the roadside sample was not forthwith. The New Brunswick Court of Appeal unanimously rejected this ground of appeal. The sample in this case was not taken pursuant to the demand. The accused had been arrested for refusal and was provided an opportunity to speak to his lawyer. He then requested to provide a sample, which he failed. The sample given was offered by the accused. It was voluntary and was not subject to the strict requirements of the demand section.

Reasonable Grounds

The accused contended that the fail reading on the roadside screening device could not form the basis for reasonable grounds, absent other indicia of impairment. After reviewing previous case law on this very issue, the New Brunswick Court of Appeal found that a roadside fail result may, by itself, be sufficient to provide reasonable grounds provided the test was properly conducted. If, however, the officer knew of circumstances making the results unreliable, such as recently consumed liquor (mouth alcohol), belching, or vomiting, the fail result will not be sufficient to provide the necessary grounds for the demand. In refusing to grant leave to appeal, Justice Larlee held:

> In the case at bar, [the constable] admitted at trial that up until the time he received a "fail" reading on the roadside screening device, he did not have reasonable and probable grounds to believe that [the accused's] ability to drive was impaired by alcohol. [The constable] had a reasonable suspicion of impairment based on finding the car in the ditch and the smell of alcohol on [the accused's] breath. On that basis, [the constable] had the necessary grounds to administer the roadside screening test. However, [the accused] did not provide the necessary samples at that point. After consulting with counsel, [the accused] voluntarily provided the samples at the police station. This fact does not eliminate the reasonable suspicion formed by [the constable] prior to administering the test at the roadside early in the night. After the failed roadside screening test, [the constable] then had reasonable and probable grounds to make the Breathalyzer demand…[para. 14]

Complete case available at www.canlii.org

WARRANTLESS ENTRY's DUAL PURPOSE DOES NOT VITIATE SUBSEQUENT WARRANT

R. v. Waldron, 2003 BCCA 442

The police responded to the scene of a warehouse fire after the fire department called them. A fire captain told a police officer they had found a marihuana grow operation and invited him inside. The police officer then entered the premises to check on the possibility of a break and enter/arson due to the nature and location of the fire (the front door) and located a room inside containing marihuana plants, growing trays, lights, and a plant feeding system. A search warrant was subsequently obtained by another police officer, but the information failed to disclose that the attending officer had been told of the presence of the grow operation before his entry to investigate the arson. The police seized several exhibits and incriminating documents, including four fingerprints belonging to the accused on a scale, pesticide bottle, and two separate light shrouds. However, the seized property was destroyed 5 days later on the instructions of the property office manager.

At his trial on charges of unlawfully producing marihuana and possession for the purpose of trafficking, the accused was convicted. The trial judge concluded that the fire captain expressly invited the attending officer into the premises to assist him in carrying out his duties under the *Fire Services Act* because there was evidence of an attempted forced entry to the premises. Even though the officer testified to having a dual purpose, investigating the possible break in with arson and to confirm the existence of a grow operation, the judge ruled the entry lawful and not unreasonable. The judge did, however, find parts of the information to obtain the search warrant misleading in that the information failed to disclose the foreknowledge of the grow prior to the initial police entry.

The accused appealed to the British Columbia Court of Appeal arguing that the trial judge erred in upholding the validity of the search warrant and that the early destruction of the evidence deprived him of the right to make full answer and defence to the charges. In rejecting the ground that the warrant was invalid, Chief Justice Finch stated:

> The record before the authorizing judge, as amplified on review, shows that the authorizing judge could have granted the order. Both the fire department investigator and [the police officer] were lawfully in the premises. Both saw the grow operation in place. This direct evidence formed the essential basis of the information. The complaints about other aspects of the information do not detract from this direct evidence.
>
> The learned trial judge found as a fact [the police officer] entered the warehouse unit lawfully. He entered in order to investigate a breaking and entering, believing he would also find a marihuana grow operation. These

findings of fact are not challenged. [The police officer's] belief that he would find evidence of further criminal activity cannot undo or undermine the valid basis for his lawful entry of the premises without a search warrant. [para. 7-8]

Early destruction of evidence

The accused's position was that the early destruction of the exhibits was an abuse of process and deprived him of his right to make full answer and defence to the charges, a right protected under s.7 of the *Charter*. The British Columbia Court of Appeal disagreed, upholding the lower court's ruling. The accused failed to demonstrate any realistic possibility that access to the destroyed property could have assisted his defence. As the trial judge noted, even if other fingerprints were found, it would only demonstrate a joint enterprise. The destruction of the evidence was an "honest blunder". The police did not deliberately decide to destroy the evidence nor was its disposal due to a systemic disregard to destroy evidence. This ground of appeal was also dismissed.

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

SEASON'S GREETINGS

The staff at the Police Academy would like to wish our **"In-Service:10-8"** readers and their families all the best for this holiday season. It has been a pleasure serving British Columbia's police officers, and our other readers across the country, by bringing them up-to-date on many of the issues facing them daily as they go about protecting and serving the citizens of their communities. May you have a safe and blessed Christmas and all the best in 2004.

Check out full Police Leadership 2004 Conference details starting on page 3.

POLICE LEADERSHIP 2004 CONFERENCE

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Please check the Justice Institute of B.C. website for more information and details at ***www.policeleadership.org***

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