

POLICE ACADEMY

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IN SERVICE:10-8

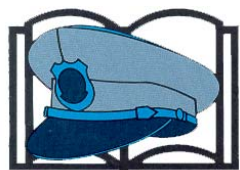
A PEER READ PUBLICATION



JUSTICE INSTITUTE
of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

'IN SERVICE:10-8' ENTERS 4th YEAR OF PUBLICATION



"In Service: 10-8" is entering its fourth calendar year of publication. Issues are available from 2001, 2002, 2003, and now

2004. We are proud to report that the publication is read from coast to coast by some of Canada's finest.

By bringing important issues to you, particularly in the area of criminal and constitutional law and its application to front line law enforcement, it is our hope that the case summaries and other subjects will stimulate thought, discussion, and understanding. Based on the kind responses we have received to date from our readers, it has been realized that there are few resources in Canada that provide the service of this publication. Our unofficial motto is quite simply, "Keep Current and Stay Safe".

For the most part, contributors to the newsletter are operational law enforcement officers. People with hands on experience who have dealt with many of the concerns you may have. Looking into the future, it is evident that we must continue as a body of professionals to commit ourselves to continuous educational development. This responsibility lies not only with our departments and training academies, but also on an individual basis!

Note-able Quote

Humility is not thinking less of yourself, but thinking of yourself less—Rick Warren

Volume 4 Issue 1

January/February 2004

POLICE LEADERSHIP 2004 CONFERENCE



*"Excellence in Policing
Through Community Health,
Organizational Performance
and Personal Wellness"*

Location:

The Westin Bayshore
Vancouver, British Columbia

Dates:

April 5, 6 & 7, 2004



JUSTICE INSTITUTE
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(includes reception, 2 lunches and the
banquet dinner)

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additional \$75

Keynote Speakers:



Dr. Kevin Gilmartin

Sir Ronnie Flanagan

Mr. Gordon Graham

LAPD Chief William J. Bratton

RCMP Comm. Giuliano Zaccardelli

Lunchtime Speakers:



Mr. Joe Roberts



Honourable Garde Gardom

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

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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, (604) 528-5733 or e-mail mnovakowski@jibc.bc.ca

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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.*** 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:

LAPD Chief William J. Bratton



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 a 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 Behavioural 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's Behavioural 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.

Mr. Joe Roberts



The most effective leaders in society are those rare individuals who can inspire their audience with a passion that can only come from personal experience. As the President and CEO of an extremely successful multimedia

company, Joe Roberts has faced and overcome key business challenges, which confront every modern organization.

Joe's business solutions have made millions of dollars for his clients, across a variety of business sectors. It is from this experience that

Joe draws when addressing Fortune 500 companies, boards of trade and professional associates internationally. With a track record of proven business success, Joe formed his own multimedia company, Mindware Design Communications. In less than four years, he led his company to a phenomenal 800% increase in business, and made his first million in sales before he was 35.

What is most amazing about this young man however is that in 1989 he was living on the streets as a homeless skid row derelict. Through perseverance, determination and his resilient human spirit, Joe pulled himself out of the darkness and despair, to become a highly respected business and community leader of today. Drawing on the tremendous courage and determination necessary for his dramatic personal transformation, Joe now uses his amazing story, insightful humour and solid business experience to inspire individuals and organizations to achieve their own remarkable goals!

How did he do it? Joe overcame his hardship by studying what worked in the past. By reading and researching great authors and business leaders he learned how to test and immediately apply usable life principles to his own growth. Today, Joe shares his life transforming techniques with his listeners in a step-by-step way that empowers audience members to achieve their goals.

In his book, "7 Secrets to Profit from Adversity - Success Against All Odds", Joe maps out exactly how to profit from hard times. His presentation of these principles with an exciting combination of inspiration, entertainment, and education is what makes Joe Roberts' programs so unique and effective. As a result, he has become an internationally known and respected speaker on Managing Adversity and Change, Visionary Goal Setting and Professional Selling.

Joe has established his professional speaking career working with major clients in both Canada and the United States. He has become a favourite

at business conventions and corporate meeting events, captivating tens of thousands of people and receiving rave reviews!

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.



Dr. Darryl Plecas (EdD) is a professor in the Department of Criminology and Criminal Justice at the University College of the Fraser Valley (UCFV) where he is Chair and has worked since 1979. In 2001 he was awarded UCFV's

Teaching Excellence Award and in 2003 he received an Innovative Excellence in Teaching, Learning and Technology Award at the 14th

International Conference on College Teaching and Learning.

Dr. Plecas has served as an Associate of the International Centre for Criminal Law Reform and Criminal Justice Policy at the University of British Columbia, as an Expert Observer to the 10th United Nations Congress on the Prevention and Treatment of Offenders, and on three occasions as an invited participant at the annual meetings of the United Nations Scientific and Professional Advisory Committee. He also served for three years as a member of the Correctional Service of Canada's Audit Team on National Programs Accreditation. He is the book review editor for *Police Practice and Research: An International Journal*, and Chair of the planning committee for the 2004 International Police Executive Symposium. He is the author or co-author of more than 80 research reports, international journal articles, and other publications addressing a broad range of criminal justice issues. He holds two degrees in criminology from Simon Fraser University, and a doctorate in Higher Education from the University of British Columbia. In the summer of 1995 he completed the Management Development Program in the Graduate School of Education at Harvard University.



Dr. Greg Anderson (PhD) received a BPE and MPE in Exercise Science from the University of British Columbia, and a PhD in Kinesiology (Applied Physiology) from Simon Fraser University. He has

been involved in teaching at the post-secondary level since 1986 and is presently a Professor in Kinesiology and Physical Education at the University College of the Fraser Valley.

Dr. Anderson's research interests lie in applied areas - recently in research examining occupational fitness and occupational physiology of physically demanding occupations. Examining

issues within law enforcement agencies, he is well published in both pure science and practitioner journals on topics ranging from bona fide occupational testing, police officer stress, grooming standards for general duty police officers, to prediction of shooting scores from physical data. He has been an invited speaker at regional, provincial, national and international venues. A passionate and enthusiastic speaker, Dr. Anderson enjoys translating "the science" for the practitioner, providing them with a better understanding of the fundamental theory behind popular practice. Recently, he received the 2003 Canadian Society for Exercise Physiology, Health and Fitness Recognition Award.

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

www.policeladership.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.

Hotel Reservations

THE WESTIN BAYSHORE RESORT & MARINA Vancouver

A block of rooms has been reserved for the Conference at the **Westin Bayshore Resort and Marina** located at 1601 Bayshore Drive, Vancouver. Delegates are responsible for booking their own rooms, but remember to state the "Police Leadership 2004 Conference" to receive the special conference rate. Because rooms are limited, early reservation is recommended.

The Westin Bayshore
hotel telephone: (604) 682-3377
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FINDING FUN IN FITNESS

Cst. Kelly Keith

13 Fitness Quick Tips

- 1) After a hard workout, greatly help alleviate sore muscles the following day by trying a contrast shower. Run the shower at cold for 1 minute. The shower should be on a hard pulse, if possible, and should cover your extremities, especially the parts you just worked out. Then alternate the temperature to warm (not hot) and do the same. Do a 3-minute rotation between each temperature and the muscle soreness will be greatly diminished.
- 2) If your runs are getting boring, try shaking things up. Try school runs where you run from school to school and do a speed lap on their track, then onto the next school; a church run where you run hard around the block of the church; or race buses and, as a bus passes, try keeping up with it for as long as possible.
- 3) Purchase some high tech, comfortable running clothing and you'll feel and act more like a runner.
- 4) Don't miss the chance to train in miserable weather. You'll feel great afterwards and if you run a race in miserable weather, you'll be invincible.
- 5) If you get blisters on your feet, try turning your socks inside out so the seams don't rub against your feet.

- 6) After your hard speed runs, try stretching immediately and then put some ice packs on your legs.
- 7) When attempting to make progress in your running, biking, workout, etc., remember to take one step at a time. You need to inoculate your body gradually to the stress you're asking it to adapt to. Try adding 5% per week to your long runs etc, or 5% weight increases to your lifts.
- 8) Consider variety in your training. If you run, mix in some tempo runs, speed runs, and long steady runs each week. If you lift weights, change one exercise for every two body parts every work out, or change from dumbbells to barbells on a regular basis.
- 9) Do Plyometrics. Plyometrics work great if you are trying to get stronger and/or faster. Use them at the end of your workout to ensure maximum benefit is gained. There are a number of books available that illustrate various plyometric techniques. Check them out.
- 10) Don't have time to cook or need a quick healthy fix. Canned salmon / flavoured tuna, and beef jerky are great sources of protein. Fruit cocktail in real fruit juice, canned peaches—major carbs. Canned chicken thrown on a salad—quick and easy meal. Beans in tomato sauce—good protein and carb content.
- 11) Is cholesterol a problem? Green tea is a heavyweight champ of a nutritional drink and it also helps lower cholesterol.
- 12) Short on pre-exercise carb drink? Three tablespoons of honey is just as effective as any gel or drink.
- 13) Double the benefit. Remember to lower the weight in total control. Lifting the weight to the desired level is only half the work. Studies have shown that the lowering, or negative phase, of the lift can be as good or even more important for muscle and strength gains.

PROCLAMATION NOT NECESSARY FOR RIOT CONVICTION

R. v. Greenhow, 2004 ABCA 22



The accused was convicted at trial for participating in a riot, assaulting police, and assault with a weapon. He appealed his convictions to the Alberta Court of Appeal arguing, in part, that there was no valid riot proclamation under s.67 of the *Criminal Code* and therefore his conviction for participating in a riot under s.65 was improper.

The Alberta Court of Appeal unanimously disagreed. Section 65 of the *Criminal Code* creates an offence for participating in a riot and only allows for a maximum punishment of two years imprisonment. Section 65 does not make any reference to s.67. Section 68, on the other hand, requires the proclamation under s.67 as an essential element and provides for a maximum penalty of life imprisonment. Thus, compliance with s.67 (riot proclamation) is necessary for a conviction under s.68, but not s.65. The appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

DID YOU KNOW...

...that of recent JIBC Police Academy recruits¹:

- the average age was 29 years old;
- ages ranged from 21 years to 44 years;
- 72% were male;
- 52% had a university degree, 30% had a college diploma, 16% had some university or college, and 2% only had a high school education; and
- 76% had no prior police experience, regular or reserve.

¹ Novakowski, M. (2003) Exploring Field Training Within British Columbia's Independent Police Agencies: It's the Singer, Not the Song. Royal Roads University Thesis

'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

encouragement we have received and look forward to future editions:

As a field trainer I find your newsletter to be invaluable as an additional resource when taking on recruits. Please keep up the good work. Our job is often without praise and you should be commended on your work." **Police Constable, British Columbia**

"Please put me on your list to receive your In Service 10-8 newsletter. It is really excellent. I post it up for the members to read as I run two community police offices." **Police Constable, RCMP British Columbia**

"I accidentally came across [an] issue of the In-Service: 10-8 newsletter. I was delighted to see such a newsletter which highlights recent case laws detrimental to day to day police work. Keep up the excellent work." **Police Officer, RCMP Major Crime Unit British Columbia**

"Could you please add me to your mailing list. They are very interesting and you obviously put a lot of work into their research. I really find it remarkable how the case law trends differ so dramatically over different geographic regions of the country! It seemed for a while the west was a source of bad case law, now it seems its us here in Ontario who are upsetting the apple cart." **Police Sergeant, Ontario**

"I look back sometimes on my career and think how great it would have been to have timely information such as you are now providing for street officers. Without such updates the job

becomes like playing a game- in which you find out what the rules were... after the game is over!"

Retired Police Sergeant, Ontario

"I've read the latest 10-8 publication and found it to be most helpful! Excellent resource and written in a manner that's easy to understand"

Police Constable, RCMP British Columbia

"I only recently received a copy of this publication. My compliments on a fine newsletter. Could you please add me to your electronic distribution list for future issues." **Deputy Chief Constable, British Columbia**

"I am a Detective Constable...in Ontario. I became aware of your publication on the internet and have been maintaining copies for review by our entire detective office. I understand you conduct automatic dispatch of your publication via e-mail. Would you please consider the addition of my e-mail address to your current distribution program." **Police Detective, Ontario**

"Thanks once again for the excellent information you provided me. The case law summaries were especially helpful. I shared the information among my co-workers and it generated lots of lively discussion...Please place me on your e-mail distribution list. I am very interested in staying current with case law and any other aspects which impact on law enforcement" **Police Constable, RCMP Nova Scotia**

"I am in charge of Policy of our service, and, review case law for our service. Your Newsletter is one of the better Canadian Newsletters I've come across." **Police Constable, Manitoba**

"I am the...Police Service Alcohol Coordinator and I found your information on Shuparski very informative. I have passed that information on to our breath techs. Thanks." **Police Officer, Saskatchewan**

'OFFICER SAFETY SEARCH' NOT TO BE USED AS FISHING EXPEDITION

R. v. Bercier, 2003 MBQB 90



The accused was asked for his drivers licence after being stopped by police for making an illegal turn at 3 am. However, he could only produce the picture part of his Manitoba driver's licence, but not the second part certifying his status. The vehicle was not stolen, but a computer check showed the accused's licence was expired and that he had an outstanding drug charge. The accused was asked to get out and pat searched before being placed in the back of the police car. A small hard, round bulge was detected in his underwear and the accused brushed the officer's hand away to prevent the completion of the search. The police forcibly completed the search and found a small cloth drawstring bag containing drugs. The accused was charged with possession for the purpose of trafficking.

At the accused's trial in the Manitoba Court of Queen's bench, the officers testified they removed the accused from his vehicle as a matter of convenience. They admitted they did not have reasonable grounds the accused committed any offences other than *Highway Traffic Act* violations and said they searched the accused for officer safety reasons. Furthermore, they testified that in most cases the driver they wish to ticket is left in the vehicle and the ticket is delivered to them, unless they need to establish identity, prevent the continuation of the offence, there is a risk of flight, or the driver poses a danger. However, the officers admitted none of these factors were a concern in this stop.

All warrantless searches are presumptively unreasonable and the Crown bears the burden of proving that the search, in this case, was lawful, reasonable, and necessary. The Crown suggested that because the police could have arrested the

accused without warrant under the *Highway Traffic Act*, but chose not to, they still nonetheless had the right to search him incidental to arrest. Such a circumstance has some times been referred to as a *de facto* arrest. Justice Scurfield disagreed, stating:

Section 240(1) of The Highway Traffic Act conveys the right to arrest a person who has committed a violation, but not the obligation to do so. Rights and obligations flow from a decision to exercise the power of arrest. In this case, the police officers testified that they did not arrest the accused, nor did they intend to do so before they conducted the search. Consequently, even if the police officers had a valid power to arrest the accused, I am not inclined to accept an argument that the powers of search should be defined by what they could have done.

Where a police officer chooses to detain a person as opposed to arresting them, it would be illogical for the courts to countenance the same degree of interference with the person's liberty as is recognized to follow a lawful arrest.

Logically, the level of warrantless search that is permissible correlates partly to the categorization of the event as either a lawful arrest or detention. Clearly the scope of a search following a lawful arrest has been recognized as broader than that generated by a mere detention...To the extent that R. v. Boyd (supra) treats a decision to detain as giving rise to a power to search that is identical to that which follows arrest simply because an officer could have arrested the accused, I am satisfied that it is no longer persuasive authority. [para. 16-18, references omitted]

Furthermore, the court found the police did not have the right to search incidental to the accused's detention. Even though the police had a right and duty under motor vehicle legislation to stop the accused, identify him, and issue him a ticket, this did not entitle the police to increase the intrusiveness of the detention and conduct a warrantless search for drugs. The court held:

In the case of a detention, the generation of a right to search should be limited by what is reasonably necessary for the police officer to complete the duty which he is then exercising...Further, the right to search is limited to situations where the police have an "articulable" cause for conducting the search. There is no general power to search following a detention. Police officers must be able to identify a reasonable basis for both the detention and any subsequent search. The scope of such a search is clearly limited to what is reasonably necessary in order to complete the bona fide duty that the police officer is exercising at the time...By contrast, where there has been a lawful arrest, wider powers incident to that arrest have been acknowledged by the courts...

If a search following a detention is necessary, then it is primarily justified by the object of preserving the peace and protecting life. Consequently, the search of the detained person ordinarily should be limited to one for weapons... [para. 19-20, references omitted]

Since the police could not articulate a reasonable necessity for escalating the level of detention nor provide reasonable grounds for performing the search, it was unreasonable under s.8 of the *Charter* and the evidence was ruled inadmissible pursuant to s.24(2). Here the police intentionally violated the accused's rights and the judge was not willing to "condone the deliberate use of "officer safety searches" as a means of avoiding the obligation to obtain search warrants or as a justification for the arbitrary interference with the liberties of a citizen." Moreover, the use of provincial legislation as a ruse to conduct a warrantless search supports exclusion of the evidence.

Note-able Quote

What matters in life is not how long we live, but how we live—Steve Berg

POLICE HAVE RESPONSIBILITY TO INVESTIGATE SUSPICIOUS CIRCUMSTANCES

R. v. Uhryn, 2003 SKPC 166



A police officer, knowing the accused was a prohibited driver and having received an anonymous tip she might be found driving near a bar, spotted a vehicle similar to that driven by the accused in the area at 3 am and stopped it to perform a licence and registration check. The accused was in fact the driver and she was arrested, her vehicle was impounded, and she was released on an appearance notice. She was charged with driving while disqualified under the *Criminal Code* but argued at her trial in Saskatchewan Provincial Court that she was arbitrarily detained under s.9 of the *Charter*.

Under Saskatchewan's *Highway Traffic Act*, a police officer is empowered to randomly stop motorists and check for driver's licences, even without a suspicion or reasonable belief that the driver has done anything wrong. Arbitrary traffic stops are a justifiable breach of a person's rights under s.1 of the *Charter* as long as the officer is in the lawful execution of their duties. Provincial Court Justice White described the power to detain as follows:

In practical terms what this means is that if a police officer wishes to stop a vehicle based upon a highway traffic safety matter or to check the license of the driver and the registration of the vehicle, he/she has an unfettered right to do so...Likewise, if there exists a legitimate concern for enforcement of the criminal law then the officer may legally detain a vehicle.

The point is that the detention of a motor vehicle is only illegal if it is done on a whim without any articulable cause that relates to the duties and responsibilities of the police officer. If the decision is made to stop a vehicle and if the purpose is related to his or

her duties as a police officer then, as a matter of law, the police officer is acting lawfully in the execution of his/her duties and responsibilities.

Problems have arisen in cases where vehicle stops have been made in high crime areas (also referred to as "trouble spots") and the police have been unable to say why they decided to stop the vehicle...Alternatively, the issue arises in those cases where the police use the pretext of stopping a vehicle to check for license and registration to satisfy their curiosity...

Our courts have made it abundantly clear that these types of activities are illegal and violate rights of citizens under the Charter of Rights and Freedoms and that the usual remedy of exclusion of evidence will be allowed pursuant to Section 24(2) in such circumstances. There must be at a minimum "articulable cause" for the detention... [paras. 17-20, references omitted]

In this case, the detention was lawful for several reasons. Justice White stated:

Clearly, he had articulable...cause to stop the vehicle and investigate the matter further. A police officer not only has a right but also a duty and responsibility imposed by law to make enquiries when confronted with suspicious circumstances. The police have a positive duty to enquire into circumstances that might have the potential for criminal activity. Surely, that is exactly why police officers go on routine patrols of their designated territory. Police officers must as a matter of course attempt to determine the identities of people where there are suspicious circumstances and they must also take active steps to prevent the commission of criminal offences or the continuation of a criminal offence. If a police officer's suspicions are satisfied then he/she must cease his enquiries if he/she wishes to duly execute his or her duties...However where the suspicions are not put to rest then the investigation must continue and this is clearly authorized by the law.

The police officer herein had a well-grounded suspicion of criminal activity which was

confirmed upon further routine investigation. He also had the additional power granted to him by the Highway Traffic Act to detain and question about license and identity which he does not normally have absent suspicious circumstances which is the prerequisite condition to making further enquiries in the non-vehicular context...The police officer in the instant case had reasonable suspicion, articulable cause and statutory authority to make the detention and subsequent arrest in this case. [paras. 26-27, references omitted]

There was no breach of the accused's *Charter* rights and she was convicted.

Complete case available at www.canlii.org

IMPAIRED OBSERVATIONS ARISING FROM ROUTINE VEHICLE STOP LAWFUL R. v. Malekoff, 2003 SKQB 455



A police officer on routine patrol in the early morning hours stopped a vehicle after observing its tires spin on the gravel as it started up from a stop at an intersection. The officer smelled a strong odour of liquor from the driver who admitted to having 5 or 6 beers, the most recent about 5 minutes prior to the stop. The officer detained the accused for an impaired driving investigation and waited 14 minutes before a roadside screening sample was taken. The accused failed and he subsequently provided two breath samples with readings of 190mg% and 200mg%. The accused was charged with driving over 80mg% and convicted in Saskatchewan Provincial Court, but appealed to the Saskatchewan Court of Queen's Bench arguing, among other grounds, that the trial judge erred in finding that he had not been arbitrarily detained under s.9 of the *Charter* and that the certificate of breath samples should have been excluded.

Justice Maher dismissed the accused's appeal. An arbitrary detention under s.40(8) of

Saskatchewan's *Highway Traffic Act* is authorized and saved by s.1 of the *Charter* provided its purpose is related to vehicle operation or road safety issues and is conducted by an identifiable police officer in the lawful execution of their duties. Furthermore, the officer is not precluded from investigating other offences arising from the detention that would not have otherwise been discovered but for the arbitrary stop. In this case, the officer was entitled to stop the accused's vehicle and check it for spinning its tires on gravel without infringing s.9 of the *Charter*.

Complete case available at www.canlii.org

MARIHUANA ODOUR PROVIDES REASONABLE GROUNDS TO OPEN BRIEFCASE

R. v. Gallie, 2003 SKPC 158



Several police officers executed a *Criminal Code* search warrant at the accused's residence looking for stolen property (a television with remote, a Sony Playstation with games, and a Nintendo 64). A search plan had been devised so that the search would be thorough, efficient, and systematic, rather than random. As such, certain police officers were assigned specific areas to search. The accused was in the residence and pointed out some of the articles mentioned in the warrant. She was arrested and then taken to the police station.

As the search continued, an officer located a locked briefcase in the living room sitting against a wall. He picked up the briefcase, shook it, and noted that it smelled strongly of marihuana. He was not aware that any of the games had been located so thought it possible that they might be inside. The lock was broken open and the officer found 32 baggies of marihuana, \$300 cash, and \$70 cash in a wallet. A purse was also found in a bedroom containing \$150 cash, a baggie of marihuana cigarettes, five baggies of marihuana, some hashish, and a notebook. The search was

concluded once the television remote control had been found.

At her trial in Saskatchewan Provincial Court, the accused submitted that her right to be secure against unreasonable search and seizure protected under s.8 of the *Charter* had been violated because the police conducted the search in an improper manner by unreasonably extending it, which eventually led to the discovery of the brief case and purse contents. She argued that all of the items listed in the warrant had been surrendered by her or could have been easily located by the police with reasonable diligence. In her view, the search warrant did not allow the police to rummage for things of interest or to search and seize at will.

Justice Kolenick upheld the search and seizure. The officer had focused his attention on the briefcase as a possible receptacle of stolen property when he noticed that it smelled of marihuana. He was not aware of the presence of marihuana until he picked up the briefcase and it was at this point he concluded it may contain illicit drugs in addition to stolen property. By shaking the briefcase and hearing something inside, as well as relying on his sense of smell, the officer properly concluded it might well contain marihuana, stolen property, or both. "As such, pursuant to s.489(1) of the *Criminal Code* he had reasonable grounds to search the contents of the brief case for possible evidence of unlawful conduct," ruled the judge. Further, this all happened in advance of the remote control being found, which ultimately terminated the search. Thus, there was no breach of the accused's s.8 *Charter* rights and her application for a remedy was dismissed.

Complete case available at www.canlii.org

Note-able Quote

Nothing gives one person so much advantage over another as to remain always cool and unruffled under all circumstances—Thomas Jefferson

CLAIM AGAINST JP REQUIRES MALICE or BAD FAITH

Pispidikis v. Scroggie et al.,
(2003) Docket: C39417 (OntCA)



The plaintiff brought a civil action for wrongful arrest and imprisonment against several defendants, including a justice of the peace, two correctional officers and the Crown. The plaintiff had pleaded guilty in front of a justice of the peace to driving with a suspended licence under Ontario's *Highway Traffic Act* and received a \$1,000 fine plus \$5 in court costs, with one year to pay. The record of the sentence, however, recorded "1 year" beside the phrase "sentenced to imprisonment for", rather than next to the phrase "time to pay." Later, the justice of the peace erroneously signed a committal warrant for the one year imprisonment and the plaintiff was arrested and taken to jail where he remained for a week until an emergency appeal was heard at which time the charges were withdrawn.

At a motions hearing in the Ontario Superior Court of Justice, the actions against the justice of the peace, the correctional officers, and the Crown were struck. The plaintiff appealed this decision to the Ontario Court of Appeal, however, the appeal was dismissed. Immunity will be afforded judicial officials acting in their duties unless it can be proven they acted out of malice or bad faith. In this case, there was no support for or evidence of malice or bad faith. Similarly, there was no basis to interfere with the other decision to strike the claim against the correctional officers or the Crown.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

When the eyes say one thing, and the tongue another, a practiced man relies on the language of the first—Ralph Waldo Emerson

CONFESSIONS RULE NOT ONLY METHOD OF STATEMENT EXCLUSION

R. v. Wells, 2003 BCCA 242



The accused was charged with sexual offences involving two young boys. The Crown sought to enter a statement made to the father of one of the victims which was obtained after he learned of the sexual allegations and had a violent confrontation with the accused, at one point punching him in the eye, pulling his hair, and holding a foot-long knife to his throat. During the altercation, the father told the accused he owed an apology to the children and marched him down the hallway of the home. The accused apologized to the children, told them it was not their fault, what he did was wrong, and that he would never do it again. At one point the accused tried to hug one of the children, but the father pulled him back and said if he ever touched the child again he would kill him.

At his trial, the accused denied touching the children. Rather, he said the victim's father made him apologize. During the trial *voir dire*, the judge concluded that "no matter how brutal the circumstances of the extraction of these statements from [the accused] were, they do not...meet or come anywhere close to satisfying me that they were made to a person in authority." The accused was convicted on two counts of sexual touching under s.151 of the *Criminal Code*, but appealed to the British Columbia Court of Appeal arguing the trial judge erred in excluding the statements. He submitted that the admission of the statements in these circumstances would violate his s.11(d) *Charter* right to a fair trial as well as offend his right to liberty under s.7. In the accused's view, regardless of the common law confessions rule, a statement can still be excluded under s.24(1) of the *Charter* or by a judge's common law discretion.

Justice Rowles, writing for the unanimous appeal court, noted that the common law confessions rule requires that an out of court statement made to a person in authority will only be admissible if the Crown proves beyond a reasonable doubt that the statement was voluntary. The rule necessarily requires that the receiver of the statement be a person in authority. In other words, statements made to private citizens under circumstances of violence and oppression need not be proven to be voluntary. However, not all confessions made to persons not in authority need be admitted.

Confessions obtained as a product of violence or threats of violence by persons not in authority present concerns about reliability and an accused may face a substantial risk of prejudice by a statement that should be given little, if any, weight. Further, if a statement was obtained in such circumstances and the potential prejudicial effect in admitting the statement is outweighed by its probative value, it is open to a court to exclude the statement. As Justice Rowles stated, "Charter guarantees of trial fairness and fundamental justice may prompt exclusion of evidence regardless of whether the traditional common law confessions rule would reach the opposite result."

The British Columbia Court of Appeal applied the curative provision of s.686(1)(b)(iii) of the *Criminal Code*. Here, the trial judge chose not to make the accused's statements or apologies part of his reasoning process in concluding that Crown had established his guilt beyond a reasonable doubt. The appeal was dismissed.

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

Note-able Quote

*When someone is injured while in police custody, the conduct of the police invites immediate suspicion and exacting scrutiny. The police have the onus of establishing that the use of force was lawful and not excessive.*²—Ontario Superior Court of Justice Lane

² Peart v. Peel Police Services Board [2003] O.J. No. 2669 (OntSCJ)

SEALING HOSPITAL BLOOD SAMPLES NOT UNREASONABLE

R. v. Gettins,
(2003) Docket:C34768 (OntCA)



The police responded to a fatal motor vehicle accident where the passenger in the accused's vehicle died after a rear end collision with a dump truck. A police officer investigating whether alcohol was a factor in the accident attended the hospital where the accused was transported for treatment, but the attending emergency room physician would not allow for a breathalyser test. The officer then placed seals on four of five vials of blood that had been drawn from the accused by medical staff and they were subsequently placed in a refrigerator. A search warrant was then obtained and executed the next day.

The blood was analyzed and admitted as evidence in the accused's trial on charges of impaired driving causing death and over 80mg%. The accused appealed his convictions to the Ontario Court of Appeal arguing, in part, that the placement of the seals on the vials infringed his rights protecting him from unreasonable search or seizure under s.8 of the *Charter*. He submitted that the actions of the police in sealing the vials were not authorized by law and therefore tainted the subsequent search warrant. Therefore, he suggested the evidence should have been excluded under s.24(2).

Justice Weiler, for the unanimous appeal court, agreed that the placement of the seals amounted to a seizure under the *Charter*. Nevertheless, the seizure was held to be reasonable. There was no interference with the accused's physical, spatial, or informational privacy interests. Justice Weiler stated:

[P]lacing [Centre of Forensic Science] seals on vials of the [accused's] blood involves no interference with the spatial aspect of the [accused's] privacy interests. There was no

intimidation or interference with the [accused's] dignity. The doctor and nurses in the hospital already knew that [the officer] was investigating the accident to see if alcohol was involved. There was no interference with the [accused's] physical integrity because the blood had already been taken. The police officer's actions were brief, limited to sealing the vials of the accused's blood, and the vials remained under the control of the hospital in the event they were needed for medical purposes. [para. 17]

Nor was there any "use" of the [accused's] blood, in the sense that any information was obtained from it, prior to the search warrant being obtained", ruled the court. Moreover, even if there was a s.8 violation, Justice Weiler nonetheless would have found the evidence admissible under s.24(2). Assuming there was a breach, it was not serious, was committed in good faith, and the accused was not compelled to participate in the creation of the blood because it had already been taken. The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

UNDERCOVER COPS ARE NOT PERSONS IN AUTHORITY FOR CONFESSIONS RULE

R. v. Grandinetti, 2003 ABCA 307



The police commenced a five-month undercover operation to obtain evidence from the accused who had become the principal suspect in the murder of his aunt. The officers, posing as members of a criminal organization, recruited the accused and gained his confidence and trust. They engaged him in various criminal activities, including money laundering, theft, receiving illegal firearms, and drug dealing, and encouraged him to talk about his role in the murder because, as they told him, they needed to ensure none of the organization's members were under police investigation. He was also told that the boss of the organization had

the ability to divert suspicion from him because certain police officers, including the lead investigator in his aunt's murder, were employed and controlled by the criminal organization and could assist in destroying evidence. The accused believed the crime boss had sufficient control over the police investigation into his aunt's murder and therefore could influence the prosecution by having witnesses and physical evidence disappear. He ultimately confessed to his involvement in the murder, provided details, and took them to the scene of the crime.

At his trial, the judge concluded that the undercover officers were not persons in authority and therefore a *voir dire* to determine the admissibility of the statements was unnecessary. His statements were admitted and the accused was convicted of first-degree murder. However, he appealed to the Alberta Court of Appeal arguing, among other grounds, that the trial judge erred in concluding that the undercover officers were not persons in authority and also that the accused was detained and that his right to silence was violated.

Persons in authority—who did the accused think he was talking to?

The common law confession rule requires the Crown prove beyond a reasonable doubt that a statement made to a person in authority is voluntary. If this burden is not met, the statement is excluded as evidence. A person in authority is not simply someone who merely exerts authority over another person, but instead someone who is believed to be allied with state authorities and can influence an investigation or prosecution against the accused. In other words, the giver of the statement (accused) must believe that the receiver of the statement is acting as an agent of the police and is under police control.

In this case, the undercover officers did not satisfy the definition of a person in authority. Rather, the accused believed that he was dealing with persons controlling corrupt police officers

who, acting contrary to their duties, may well sabotage the investigation into his aunt's murder. In dismissing the person in authority argument, Justice McFayden for the majority wrote:

[The accused] believed that he was dealing with members of a criminal organization, which he voluntarily joined, who might be able to assist him through their control of corrupt police officers acting outside their lawful duties. At no time did he suggest that he believed the members of the organization were acting on behalf of the police and could influence the prosecution as agents of the police.

Detention & the Right to Silence

A person may be detained even though they are not under arrest or physical restraint. A *Charter* detention can arise "when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel" (R. v. Therens, [1985] 1 S.C.R. 613). A person's sense of compulsion for the purpose of a detention can also occur if they submit or acquiesce to the deprivation of their liberty when they reasonably believe they have no choice but to do so. This has been referred to as "psychological detention".

The accused argued that he was a psychological captive of the undercover officers because he was told he risked death if he walked away from the criminal organization. The majority of the court rejected the accused's contention that he was detained. The police had not assumed control over the accused nor did he believe the undercover officers were the police. Nor was there any criminal liability if the accused refused to comply with the undercover officers or any of their demands. The accused did not believe the undercover officers were acting in any official capacity as police officers or other state agents and therefore the principle of psychological detention did not apply.

The right to silence protected under s.7 of the *Charter* was not engaged either. The right to silence only arises after detention, when a person is under the control of state authorities who maintain the superior power imbalance in the detention relationship. In undercover operations, such as this case, the accused was not under the control of the state. Pre-detention undercover operations do not trigger a right to silence protection. Since there was no detention, the trial judge did not err in concluding that there was no violation of the accused's right to silence.

A Different View

Justice Conrad, in dissent, found that the trial judge erred in concluding that an undercover police officer can never be a person in authority unless an accused reasonably perceives that the undercover officers can influence the investigation or prosecution and are acting for the state objective of promoting justice, rather than thwarting it. In this case, Justice Conrad found there was some evidence to show a reasonable perception that the undercover officers were sufficiently connected to the police officers investigating the murder that they could influence or control the investigation. In her view, a *voir dire* should have been held and she would have ordered a new trial.

Complete case available at www.albertacourts.ab.ca

ARRESTEE MUST SEEK COUNSEL, OTHERWISE POLICE MAY BEGIN QUESTIONING

R. v. Green, 2003 BCCA 639



The accused, a part time employee of a bottle depot, was arrested for theft over \$5,000 after her supervisor reported the misappropriation of funds to the police. She was read her s.10(b) *Charter* rights and acknowledged that she understood. When asked if she wanted to contact a lawyer she said, "Can I

think about that?" The officer told her she could and also informed her of her right not to say anything. She was transported to the police station and was left alone in an interview room for a few minutes. The officer returned to the room and said, "You are aware about your rights regarding legal counsel", but the accused made no indication that she wanted to call a lawyer. A statement was then obtained from the accused confessing to stealing the monies from the bottle depot.

At her trial, the judge found no s.10 *Charter* violation and ruled the statement admissible. In the judge's view, the officer properly advised the accused of her *Charter* rights at the time of her arrest and again reminded her of those rights at the station. Had she asked to speak to a lawyer she would have been provided a reasonable opportunity to do so, but she did not. The informational components of s.10, the judge held, had been satisfied. The accused appealed the admission of the statement to the British Columbia Court of Appeal arguing that her rights under s.10 of the *Charter* had been violated.

The British Columbia Court of Appeal found no error in the trial judge's decision and unanimously dismissed the appeal. In citing case law, the court noted that a person who is detained by the police and has been informed of their right to counsel does not have to speak to a lawyer. Therefore, once a detainee has been properly advised of their right to counsel, the onus shifts to them to assert a desire to call a lawyer. Until such a desire is communicated to the police, there is no duty on the police to provide a reasonable opportunity and facilitate access to counsel. The police are not required to assume or guess that a person will call a lawyer. Hence, when no desire to contact a lawyer is expressed the police may proceed with their investigation and, as in this case, take a statement without breaching the accused's right to counsel.

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

ETHICS-BASED POLICING... UNDOING ENTITLEMENT

Dr. Kevin Gilmartin, PhD



One of the greatest challenges facing law enforcement administrators today is the creation and maintenance of a values-based agency consisting of an ethical cadre of officers and supervisors that represent the values of society. Many issues arise that make the maintenance of ethical employees a difficult task. One major challenge to maintaining an ethical/values-based agency is that over the course of a police career every department can expect its officers to be exposed on a daily basis to individuals and situations that violate the values these officers hold central. This exposure over time can be expected to leave an emotionally corrosive impact. To assist in the goal of creating values-based police agencies, one of the primary areas of study of the law enforcement behavioral sciences for more than two decades has been the refinement of pre-employment selection techniques that bring values-based individuals to the starting point of a police career. Screening protocols from psychological test batteries to interactive video assessment instruments have assisted agencies in selecting men and women who have the skills and values to potentially become successful police officers. These individuals begin their careers able to not only successfully complete the multiple task demands required of a police officer, but to present personal backgrounds reflective of well developed values systems congruent with those of society. For the law enforcement administrator, the challenge of the selection of competent and ethical police candidates may be significantly less demanding than the maintenance of a values-based police agency.

To become a law enforcement officer is not an easy task. Intellectual, psychological, and background reviews are completed that many

times require the officer applicant to wait months, if not years, to determine if they are successful in obtaining a position in the basic police academy. Once selected to attend the academy, the applicant faces further academy screening and testing. Demanding academic, physical, and discipline challenges continue to reduce the number of recruits who eventually graduate the academy. Even then, after successful completion of months of an academy curriculum, a Field Officer Training Program thins the ranks even further of those hoping to successfully complete the probationary period and have the opportunity to serve their respective communities as police officers. With the exception of a small number of professions in our society, very few other career fields demand more to obtain an entry level position than law enforcement. Even with these highly selective screening measures in place, why does the field of law enforcement experience the headline cases of wrongful acts perpetrated by officers that potentially taint the entire profession? Are these cases of "Bad Apples" that should never have been officers and are selection failures, or can the experience of being a law enforcement officer change the existing values structure of the officer? Can this change cause an abandonment of "Core" ethical values by officers and permit the development of rationalized "Situational Ethics"?

The selection of values-based individuals at the entry level appears to have been successfully completed by most law enforcement agencies over the past 20 years. The maintenance of values-based individuals in police work, however has not been a major focus of attention either by law enforcement executives or behavioral researchers until quite recently.

In an effort to reduce ethical violations by officers, agencies continue to address the issue of inappropriate officer behavior patterns by utilizing primarily a reactive investigative model. Although clearly the thorough investigation of inappropriate acts committed by officers is an

absolute necessity, it does not reflect a complete management intervention strategy to reduce wrongful police acts. The reactive investigative prong needs to be augmented by a proactive values maintenance" prong designed to provide officers with the necessary information and insights to maintain core based values. These interventions would need to take place at routine intervals over the course of a police career and not limited to only entry level academy lectures.

In attempting to create values-based law enforcement agencies, the profession demands review of the dynamics that create officers who willfully violate the values structures they possessed at the time of career entry. Viewing officer values or ethics as a never changing photograph taken at the time of entrance into the career, inappropriately permits ethical violations to be viewed as poor pre-employment selection decisions and misses the essential elements of most inappropriate police behavior patterns. In reviewing the factors that permit ethical violation to occur within a law enforcement agency, no singular determining causative factor exists that generates these behavior patterns. There does however, exist several central traits that provide fertile ground for the development of ethical deterioration at all levels of the rank structure.

One of the central traits to values deterioration is the development of a culture of perceived "Entitlement". This belief would permit law enforcement officers to rationalize and justify to themselves behavior that is clearly unacceptable and would warrant enforcement action if engage in by members of the community at large. The belief that unrealistic expectations of favorable treatment or privileges being granted embodies entitlement. Entitlement can take many forms and can appear at initial review to be a relatively benign issue. Closer scrutiny can demonstrate the essential malignant nature of entitlement. Entitlement is the belief that an individual by virtue of his/her position as a law enforcement officer is owed certain privileges or latitudes in

terms of their behavior, "those rules really don't apply to us". The old military adage of "rank has it's privileges" would represent one example of "Entitlement" that appears to be accepted within that culture and possibly is only an expression that certain positions of authority are afforded additional respect in proportion to additional responsibility. In law enforcement, however, like any other authority based system, the potential for the abuse of authority exists and requires consistent vigilance for prevention. When the concept of entitlement is transferred to the law enforcement culture, it can take the form of "as cops we deserve 'Professional Courtesy'"; "Speed limits don't apply to us"; "as a commander my secretary can do my personal typing"; or "as the Chief, I can play golf instead of attending the conference, even though I'm attending the conference at the communities expense". Each of these statements is the embodiment of entitlement. A belief develops that "you owe us cops for all we put up with on the streets to serve and protect you". Pride in being able to serve as a member of a given police agency is not entitlement. The belief that as a member of a police agency "we're special and the rules don't apply to us" is however, "Entitlement".

When attempting to discuss values many law enforcement agencies, unfortunately, have not discussed the concept of the possible existence of a belief of entitlement in their agencies, but rather have instead focused on such issues as the acceptance of gratuities or other potentially controversial behaviors. When an agency focuses it's attention on the question of what is an inappropriate behavior or gratuity without discussing entitlement it bypasses the more fundamental question for the officers to answer. Without discussing entitlement the agency loses an opportunity for officers to understand and discuss the potential impact of the gratuity question and its impact on core values for the police officer. Lecturing working police officers about the evils of gratuities and how they lead to the "slippery slope" of corruption will usually be

met with sarcastic sighs and closed minds. Discussing entitlement provides officers the information necessary to conceptualize independent values-based decisions. Whether or not the free cup of coffee is a harmless expression of appreciation by a member of the community or represents a contingent gratuity such as; "if I keep the cops in my restaurant the added security is good for business" is actually a moot point for officers trained in core values maintenance. The more appropriate questions for a police administrator would be, by permitting the members of the department to accept free coffee or reduced priced meals are we permitting to be created a belief system in the officers that they warrant a different standard of accountability than the general population. Secondly, it should be asked if a different standard of accountability does exist, is it one where the officers are less accountable for their behavior than the general community. Many a police administrator that would consider reduced priced meals inappropriate would permit officers to accept "special prices for law enforcement" for cellular phones or pagers without a second notice. The law enforcement administrator would also need to evaluate if a sense of "Entitlement" is being cultivated within the departmental hierarchy, and expressed as an extension of the military "rank-to-privileges" relationship. "As a commander I can bend the rules, but you folks down the chain better behave", represents in-house entitlement in operation.

How does entitlement develop and become institutionalized across levels of rank/status within agencies? Law enforcement by its nature is required to perform tasks the majority of society cannot or will not perform. The tasks can range from dealing with violent situations, responding to tragic events, or dealing with the most unsavory aspects of society. Officers, by seeing themselves dealing with situations that they alone must handle and control, learn early in a police career that the position permits them authority to transgress certain social norms to perform job

duties. Impacting freedom of movement of citizens, ingress and egress into citizen's private homes, emergency movement due to exigent circumstances that permit traffic laws to be suspended, even the capacity/responsibility to make lethal force decisions are part of the officers regular routine. Being exposed on a regular basis to "special authority" and at the same time being exposed on a daily basis to that element of society that operates without values, combines to severely challenge an officer's core values system. Unchecked authority operating in an ethical vacuum is a central component of all police corruption.

The movement away from core values is not a difficult transition for officers working in many settings in our society. "What harm is there in accepting a free meal compared to the carnage these suspects at my last call just dealt to society?", is a realistic appraisal of the situational relativity of values. It severely challenges officers to maintain their essential "Core" values. "Situational" or "Relative" values or ethics are often times the path of least resistance. "Before I became a cop I had no idea this kind of stuff went on", can become the foundation for rationalizing what initially appears to be harmless rule violations. The change in values-based decisions by police officers can be outlined by a "Continuum of Compromise" ranging from "Acts of Omission" typified by not performing seemingly petty tasks to "Acts of Commission" including the active violation of administrative rules and possibly ultimately criminal violations. This compromise begins with the onset of a change in the manner in which officers explain or rationalize minor rule violations. The officer's newly acquired behavior patterns begin with a reappraisal of values relative to the environment in which the officers operate. "Because of all the garbage we put up with on the streets, what's the big deal about a little speeding or a free meal" can become an expression of situational values comparison. Entitlement is the precursor belief that leads to wrongful acts ranging from minor to

felonious. Entitlement spans the rank structure. Many times the best examples of entitlement can be found at the top of the organizational chart. The chief who disciplines an officer for accepting a free meal, yet plays golf with greens fees that are paid for by a member of the community is clearly expressing a double standard and loudly proclaiming the instruction "Do as I say not as I do", rendering hollow any attempts to create and maintain a values based agency. Police executives that operate under the double standard in terms of entitlement are doomed in attempts to create values-based agencies and are viewed cynically by rank and file as little more than generating sound bites for the local media. This command perspective lends itself to "Politics-based" policing as opposed to "Values-based" policing. Often times the executive level capacity to rationalize "special" ethical decisions due to political exigency is no different than the street officer rationalizing inappropriate actions for more tangible or earthy reasons.

A culture of entitlement is only reduced by a culture of ethical accountability. Accountability needs to be both self-initiated and organizationally-generated. The capacity to rationalize a lack of both individual and organizational accountability can be directly linked to what degree officers perceive themselves as being victimized by the deteriorating values of the community they police. If the officer is exposed on an increasing basis to violence and a generalized lack of social order it becomes easier to perceive wrong doing as harmless relative to the general level of community deterioration. The officer can readily rationalize that "Extreme situations demand extreme measures". Brutality, lack of truthfulness in reporting police activities, and a well entrenched belief that loyalty is far more essential than integrity for a street police officer can, unfortunately become established core cultural agency values, internalized by officers but rarely if ever discussed or reviewed.

If officers are not reviewing their respective values through competent training and frank discussion of the emotional demands of the job, "Core" ethics give way to "Situational Ethics". Officers not provided ongoing values training can naively perform a comparative assessment of their held core values and beliefs in relation to the social disorder that can typify their call-loads. This potential transfer to "Situational Ethics" away from "Core Values" occurs in an emotionally charged atmosphere of perceived exigency of the situations in which the officer works. A sense of entitlement combines with a belief that the degree of the social deterioration permits situational suspension of core values for the police officer. "You won't exist for five minutes out here in this jungle with your core values", "these folks down here would eat you alive, all they understand is force", or "These folks respect what they fear, not your core values", can become the expression of the rationalization of values deterioration.

This movement to situational values from core values many times put the police in direct confrontation with subgroups within society. Subgroups within our society that experience significant disenfranchisement in terms of education, employment and housing are particularly at risk for exposure to the "Situationally Ethical" police officer. Permitting the belief that separate standards of policing behavior are demanded in certain areas of the community has potentially tragic consequences for all involved. Although obviously more violent areas of any community require enhanced officer safety procedures tactically, they do not warrant suspension of ethical police behavior.

The capacity to maintain ethical behavior can pose an overwhelming challenge to the young officer experiencing for the first time, challenges and questioning of his/her core values in a confrontational atmosphere supported only by other officers requiring camaraderie for survival. The more confrontational the situation, the more officers are required to rely on fellow officers

for survival. Loyalty becomes more important than integrity. Officers policing in the more confrontational areas of any community require larger organizational resources invested in the area of values maintenance and review, however manpower shortage-, and high call-loads typically permit the administrator to perceive it as a low operational priority. This belief typically changes radically when an agency must react to a significant crisis stemming directly from inappropriate officer behavior patterns.

To establish a values-based police agency requires the agency to invest resources into permitting officers to review the dynamic process of values formation and deterioration. Lectures from Internal Affairs on past investigations of "Bad Cops" that do not explain the underlying behavioral issues facing the officers only further alienates officers from the mechanisms of values based accountability. This potentially leads to the belief "so-called 'values' are externally imposed upon us by people who have either forgotten what the streets are really like or have never been out here". Officers without an understanding of the dynamic nature of values formation respond to values or ethics training with rather naive comments like "you can't teach ethics, either you have it or you don't". Vilifying officers that have produced major ethical or criminal transgressions does little to preserve core values if the officers do not gain insight into the dynamic process of ethical deterioration that leads to the violations. Strictly seeing the "Bad Cops" as some alien entity from other larger departments and unrelated to the "Good Cops" does nothing to inoculate officers to values/ethical deterioration. Interventions that pen-nit officers to realize that many times the compromised officer started his/her career as an enthusiastic values-based individual, who possibly only after 10 or more years of good service began the transgressions, permits a more valuable values/ethics review. Helping officers to understand their perception of values and ethics in policing as a potentially changeable state consisting of daily challenges

pen-nits officers to reduce their own respective naiveté and resistance to the issue. This also permits officers to develop and embrace strategies for ethical preservation and maintenance. Officers with well developed support systems and priorities consistent with their core values are more resistant to deterioration. Integrity inoculation and strategies for ethical maintenance requires effort and resources. These resources, however, are minuscule compared to what an agency invests dealing with a major ethical/values violation that destroys the public trust. Strategies to preserve values based behavior are varied. Group instruction/discussion of ethical issues by competent facilitators is fundamental. Information on past cases of corruption and the specific potential pitfalls to officers in any given jurisdiction is also essential. Officers with well developed support systems and balance in the realm of their personal lives can be expected to be perceptive of the full range consequences of their behavior. "Emotional Survival" training needs to be perceived as essential to the officer as street survival instruction. Officers need to learn the skills to develop and internalize a sophisticated sense of self accountability that stretches beyond the belief "us cops are victimized by having to deal with society's problems therefore we're justified or 'Entitled' to take liberties with rules or laws". Using exposure to hazard and risk in the line of duty as an officer as a means of rationalizing rule violations needs to be seen as a precursor to deterioration/corruption, not misplaced loyalty or camaraderie to fellow officers. "If it weren't for us where would society be?" at one level can be an expression of job commitment; at another level can be an expression of victimization and entitlement. A rationalization or belief that can prove disastrous to maintaining "Core" values-based police officers.

Providing law enforcement professionals with the information and support to remain core values-based individuals should be a primary goal of any

police administrator. Officers who maintain emotional and social perspective are the only ones who can professionally enforce societies values and norms. Officers who perceive themselves "at war" with the communities they serve, soon question their own internal values beliefs. Officers, due to special assignment, that are exposed to either increased risk or behavioral latitude are particularly vulnerable in this area. Although this questioning of values is to be expected it cannot be ignored. Competent intervention is demanded. Those officers who posses the belief "that due to everything we deal with and are exposed to on a daily basis we're 'Entitled' to our own standard" spell a disaster to the community and agency alike.

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.

STANDARD FOR POLICE PURSUIT IS REASONABLENESS, NOT PERFECTION

Cheung v. MacDonald et al, 2003 BCSC 689



The standard required of police officers involved in a pursuit is not perfection, but rather whether they act reasonably according to the circumstances and within the powers imposed on them, the Supreme Court of British Columbia has ruled. In this case, the police pursued the drug-impaired driver of a highway maintenance truck after he stole the vehicle in Vancouver. The two large, roof top flashing orange lights and the large indicator arrow in the back of the truck remained on and flashing. The stolen vehicle was initially spotted by Vancouver police officers, driving an unmarked police car, enter onto Highway 1 eastbound. These officers

followed the vehicle at a distance of about 1 km while they awaited the arrival of the RCMP. A member of the Port Mann Freeway patrol picked up the vehicle on the highway and activated his emergency lights and siren. The roads were dry, it was daylight, but cloudy, and visibility was good. Traffic on the west side of the Port Mann bridge was described as heavy to moderate, but light on the east side. The pursuing officer requested a stop stick tire deflation device be deployed.

A second RCMP unit joined in the pursuit and passed the suspect in an unsuccessful attempt to box him in. This officer then pulled back and became the secondary unit. As the pursuit continued, the suspect drove "in a fairly safe manner, changing lanes from time to time and driving no more than 10 to 20 kilometres over the posted speed limit." Other motorists, seeing the flashing lights, would move over to allow the vehicles to pass. A police corporal took charge of the pursuit over the radio, but never called it off.

Another RCMP officer, ahead of the chase, parked her vehicle diagonally across the slow lane of the highway, diverting traffic into the fast lane. Armed with two connected stop sticks, she then stood about 15 feet in front of her vehicle ready to toss them. As the suspect approached, he made an abrupt turn from the right hand shoulder across the slow lane into the fast lane. The officer then deployed the stop stick. Unfortunately, there was another motorist in the fast lane and the stop sticks were deployed in front of this vehicle, which ran over them. The suspect driver then crashed into the rear of the motorist, pushing him 150 feet down the highway. In total, the pursuit lasted for almost 20 minutes.

The motorist, Dr. Cheung, sued the suspect and the police for his injuries arising from the accident. In his claim, he argued that the police were negligent by pursuing the suspect and for blocking traffic at a time and in a manner that was dangerous to other motorists. He submitted that the police pursuit policy was meant to "remove the thinking" of the officers. However,

on this point Justice Loo of the British Columbia Supreme Court disagreed:

In my view, the policies are intended to assist the thinking. A police officer who is involved in a pursuit and not thinking is not coming anywhere close to meeting the requisite standard of care. The policies are a guideline to assist in assessing whether to start, continue, or terminate a pursuit. Police involved in a pursuit must be constantly thinking and constantly assessing the situation in an effort to balance the need to apprehend a suspect and any unnecessary risk to public safety.

Cheung also proposed that the pursuit should not have been initiated for a simple theft of automobile because the police pursuit policy prohibited chases for *minor violations*. Ruling that the theft and possession of stolen vehicle is not a minor violation, Justice Loo noted that the pursuit policy was a guideline and did not have the force of law. In her view, it was open to the officer to initiate the pursuit. She also found that he considered the factors outlined in the guideline in deciding whether to continue with or terminate the pursuit. Furthermore, while the pursuit lasted for almost 20 minutes, the conditions for continuing the pursuit were close to optimal.

The plaintiff's suggestion that that the pursuit was not supervised properly was also rejected. Justice Loo stated:

I also cannot find fault with the manner in which the pursuit was supervised. As the only officer on duty from his detachment at the time, it was necessary for [the officer] to act as his own supervisor at the outset of the pursuit. [The corporal] assumed control as soon as he arrived at the detachment and came on duty, as required by the policy. [The corporal] could have called off the pursuit, but he did not. Neither he nor [the officer] can be criticized. [para. 42]

Cheung further argued that use of the police vehicle to block the lane was not a control device, but rather a hazard. He contended that the

suspect driver should not have been forced to make a choice to go to the left, right, or through the police vehicle and that he should have been permitted to continue until he decided to stop. Justice Loo disagreed. The placement of the police vehicle in the slow lane "forces traffic to a smaller target area and increases the chances of throwing the stop stick or other spike belt in front of the target vehicle", said the judge. The suspect had two full tanks of gas and had no intention of stopping. No liability arose from the blocking of the lane or from the tossing of the stop stick. The accident would have occurred even if the stop stick was not thrown in front of Cheung's vehicle. The suspect was fully responsible for the accident. He was not paying attention and abruptly changed lanes before the collision. The claim against the police was dismissed.

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

COMMISSION RULES OFFICER DISCRIMINATED AGAINST VEHICLE OCCUPANT

**Johnson v. Halifax Police Service et al.,
Nova Scotia Human Rights Commission
(December 22, 2003)**



A police officer stopped a Texas registered vehicle owned and occupied by Johnson, a well known black Nova Scotia heavyweight boxer, after following it along a highway. Johnson was a passenger while his friend, who was also black, was the driver. The officer asked for the vehicle documents (which were valid under Texas law), but was not satisfied with the information provided, partly in response to an erroneous interpretation of a NCIC computer report. The driver was ticketed and the vehicle was towed. The following day the seizure was determined to be a mistake and the car was released. A Nova Scotia *Police Act* complaint filed by Johnson

alleging abuse of authority was written off as an error in judgment. He then filed a complaint under Nova Scotia's *Human Rights Act* alleging he was discriminated against because of his race and colour.

The Nova Scotia Human Rights Commission Board of Inquiry, adjudicated by Philip Girard, first examined the law regarding such complaints. In this case, Johnson would have to establish a prima facie case, on a balance of probabilities, that he was discriminated against (adversely treated) at least in part because of his race. The burden would then shift to the police to "demonstrate a rational and credible justification for their conduct", at which point Johnson would then have to show the justifications put forth by the police were merely pretexts or veils for the discriminatory conduct.

The Stop

The Commission found that the officer did not know the race of the vehicle's occupants when he initially decided to follow it. However, when he decided to pass the vehicle, the officer observed the occupants colour. Of course, this by itself does not prove discrimination unless it can be demonstrated that their race caused them to be treated differently from other citizens. In this case, the officer's unusual conduct in following the vehicle as he did, along with his denials of such, was held to be discriminatory.

In Girard's view, once the officer discerned the race of the vehicle's occupants, his decision to stop them was based on a stereotype of black criminality. Even though there were other legitimate factors to the stop, such as the fact the vehicle appeared to be eluding the officer and his interpretation of the NCIC report, the awareness of race, either at a conscious or subconscious level, was an operative element in his decision making and thus a violation of the *Human Rights Act*.

As Girard noted, he believed the officer was much less likely to continue following the vehicle

had there been two well dressed white men in the car. Finding the officer less than candid on some key points, Girard found the officer unable to rebut the prima facie case for discrimination.

Ticketing and Towing

The issuing of the tickets to the driver and the decision to tow the vehicle was also held to be discriminatory in that these actions were motivated by race and would not have resulted with a white driver. The officer was not satisfied with the documentation provided by the driver. The vehicle was out of province registered and the police cannot be expected to memorize the documentation requirements of all North American jurisdictions. However, if the officer is not familiar with the form of documentation produced, they will have to speak to the driver to ascertain the requirements of the unfamiliar jurisdiction. No such action was taken in this case.

The officer was not courteous to Johnson nor did he make any inquiries into what the legal requirements were in Texas nor properly assess the documentation offered. This was unprofessional police behaviour, deviated from normal practice, and was evidence of discourtesy or intransigence, which provided grounds for finding differential treatment based principally on race. Although the initial suspicion about the documentation was reasonable, the officer did not provide a fair chance for Johnson, as the registered owner of the vehicle, to respond which resulted from the officer's use of racial stereotyping.

The Halifax Regional Police was also found to be vicariously liable, in that the sergeant attending the scene failed to intervene in a possible discriminatory act in progress. Johnson showed the sergeant an insurance letter, which demonstrated that the officer was possibly in error. This, along with the race of the occupants, was indicative of discrimination and the sergeant should have investigated further to ensure no discriminatory act was taking place. As Girard

stated, "[the sergeant] could have provided the sober second look that was sorely needed, but did not."

Level of Police Response

Johnson's allegation that the police response was excessive and discriminatory was rejected. He submitted that there were more police officers and vehicles (5 cars and a police wagon) on the scene of this traffic stop resulting in an over-response and not objectively justified. It was his position that the level of response was more appropriate for a criminal investigation, rather than a motor vehicle offence. Although the police response to the traffic stop was "unusually strong" and there was little objective justification for more than three police cars, it was not related to the race of the occupants and did not result from any discriminatory behaviour. Rather, it was "simply opportunity to check out an unusually long traffic stop on a slow night" the Commission stated.

Recommendations

As a result of the Commission's findings, the following recommendations, advisements, urgings, awards, orders, suggestions, and requests were made:

- It was recommended that the Halifax Regional Police Service obtain a legal opinion about the statutory and constitutional authority of Nova Scotia police officers to routinely request proof of registration and insurance from out-of-province vehicles and to seek legislative amendments if necessary. In the Commission's opinion, police officers do not have the legal authority under Nova Scotia's *Motor Vehicle Act* to ask for such documents, except perhaps under common law authority if there are reasonable grounds to believe a vehicle is stolen.
- It was advised that problems resulting from police over-response (escalating the situation and negative public perception) be

incorporated into traffic stop training. Further, police officers and dispatchers should be made aware that excessive police response might be considered discriminatory depending on the circumstances.

- It was urged that a senior member of the police administration take a personal tour of the NCIC facility in West Virginia to learn exactly what the centre does and to re-educate all police officers and dispatchers about the nature of NCIC reports. The officer in this case misunderstood the NCIC report, which resulted from his training. There was confusion about what information NCIC collects and what inferences can and cannot be drawn from its reports.
- Johnson was awarded \$4,920 in special damages for six trips he would not have otherwise made to the Halifax area in connection with this case and \$10,000 (plus 2.5% interest from the date of the stop) in general damages. Exemplary damages were not warranted.
- The driver of the car was awarded \$1,000, even though he was not a complainant in this proceeding, because he experienced the effects of this discriminatory act.
- It was suggested that an outreach effort by the Halifax Regional Police Service be made with the surrounding black communities of North Preston, East Preston, or Cherry Brook, even though they are policed by the RCMP.
- It was ordered that a needs assessment for diversity training be undertaken by two consulting groups, one local and one from outside the Maritimes. Once the report is completed, the Halifax Regional Police must make a public response and indicate what steps it is planning on taking in light of the report.
- It was requested that lawyers for the Halifax Police submit one or more proposals on how

information could be provided on the role of race in traffic stops.

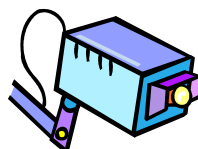
- It was suggested that the Halifax Police engage an outside consultant with expertise in restorative justice theory and methods to re-design their police complaints process.
- It was suggested that the parties involved in this proceeding think about whether they are willing to offer forgiveness and a sincere apology, perhaps through a skilled mediator or facilitator paid for by the Halifax Regional Police, in order to close the circle on this matter.

Complete case available at www.gov.ns.ca/humanrights

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

collected by Constable Ian Barraclough

Innovative Ticket Dispute Down Under Quadruples Fine



Mad Aussie Carlos DeMarco got cheesed off by two speeding tickets emanating from the same police camera posted in a 60km/hour zone in November last year. The 39 year old driver went to the trouble of stealing a 70km/hour sign, which he then affixed to the pole beneath the very speed camera against which he had already been ticketed. He then photographed the sign as evidence, which he later produced in Parramatta Local Court in Sydney to prove that he was innocent. His plan was foiled however because he was spotted taking the photos in broad daylight by a passer-by who watched him hatch his harebrained scheme and alerted authorities.

By the time the court was finished with DeMarco, he was ordered to pay \$900 in fines and expenses, about \$700 more than the two tickets would have cost him originally. "I have found you

to be a liar," Magistrate Lee Gilmour said in punishing DeMarco. (Edited and excerpted from an article in the Sydney Daily Telegraph and United Press International).

Caught Red Handed & Red Faced with Pants Down



So you catch a man driving with his pants around his ankles. On further observation, you notice that he's paying more attention to the display on his laptop balanced precariously upon his naked legs than the road he's driving along. Suddenly, he turns down a one-way street. He's now going in the wrong direction. It's 5am on a winters' morning. As you stop the vehicle to investigate the matter, you find his computer streaming kiddie porn from the wireless internet. What do you charge him with?

That was the dilemma faced by Toronto traffic police when they stopped 33-year old Walter Nowakowski who was followed for several blocks and then stopped when he was observed driving the wrong way down a residential one-way street. The police report states that the Toronto officer found Nowakowski not wearing pants and driving around while watching a pornographic movie on his laptop involving a 10-year old girl.

Nowakowski was allegedly watching the pornographic images as they were being streamed live using a hijacked wireless Internet connection. Following his arrest, police searched Nowakowski's home where they recovered 10 computers along with thousands of CDs and floppy disks suspected to contain child porn images.

Nowakowski, who appeared in court on December 23rd, faced numerous charges, including possession of child pornography and theft of communications. What, no driving offences? (Edited and excerpted from an article in The Register and The London Free Press.)

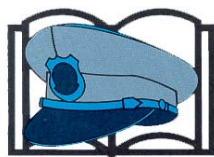
From US Police Blotters

- (1) James Perry, with four drunk driving arrests in Florida, feared rejection if he tried to get a driver's license in his new home state of Connecticut and so pretended to be Robert Kowalski, the name of his neighbour in Florida. However, this led to a police computer check, which revealed that "Robert Kowalski" was on file as a Michigan sex offender. (Chillicothe News, Ohio).
- (2) 44-year old Toni Lycan became so carried away during a shouting war with a downstairs neighbour over loud music, that she stomped up and down on the floor until she broke both her legs about four inches below the knee (Vancouver Washington News).
- (3) Chance Copp, 15, who was on probation for arson and who feared testing positive for marijuana, submitted urine of a relative instead, only to find out later from police that the urine had tested positive for cocaine (Columbus Dispatch-AP).
- (4) According to the arresting officer, 20-year old Devikia Garnett was calm when he stopped her for speeding in Virginia in November. However, after accepting the ticket, she quickly developed second thoughts against the officer, slamming her car into the back of his cruiser, then stopping and accelerating again, smashing his car in a similar fashion three more times. After the police officer avoided her fifth pass, Garnett spun around and headed straight for him, but he managed to pin her in before being struck again. (Associated Press).

Note-able Quote

The achievements of an organization are the results of the combined efforts of each individual—Vince Lombardi

2004 POLICE ACADEMY COURSES



The JIBC Police Academy has recently released its 2004 Course Calendar. There are a number of Advanced Police Training

courses designed to provide police officers with professional development in operational, investigative, administrative, and communications topics, including supervisory and management training. Subject to specific criteria, attendance is generally restricted to sworn police officers who have been selected by their Training Officer; registration will not be accepted from individual members. A complete and updated copy of the course calendar along with detailed course descriptions is available online at www.jibc.bc.ca.

March

Code	Course Name	Dates
POLADV646	Tactical Surveillance**	1-5
POLADV645	Search & Seizure**	8-11
POLADV687	School Liaison Officer	15-19
POLADV677	Police Supervisors	22-26
POLADV602	BAC Datamaster C	29-2

April

Code	Course Name	Dates
POLADV690	Selection & Interviewing	5-6
POLADV629	Forensic Interviewing	19-23
POLFTS140	IDD & SFST**	19-22
POLADV637	Undercover Operator	18-30
POLADV646	Tactical Surveillance	26-30

May

Code	Course Name	Dates
POLADV645	Search & Seizure	3-6
POLFTS140	IDD & SFST	3-6
POLADV664	Interviewing/Mentoring	10-12
POLADV640	General Invest. Skills**	17-21
POLADV627	Forensic DNA	17-21

June

Code	Course Name	Dates
POLADV657	Effective Presentations**	7-11
POLFTS100	Basic Collision Invest.	7-16
POLADV646	Tactical Surveillance	14-18
POLADV630	Forensic Interviewing	14-18
POLADV672	Media Relations	14-18

September

Code	Course Name	Dates
POLADV633	Forensic mapping	7-17
POLADV677	Police Supervisors**	13-17
POLADV640	General Invest. Skills	13-17
POLADV652	Admin Skills**	20-24

October

Code	Course Name	Dates
POLADV690	Selection & Interviewing	4-5
POLADV602	BAC Datamaster C	4-8
POLADV657	Effective Presentations	18-22
POLADV677	Police Supervisors	18-22
POLADV661	Field Trainers	TBA
POLFTS140	IDD & SFST	25-28

November

Code	Course Name	Dates
POLADV628	Crime Scene Diagrams	1-5
POLADV635	Criminal Intelligence**	8-10
POLADV656	Effective Writing	8-9
POLADV646	Tactical Surveillance II	15-19
POLADV640	General Invest. Skills	15-19
POLADV652	Admin Skills	22-26
POLADV691	Pedestrian Collision	29-6

December

Code	Course Name	Dates
POLADV631	Effective Presentations	6-10
POLADV642	IDD & SFST Instructors	6-10
POLADV622	Drug Investigators	6-17
POLADV645	Search & Seizure	13-16

**courses will be held on Vancouver Island.

Note-able Quote

Only in a police state is the job of a policeman easy—Orson Welles

RESIDENTIAL 'FLIR' NOT A SEARCH

R. v. Rugg, 2003 BCPC 444



The police received an anonymous tip of a marihuana grow operation and conducted some follow-up investigation, which included the use of a Forward Looking Infra Red (FLIR) device to obtain a heat signature from the accused's residence consistent with a marihuana cultivation. As a result of their investigation, the police applied for and were granted a search warrant. During a *voir dire* in British Columbia Provincial Court, Justice Higinbotham concluded that the use of FLIR did not constitute a search. A police officer demonstrated for the judge how the FLIR works in picking up a "heat picture" of an object. In the judge's view, "it does not penetrate, or see into or behind any surface" nor did it provide any core biological information about the residents of the home. Justice Higinbotham stated:

In fact, [the FLIR] reveals less of the lifestyle of the occupant than do the records of electrical consumption, and far less than does public, passive, physical observation of a suspect as he or she goes about daily life, both of which are constitutionally approved.

Although some previous cases, like the Ontario Court of Appeal decision *R. v. Tessling* (now under appeal to the Supreme Court of Canada), have come to a contrary conclusion, the judge noted they did not have the benefit of a FLIR demonstration in the courtroom. In addressing the *Tessling* judgment's requirement that a warrant is necessary to use FLIR, he held:

In *Tessling*, [Justice Abella] states that a search warrant would be necessary in order to legitimize the use of FLIR technology on a residence. I question why an investigator would apply for a FLIR authorization when it would require the same justification as an application to actually enter the residence and paw through the bedroom drawers? In the case at

bar, the police felt they needed the FLIR results to justify a search warrant, and this would likely be true in most cases where a FLIR examination was conducted. It is clear that if the police had enough grounds for a "FLIR warrant", they wouldn't need one, because they would already have sufficient grounds to enter the property.

The FLIR was not a search for the purposes of s.8 of the *Charter* and it could legitimately be used to support a search warrant. However, the warrant was invalid because a justice of the peace who did not have the necessary judicial independence issued it. In examining the admissibility of the evidence under s.24(2), the evidence was excluded. The justice found that the information to obtain only provided a reasonable possibility, not the required reasonable probability (reasonable grounds). Although the FLIR results were consistent with a grow operation, the police officer testified "he would under no circumstances conclude, on any legal standard, that a marihuana cultivation was taking place within the residence."

Complete case available at www.provincialcourt.bc.ca

'DETECTIVE INSPECTOR' NEITHER DEMOTED NOR DISMISSED

Rossmo v. Vancouver Police Board et al, 2003 BCCA 677



The plaintiff, who held a PhD in Criminology, was a constable with the Vancouver Police Department given the position of "detective inspector" in charge of the department's Geographic Profiling Unit for a fixed 5-year term. He was not promoted to the rank of inspector. Rather, the title he was given was outside the rank structure of the department and was created especially for his role while in charge of the experimental unit. He was, however,

paid the same compensation as an Inspector and signed an agreement.

At the end of the 5-year agreement, a further 2 year deal was offered, but rejected by the plaintiff because it was not what he was looking for. The contract was not renewed and the plaintiff was offered re-employment as a constable. The plaintiff considered this a demotion.

The plaintiff sued the Vancouver Police Board for wrongful dismissal and a Deputy Chief for interference with contractual relations and inducing breach of contract (not to renew the agreement). At trial in British Columbia Supreme Court, the judge found that the plaintiff had neither been demoted nor dismissed, but rather the agreement expired. The plaintiff rejected the 2-year contract extension and the Police Board had no obligation to place him in an Inspector position. The plaintiff then appealed to the British Columbia Court of Appeal.

Justice Donald, writing for the unanimous court, dismissed the plaintiff's appeal. The plaintiff had signed a contract for a 5-year term, which was not renewed. The plaintiff was not "promoted" to the rank of inspector, therefore the offer to restore him back to the rank of constable was not a demotion. The trial judge made no error in concluding that the contract of the position of "Detective Inspector" simply ended.

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

WITHOUT ARTICULABLE CAUSE, SAFETY SEARCH NOT JUSTIFIED

R. v. Nielsen, 2003 ABPC 56



Two Calgary police officers were patrolling near a hotel bar parking lot, known as a high drug trafficking area, when they observed three people approach a parked van with BC licence plates. The driver

exited the vehicle and entered the hotel while the accused exited from the passenger side. One officer dealt with the driver while another officer decided to check the accused and inquired into what he was doing. The accused relied that he was doing nothing.

The officer noted the accused appeared intoxicated and was fidgeting with his pant's pocket. The officer asked what was in the accused's pants for reasons of officer safety because it was his experience that it was not uncommon for people under detention or arrest to be in possession of weapons. The accused removed a crack pipe with heavy cocaine residue and was arrested for public intoxication under Alberta's *Gaming and Liquor Act* and possession of a crack pipe. A search was conducted and two rocks of crack cocaine were found. He was then arrested for possession of a controlled substance.

During a *voir dire*, the accused testified that he met the driver of the van and went with him to consume marihuana in the van. He was handed the pipe, which he thought was marihuana, just as the police car arrived. He said the driver jumped out of the van and went back to the bar while he exited the passenger's side. He also testified that he removed the pipe from his pocket because the officer told him to.

At his trial in Alberta Provincial, Court Justice Lamoureux found that police had detained the accused after he exited the van and was stopped and questioned because of his presence in an area known as a haven for drug trafficking. However, the police did not have any authority to detain the accused and the detention was arbitrary because there was no articulable cause. Justice Lamoureux stated:

In this case, police officers...were not investigating any alleged crime. They were simply on a routine patrol near the Cecil Hotel in an area in which they believed to be an area for "drug trafficking". It is the Court's view, that police opinion about locations of crime in a

city, is not per se a reasonable foundation of articulable cause for detention. The Court has not heard any evidence in the voir dire of "a constellation of objectively discernable facts" which provided either police officer with reasonable cause to suspect that the accused had committed an offence. The accused was not a driver of a motor vehicle involved in a traffic stop. He was not in the course of committing any criminal offence. At worst, the accused might have been an intoxicated passenger in a stationary motor vehicle. [para. 26]

And further:

The Court recognizes that the police duty to prevent crime and maintain the public peace does require proactive measures on their part. Proactive policing does interfere from time to time with individual liberty. It is somewhat easier to justify such interference when the interference relates to qualified rights such as the right to drive. If there is proactive policing amounting to an interference of individual rights unrelated to qualified rights such as driving, then the interference is more difficult to justify.

In this case, the Crown appears to be suggesting that there was an apprehended breach of the peace by the accused. With respect, I disagree. In this case, the only act that caused the police to detain the accused, was his exit from the passenger side of a parked van in the Cecil Hotel parking lot, an area which the police viewed to be a haven for drug trafficking.

It is the Court's conclusion that the police did not have authority, either in common law or statutory power, to detain the accused. The accused's detention was arbitrary in that there was no objectively discernable set of facts justifying his questioning by police. The mere fact that the accused was found in an area which the police viewed to be a high trafficking area for drugs is insufficient to support a detention in either a common law or by statute in the absence of evidence establishing the truth of this opinion.

Accordingly, I find that the accused was detained by the officer in order to allow them to follow 'a hunch' about the accused's conduct. There was no offence which had been or was reasonably suspected to be committed in the future. The detention of this accused was arbitrary. [paras. 30-33]

As for the search of the accused's pant pocket that preceded the arrest, Justice Lamoureux found the search violated the accused's s.8 Charter rights:

The Court must also review whether the police officers, in this case, can lawfully search the accused for the purpose of officer safety. There is no question that during investigative detention based on articulable cause, that the police have power to effect a search for the purpose of officer safety, without warrant...

However, the authority of an officer to effect a search of an accused without warrant for purposes of officer safety, can only be sustained if the original investigative detention is based on articulable cause...There can be no proper search of an accused for purposes of officer safety during investigative detention unless articulable cause...exists. In this case, I have already concluded that the detention of the accused was arbitrary and without articulable cause. Accordingly, the police officers cannot justify the search of the accused for officer safety purposes. [para. 40-41, references omitted]

The evidence was excluded.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

Things in law tend to be black and white. But we all know that some people are a little bit guilty, while other people are guilty as hell—Donald R. Cressey

CLASS 94 GRADUATES



The Police Academy is pleased to announce the successful graduation of recruit Class 94 as qualified municipal constables on January 23, 2004.

ABBOTSFORD

Cst. Jerry Holz
Cst. Jeffrey Morgan
Cst. Angela Scott

DELTA

Cst. Leisa Bernard
Cst. Deanna Church

NEW WESTMINSTER

Cst. Colin Betts

VANCOUVER

Cst. Julia Agosti
Cst. Corey Bech
Cst. Ian Christie
Cst. Michelle Farrell
Cst. Ryan Hooper
Cst. Jennifer Jackman
Cst. Chad Machuik
Cst. Donald MacIver
Cst. Robert Mitchelson
Cst. Colin Naismith
Cst. Aaron Olson
Cst. Kristina Paech
Cst. Jason Perry
Cst. Andrew Prebushewski
Cst. Jason Ruzyski
Cst. Sukhjit Sangha
Cst. Caroline Wigglesworth



Congratulations to Cst. Jennifer Jackman (Vancouver), who was the recipient of the British Columbia Association of Chiefs of Police Shield of Merit for best all around recruit performance in basic training. Cst. Jerry Holz (Abbotsford) received the Abbotsford Police Association Oliver Thomson Trophy for outstanding physical fitness. Cst. Jennifer Jackman (Vancouver) received the Vancouver Police Union Excellence in Academics award for best academic test results in all disciplines. Cst. Caroline Wigglesworth (Vancouver) received the British Columbia Federation of Police Officers Valedictorian award for being selected by her peers to represent her class at the graduation ceremony. Cst. Aaron Olson (Vancouver) was the recipient of the Abbotsford Police Recruit Marksmanship award for highest qualification score during Block 3 training. Port Moody Police Chief Paul Shrive was the keynote speaker at the ceremony.

DEFICIENT SOBRIETY TESTS DO NOT PROVIDE REASONABLE GROUNDS

R. v. McNabb, 2003 BCPC 180



At 1:40 am a police officer responded to a civilian's tip of a possible impaired driver. He located the suspect vehicle stopped at a traffic light without headlights that seemed to be lurching forward. The officer followed the vehicle for less than five minutes and saw the vehicle weaving in its lane. He stopped the accused and noted she spoke slowly. She denied drinking but the officer smelled liquor in the cab of the pickup. Since there was a passenger in the vehicle, the officer asked the accused to step outside so he could isolate the source of the liquor odour. She initially stumbled, and walked unsteadily to the back of her pick-up. The officer smelled liquor about the accused, her eyes were slightly bloodshot and her face was lightly flushed. Even though the officer had not yet received any training in standardized field sobriety tests, he nonetheless conducted three sobriety tests; the leg raise, the alphabet recitation, and picking up coins. One test was satisfactorily performed and two were not. The officer formed the opinion the accused was impaired and a breath demand was made. Two samples of breath were subsequently obtained.

At her trial in British Columbia Provincial Court on charges of impaired driving and over 80mg%, the accused argued the breath samples were inadmissible because the police officer did not have the requisite reasonable and probable grounds upon which to justify the demand. As such, she submitted that the taking of the samples therefore amounted to an unreasonable search and seizure under s.8 of the *Charter*.

Reasonable and probable grounds for the taking of breath samples "involves both a subjective and an objective component." Subjectively, the officer must have an actual or honest belief that

the suspect's ability to operate a motor vehicle was impaired. Objectively, the officer's opinion must be supported by objective facts. In this case, the officer's observations made prior to the sobriety tests, either singly or in combination, on his own testimony did not provide reasonable and probable grounds. Rather, the three sobriety tests were instrumental in raising the officer's suspicion to reasonable and probable grounds for the breath demand. Justice Blake found "the sobriety tests alone... caused the officer's suspicions to coalesce into [the fixed opinion that the accused was impaired by alcohol]."

Roadside field sobriety tests can be used as evidence, but they will take on a "clinical or pseudo-scientific air." If a trained expert can only interpret the tests used, a police officer must be properly trained in their administration and interpretation before they will be sufficient to provide objective reasonable and probable grounds. Furthermore, if the test is performed improperly the objective standard will not be satisfied.

In this case, a recognized expert involving matters of alcohol consumption, its effects on the human body and behaviour, and field sobriety tests, provided evidence. He testified that the leg raise test varied significantly from standard procedure. The test was conducted on an uphill grade rather than a flat surface, the accused was asked to raise her leg twice as high as established standards, and she was required to spread her arms rather than keep them at her sides. As for the alphabet test, it is not a standardized test at all and would probable not be reliable from which to draw a conclusion. Finally, the officer did not place enough significance on the accused's success in picking up the coins from the surface of the roadway, which is not a standardized test because it is too difficult to perform. In the expert's opinion, satisfactory performance of this test should be taken as significant proof of an absence of impairment.

In excluding the results of the breath tests, Justice Blake stated:

The field sobriety tests adopted in this case were clearly deficient. One test deviated significantly from standardized practice. Another bore no resemblance to standardized testing. The tests themselves seem to have been designed by the police officer himself without regard to known and available standards, simply on the basis of his own unverified expectations about the physical abilities of others. With respect to the one test (perhaps the most difficult of all) which [the accused] performed to the officer's satisfaction, I am left completely in the dark as to how (or if) the officer factored the result into his conclusion. Indeed, the whole notion of "scoring" the tests in any way does not seem to have been considered by the officer.

In the end result, I find that the field sobriety tests which were conducted, and the results which were obtained, were insufficiently probative of alcohol impairment to allow an objective, informed observer to conclude that there existed reasonable and probable grounds to believe in [the accused's] impairment by alcohol once the tests had been completed. Or, to state my conclusion a little differently by taking into account the other observations made by the police officer in this case, I do not believe it can fairly be said that the field sobriety tests which were conducted and the results which were obtained could reasonably allow the police officer's existing suspicions to be transformed into a fixed opinion of impairment on [the accused's] part. Whichever way it is stated, my ultimate conclusion is the same: The police officer's demand was not based on reasonable and probable grounds, objectively viewed, and [the accused's] section 8 Charter rights were violated as a result. [paras. 32-33]

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

Without vision, the people perish—Proverbs 29:18

ON-DUTY DEATHS DOWN



On-duty peace officer deaths in Canada are at their lowest in 10 years. In 2003, six peace officers lost their lives on the job. This equals the 10-year lows of 1994, 1996, 1998, and

1999 and represents a 46% reduction over 2002.

Motor vehicles, not guns, pose the greatest risk to officers. Over the last 10 years, 37 officers have lost their lives in circumstances involving vehicles, including automobile and motorcycle accidents (27), vehicular assault (1), and being struck by a vehicle (9). These deaths account for 49% of all on-duty deaths, which is more than three times the next leading causes of aircraft accidents and gunfire, each taking 11 lives from 1994 to 2003. On average, 7.5 officers per year lost their lives during the last decade, while 1997 and 2002 had the most deaths at 11 per year.

**"They are our heroes.
We shall not forget them."³**

2003 Roll of Honour

Conservation Officer Walter Ceolin

Ontario Ministry of Natural Resources, ON

End of Watch: January 21, 2003

Cause of Death: Aircraft accident

Senior Constable Philip R. Shrive

Ontario Provincial Police, ON

End of Watch: May 23, 2003

Cause of Death: Automobile accident

Constable Ghislain Maurice

Royal Canadian Mounted Police, CAN

End of Watch: June 10, 2003

Cause of Death: Automobile accident

Senior Constable John Paul Flagg

Ontario Provincial Police, ON

End of Watch: September 20, 2003

Cause of Death: Motorcycle accident

Corporal Stephen Gibson

Canadian Forces Military Police, CAN

End of Watch: September 26, 2003

Cause of Death: Automobile accident

Constable Patrick Levesque

Surete Du Quebec, QC

End of Watch: September 27, 2003

Cause of Death: Aircraft accident

Canadian Peace Officer On Duty Deaths (by year)

Cause	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	Total
Aircraft accident	2		1	2	1		4		1		11
Auto accident	3	5	2	1	1	2	2	2	4	2	24
Drowned			1			1	1	1		2	6
Fall				1							1
Gunfire		1	2				3	2	2	1	11
Heart attack		1		1		1	1				4
Motorcycle accident	1			2							3
Natural disaster		1									1
Stabbed						1					1
Struck by vehicle		3		2	2	1		1			9
Training accident			1		1					1	3
Vehicular assault					1						1
Total	6	11	7	9	6	6	11	6	7	6	75

Source: Officer Down Memorial Page www.odmp.org/canada [accessed January 12, 2004]

³ Inscription on Canadian Police and Peace Officer Memorial—Parliament Buildings
Ottawa, Ontario.

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ABBOTSFORD

Cst. Martin Walrod

DELTA

Cst. Bentley Johansson
Cst. David Vaughan-Smith

PORT MOODY

Cst. Fraser Renard

SAANICH

Cst. David Gray
Cst. Tara McNeil
Cst. Roy Radu

VANCOUVER

Cst. Oscar Alvarez
Cst. Ian Barraclough
Cst. Terry Duesterwald
Cst. Paul Dungey
Cst. Linda Grange
Cst. David Hopp
Cst. Jordan Lennox
Cst. Clifton Louie
Cst. John Roberts
Cst. Edward Scally
Cst. Alvin Shum
Cst. Mehrban Sidhu
Cst. Steven Stefani
Cst. Paul Sewek
Cst. Michelle Trudel
Cst. Michael Wagar



Congratulations to Cst. Roy Radu (Saanich), 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. Michael Wagar (Vancouver) received the Abbotsford Police Association Oliver Thomson Trophy for outstanding physical fitness. Cst. Paul Sewek (Vancouver) received the Vancouver Police Union Excellence in Academics award for best academic test results in all disciplines. Cst. Paul Dungey (Vancouver) received the British Columbia Federation of Police Officers Valedictorian award for being selected by his peers to represent his class at the graduation ceremony. Cst. Paul Sewek (Vancouver) was the recipient of the Abbotsford Police Recruit Marksmanship award for highest qualification score during Block 3 training. Port Moody Police Chief Paul Shrive was the keynote speaker at the ceremony.

APPREHENSION BY POLICE DOG REASONABLE

**Robinow v. City of Vancouver et al,
2003 BCSC 661**



Police were dispatched to a theft in progress at 1:39 am where they saw a van driving in the area. They assumed the van was related to the theft and followed it. The van drove through a stop sign, sped away, and then slowed when two occupants bailed out and fled on foot. A canine unit was called to the scene and the dog handler noted the ignition had been tampered with. The handler believed the van had been stolen, that a crime had been committed, and that the suspects were fleeing from police to resist arrest. Police did not know how far the suspects had travelled, whether they were armed or dangerous, or whether they had a criminal record.

A police dog was deployed using a 25' tracking line. He tracked to a carport and bit the plaintiff, who was hiding under a parked car. The handler looked under the car and saw the screaming plaintiff grabbing at the dog's head and ears and swinging the dog around under the car. The plaintiff was told to stop fighting, to show his hands, and to come out from under the car. He soon stopped and crawled out from under the car with the dog biting his arm. The handler commanded the dog to release the plaintiff. The plaintiff sustained serious injuries to his arm, including loss of soft tissue, nerve damage, and scarring, and required corrective surgery to transplant some dead muscle. The plaintiff sued the City of Vancouver and the dog handler in British Columbia Supreme Court alleging assault and battery in that the use of the police dog amounted to excessive force.

The handler testified the dog was trained not to release a fighting and resisting suspect. He also said that it was unsafe to order the release of the plaintiff while under the car because the dog

would perceive any movement as a threat and re-engage, perhaps to a different part of the suspect's body. In the handler's view, there were no alternate methods to find and arrest the plaintiff and the level of force used was determined by the plaintiff's decision to hide and then fight the dog.

After reviewing the Vancouver Police Department's Regulations and Procedure Manual and hearing evidence about the "bite and hold" method used by the department, Justice Allan concluded the use of force used was justified under s.25(1) of the *Criminal Code*. Section 25(1) provides a defence to both civil and criminal liability provided the requirements of the section are satisfied. She found that up until the point that the plaintiff was initially bitten, the officer followed the standard procedures and guidelines in the use of police dogs. Further, the dog's actions were predictable within the context of its training. While recognizing that a police officer is not expected to carefully measure the exact amount of force a situation requires, Justice Allan stated:

The reasonableness of [the handler's] actions on...falls to be determined in the light of the circumstances and not through the lens of hindsight...After the fact, it is obvious that [the plaintiff] was a young man, unarmed, without a criminal record and not dangerous. His judgment was impaired by heroin and he panicked. However, those facts were unknown to [the handler] in the heat of a potentially dangerous pursuit and he was trained to anticipate an armed suspect who may be planning an ambush.

I conclude that [the handler's] use of force was justified within the criteria established by s. 25 of the Code: he was a peace officer, authorized to arrest [the plaintiff] without a warrant; he acted on reasonable grounds, and the force used was necessary to apprehend and arrest the suspect. In all of the circumstances, including his concerns regarding the safety of himself, his dog and plaintiff, the handler] was justified in ordering

[the dog] to disengage when he did so and not earlier. The force used did not become excessive, unreasonable or inappropriate. Furthermore, there is no evidence as to what injuries, if any, [the plaintiff] suffered as a result of Constable Star's alleged delay in releasing his dog.

Neither the city nor the handler was found to be negligent and the plaintiff's claim was dismissed. However, if negligence had been proven, the plaintiff would have been awarded \$30,000 for general damages, \$2,000 for future special damages (revision surgeries), and \$5,000 for loss of earning capacity.

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

BC POLICE HONOURED



Thirty-four of British Columbia's finest police officers were honoured on November 30, 2003 at Government House in Victoria. They were selected by a committee comprised of representatives from the British Columbia Association of Chiefs of Police and Police Services Division, Ministry of Public Safety and Solicitor General. Awards are presented for either valour or meritorious service. The criteria for the awards are as follows:

Valour (gold coloured) is the highest award for a police officer in British Columbia and involves an act of exceptional valour in the face of extreme hazard. It is awarded to police officers who purposely took action for the benefit of others while knowing that, in doing so, they placed themselves at substantial risk of death or serious injury.

Meritorious Service (silver coloured) is exemplary performance that enhances the image of police officers in British Columbia. It is awarded to police officers who clearly demonstrated that they acted in a manner

significantly beyond the standard normally expected.

Awards of Valour



Cst. Warren Brown, Delta Police Department, for single-handedly searching a burning commercial building to make sure no one was inside.

Cst. Dan Crivello - currently serving with the RCMP, Ottawa Headquarters, **Cst. Rosanne Komlos** and **Cst. James Splinter**, New Hazelton RCMP detachment, for apprehending a violent suspect who was threatening fellow officers with an axe.

Cst. Harold Harding, West Vancouver Police Department, for rescuing a woman from a burning residence.

Sgt. Greg Kodak and **Cst. Graham Orlick**, Vancouver Police Department, for their multiple attempts to rescue an unconscious victim from a burning building.

Sgt. Joseph Chu and **Cst. Al Kussat**, Vancouver Police Department, for scaling a 300-foot crane to rescue a suicidal woman.

Cst. Tina Fuchs and **Cst. Derrick Gibson**, Vancouver Police Department, for apprehending a mentally unstable and violent man who initiated an armed attack.

Cst. Allan Hester, Vancouver Police Department, for saving a suicidal woman's life after she jumped from a third story balcony.

Cst. Paul Spencelayh, Victoria Police Department, for rescuing two people with disabilities from their burning residence.

Meritorious Service



S/Sgt. Paul Briggs, Abbotsford Police Department, for dedication of duty and tenacity in pursuing a seven-year investigation that led to the conviction of a serial rapist.

Cst. Jim Poulin, Delta Police Department, for dedication in establishing the Kidz 4 Success Kamp, a Delta community youth initiative.

Sgt. Clark Russell, **D/Cst. Barrie Cockle**, **Cst. Shannon Perkins**, **Cst. Harvey Stevenson** and

Cst. Brenda Kelly, Esquimalt Police Department (currently serving with the Victoria Police Department) for professionalism and tenacity during the investigation of three gang members whose arrests led to convictions of aggravated assault.

Cst. Edward Luscombe, Queen Charlotte City RCMP Detachment (currently serving with the Terrace RCMP detachment) for compassion in establishing a memorial for 36 American servicemen who died in an aircraft accident in Sandspit, B.C. in 1952.

Sgt. Barry Baxter and **Sgt. Robert Turnbull**, RCMP "E" Division Headquarters, for dedication and persistence during the lengthy and complex investigation of an organized crime group that was eventually convicted.

Cst. Mark Naipaul (currently serving with the RCMP "E" Division Headquarters) **Cst. Margo Halliday**, **Cst. A.J. Kassam**, Surrey RCMP Detachment, for courage and quick action in saving the life of a suicidal man who attempted to jump from an 11th-floor balcony.

D/Cst. Murray Rayment, Vancouver Police Department, for innovation in developing software applications for police crime analysis.

Cst. Paul Verral (Retired), Vancouver Police Department, for dedication and tenacity in supporting the Missing Women's Task Force investigation.

Sgt. Steven Ing and **Cst. Penny Durrant**, Victoria Police Department, for courage and professionalism in rescuing a suicidal woman from the fifth-story ledge of a building.

Cst. Jonathan Sheldon, Victoria Police Department, for research and contributions to the National Peace Officers Memorial for four fallen Victoria police members.

Cst. Derek Tolmie and **Cst. Eric Ooms**, Victoria Police Department, for courage and quick action in saving the life of a suicidal man attempting to jump from the sixth level of a parkade.

Norman D. Simmons, Retired Chief Constable, Esquimalt Police Department, for outstanding service to policing in British Columbia.

Source: http://www.pssg.gov.bc.ca/police_services/honours/index.htm [January 12, 2004]

S.215 MVA: A SOBERING LOOK AT BC's 24-HOUR ALCOHOL RELATED DRIVING PROHIBITION



The 24-hour roadside driving prohibition found in British Columbia's *Motor Vehicle Act (MVA)* is an important tool in addressing drinking and driving and the corresponding devastation it

causes on our roadways. From 1998 to 2002 there were on average, approximately 43,000 24-hour prohibitions per year in British Columbia⁴. In 2003, the British Columbia Court of Appeal examined the nature of s.215 MVA and its effectiveness in banning motorists from driving, without court review at the time the prohibition is imposed. Justice Low stated⁵:

It is difficult to conceive of a more appropriate summary procedure for removing drinking drivers from the roads than the 24-hour suspension procedure under s. 215 of the statute. The peace officer must have reasonable and probable grounds for believing that the driver's ability to drive is affected by alcohol. It is impractical in the extreme for this belief to be subject to a judicial finding before the suspension can come into effect. The Legislature has chosen to create this procedure to permit peace officers to regulate driving privileges and protect the public.

24-Hour Prohibition Fast Facts

24-hour prohibitions across BC
(rounded to nearest 1,000)

1998	44,000
1999	45,000
2000	42,000
2001	44,000
2002	40,000

Source: ICBC Victoria Data Warehouse-Contraventions (Jan 11, 2004)

Most of the case law surrounding the 24-hour driving prohibition arises from instances where drivers are charged with driving after the prohibition is issued, since there is little opportunity

to otherwise dispute the issuance of the prohibition in court. In cases where a person is charged with driving while prohibited they may seek to challenge the validity of the initial prohibition⁶. In fact, the Crown must present evidence with respect to whether the officer issuing the prohibition had reasonable and probable grounds to do so. It is not enough simply to present the Notice of Prohibition⁷. As a consequence, if the prohibition was not valid from inception the subsequent charge of driving while prohibited fails.

Genesis



The alcohol related 24-hour driving prohibition in today's British Columbia *MVA* originates from the 1960's in

s.203. This section, later changed to s.214 and now s.215, initially required only that a police officer suspect the driver of a motor vehicle had consumed alcohol before a driver's licence could be suspended. It read:

A peace officer may, at any time or place on a highway or industrial road when he has reason to suspect that the driver of a motor vehicle has consumed alcohol, request the driver to drive the motor vehicle, under the direction of the peace officer, to the nearest place off the travelled portion of the highway or industrial road and there to surrender his driver's licence. [emphasis added]

However, following a challenge to this section, the British Columbia Court of Appeal⁸ ruled that the section, as it was worded, was procedurally unfair since it permitted suspension on mere suspicion of alcohol consumption, without notice or a hearing. Further, the court found the section too vague. Chief Justice Nemetz wrote:

A plain reading of s.214(2) shows that it is riddled with vagueness. The provision allows a constable to order a roadside suspension on

⁶ See for example *R. v. Sam* [1975] BCJ No. 0508 (BCSC), *R. v. Wolff* (1979) 46 CCC (2d) 467 (BCCA), *R. v. McGowan*, [1995] BCJ No. 1100 (BCPC), *R. v. Van Groen*, [1997] BCJ No. 1175 (BCSC), *R. v. Sengara*, [1988] BCJ No. 673 (BCSC)

⁷ *R. v. Lam* [2002] BCJ No. 2566 (BCPC)

⁸ *R. v. Robson*, 19 CCC (3d) 137 (BCCA)

⁴ ICBC Victoria Data Warehouse-Contraventions (Jan 11, 2004)

⁵ *Sigurdson v. British Columbia*, 2003 BCCA 535

mere suspicion that the driver had consumed alcohol. No amount of such consumption is set out. No limitation as to when the consumption took place is mentioned and, what is most important, the suspension can be made regardless of whether the person's ability to drive is affected.

In response to the court's decision, the provincial government amended the legislation. The concept of reasonable and probable grounds was added to replace the standard of suspicion. Further, it was also necessary that the person's ability to drive be affected by alcohol. It was no longer enough simply to suspect alcohol consumption. The section was changed to read:

A peace officer may, at any time or place on a highway or industrial road when he has reasonable and probable grounds to believe that a driver's ability to drive a motor vehicle is affected by alcohol, request the driver to drive the motor vehicle, under the direction of the peace officer, to the nearest place off the travelled portion of the highway or industrial road and there to surrender his driver's licence.

Today, police officers are empowered under s.215 *MVA* to suspend a driver's licence for 24 hours. The section now reads:

s.215(2) Motor Vehicle Act

A peace officer may, at any time or place on a highway or industrial road if the peace officer has reasonable and probable grounds to believe that a driver's ability to drive a motor vehicle is affected by alcohol,

- (a) request the driver to drive the motor vehicle, under the direction of the peace officer, to the nearest place off the traveled portion of the highway or industrial road,
- (b) serve the driver with a notice of driving prohibition, and
- (c) if the driver is in possession of a driver's licence, request the driver to surrender that licence.

Subsection 215(3) provides a similar authority for instances where the officer reasonably believes a motorist's driving ability is affected by a drug, other than alcohol. This drug related provision is mentioned for reference only and will no longer be discussed.

A driver is defined in s.215(1) as including "a person having the care or control of a motor vehicle on a highway or industrial road whether or not the motor vehicle is in motion." Care or control is not defined and there is no presumption in the *MVA* similar to that found in the *Criminal Code*⁹, which deems a person in the driver's seat as a person in care or control. However, "care or control" is a much broader concept than the specific and narrow concept of driving¹⁰. Therefore, each circumstance will need to be assessed by the investigating officer to determine whether the person was driving or was in care or control.

For example, in *R. v. Berlin* [1991] BCJ No. 2525 (BCSC), a police officer prohibited a driver after attending a single vehicle, single occupant motor vehicle accident in which the vehicle had flipped and was left inoperable. The driver was not injured and was standing by the road when police arrived a few minutes after the accident happened. The trial judge concluded that at the time the police officer arrived on scene, the driver had in effect become a pedestrian and therefore the officer had no power to proceed under s.214. The case was appealed and the British Columbia Supreme Court came to a different conclusion. Justice Prowse stated:

...I have concluded that the aim of s.214 is not limited "to stopping a driver from starting to drive a parked vehicle that is already on the road or from continuing to drive a vehicle already on the road" [in the words of the trial judge] but rather extends to stopping a driver from driving any vehicle for which his licence is surrendered.

Furthermore, Justice Prowse found "there is nothing in the words of the section that either expressly or impliedly, indicate that the fact the vehicle be operable is a condition precedent to the application of this section."

⁹ See s.258 Criminal Code of Canada

¹⁰ *R. v. Steeden* [1995] BCJ No. 1413 (BCCA)

Having Driver Move Vehicle



Although s.215(2) allows the police officer to "request the driver to drive the motor vehicle, under the direction of the peace officer, to the nearest place off the traveled portion of the highway or industrial road" after their belief is formed, it is not a condition precedent to a valid prohibition. As Chief Justice Nemetz stated in *R. v. Wolff* (1979) 46 CCC (2d) 467 (BCCA):

...it seems to me that the effectiveness of the demand to surrender a driver's licence is not conditional on the driver's moving the car to the nearest place off the traveled portion of the highway. I can conceive of situations where a car might not be moveable from the traveled portion of the highway, and yet the condition of the driver is such that the police officer can properly demand that he surrender his licence so that he would not drive, or attempt to drive, any other vehicle.

In an earlier decision, Justice Monroe in *R. v. Sam* [1975] BCJ No. 0508 (BCSC) held the request to move the vehicle was discretionary. In other words, a police officer may request the vehicle be moved, but they need not do so. As the justice noted, "the provisions of the section become absurd where, for example, the driver was obviously incapable of driving the vehicle or the vehicle was so disabled as to be incapable of being driven or the vehicle had already been driven off the traveled portion of the highway before the officer spoke to the driver."

In *R. v. Brick* [1995] BCJ No. 3005 (BCPC) a police officer formed the opinion a driver was mildly impaired by alcohol, but before demanding samples he had the driver pull the vehicle ahead 30 feet and park it on the shoulder, as s.214(2) (now s.215(2)) permitted, because it was blocking an apartment entrance. The accused provided breath samples and was charged with driving over 80mg%. At his trial, he argued that the certificate of qualified technician ought to be excluded because the officer failed to make the

demand "forthwith as soon as practicable" when he delayed the demand by asking the driver to move his car. It was further contended by the accused that the court should not condone a police officer directing a suspected impaired driver to set their vehicle in motion, thereby committing an offence under s.253 of the *Criminal Code*.

Justice Saunderson rejected both of these arguments. The exercise of the officer's statutory discretion to have the accused move his car did not result in an unreasonable delay and it was exercised legitimately and properly. Although the court noted the officer had three options—move the vehicle himself, have the driver move it, or have it towed—the justice ruled, "The courts ought not to lightly interfere with the practical judgments the police are so frequently called upon to make in the course of their duties."

Surrender of Driver's Licence



When a police officer asks a driver to surrender their licence, s.215(4) places an obligation on the driver to surrender it at the

time of request, whether a British Columbia licence or otherwise. Section 215(4) reads:

s.215(4) *Motor Vehicle Act*

If a peace officer requests a driver to surrender his or her driver's licence under this section, the driver must forthwith surrender to the peace officer his or her driver's licence issued under this Act or any document issued under another jurisdiction that allows him or her to drive or operate a motor vehicle.

Once a notice of prohibition is issued, the motorist is prohibited from driving any vehicle, not just the one they were stopped in or were in care and control of¹¹, for a period of 24 hours. Section 215(5) reads:

¹¹ *R. v. Berlin*, [1991] BCJ No. 2525 (BCSC)

s.215(5) Motor Vehicle Act

Unless the prohibition from driving a motor vehicle is terminated...the driver is automatically prohibited from driving a motor vehicle for a period of 24 hours from the time the peace officer served the driver with a notice of driving prohibition...[emphasis added]

Constitutional Concerns

Section 7 of the *Charter* protects a person's right to life, liberty and security of their person. However, there is no *Charter* right to drive a motor vehicle on a public highway. Driving is not a liberty protected by s.7, but rather a privilege¹². Furthermore, a 24-hour driving prohibition is neither an offence¹³ nor punishment¹⁴, but rather a civil disability¹⁵. Therefore, charging someone with impaired driving while also issuing a 24-hour driving prohibition does not violate s.12 of the *Charter* protecting persons from cruel and unusual punishment¹⁶. Nor does it create a double jeopardy situation under s.11(h) of the *Charter*¹⁷ (when a prohibition is served and the person is also convicted of impaired driving) or violate the presumption of innocence protection under s.11(d), because a person is not charged with an offence¹⁸. On the other hand, the mandatory minimum sentence of 7 days imprisonment arising from a conviction for driving while suspended as a result of a 24-hour prohibition was held to be unconstitutional because it amounted to cruel and unusual punishment¹⁹, despite an earlier decision concluding that the 7 day minimum did not contravene the *Charter*²⁰. The right to counsel under s.10(b) of the *Charter* will be discussed later.

The Standard

The legal standard for prohibition is one of reasonable and probable grounds to believe a person's ability to operate a motor vehicle is affected by alcohol. The reasonable and probable grounds standard requires a subjective belief supported by objective criteria²¹.



Synonymously, reasonable and probable grounds has been referred to as reasonable grounds²², strong reason to believe²³, credibly based probability²⁴, reasonable probability²⁵, reasonable belief²⁶, reasonable and probable cause to believe²⁷. It is not enough simply to say the person was affected by alcohol. Rather, the officer must be able to properly articulate the reasons for coming to their conclusion, which in turn must be objectively reasonable, such as physical observations, field sobriety tests, driving evidence, or roadside screening device results.

Although common parlance would suggest terms such as intoxicated, drunk, inebriated, or impaired are synonymous and interchangeable, three distinct terms concerning the level of influence alcohol has on a person can be found in common federal or provincial statutes; intoxicated (appearing in s.41 of the *Liquor Control and Licensing Act (LCLA)*), impaired (appearing in s.253 of the *Criminal Code*), and affected (appearing in s.215 *MVA*). It would therefore be prudent to review these three standards in order to understand the minimum legal benchmark required for the service of a 24-hour driving prohibition.

¹² Buhlers v. British Columbia (Superintendent of Motor Vehicles), 1999 BCCA 114.

¹³ R. v. Demaniuk [1983] BCJ No. 221 (BCSC), Sigurdson v. British Columbia, 2003 BCCA 535

¹⁴ R. v. Nguyen [1993] BCJ No. 586 (BCPC), R. v. Shaw [1991] BCJ No. 221 (BCSC), R. v. Art [1987] BCJ No. 2158 (BCCA)

¹⁵ R. v. Nguyen [1993] BCJ No. 586 (BCPC)

¹⁶ R. v. Shaw [1991] BCJ No. 221 (BCSC)

¹⁷ R. v. Art [1987] BCJ No. 2158 (BCCA)

¹⁸ Sigurdson v. British Columbia, 2003 BCCA 535

¹⁹ R. v. Tommasi, [1997] BCJ No. 3040 (BCPC), R. v. Stasuk, 2002 BCPC 123, R. v.

McKenzie, [2001] BCJ No. 2415 (BCPC)

²⁰ R. v. Knoche, [1994] BCJ No. 2102 (BCSC)

²¹ R. v. Van Goen [1997] BCJ No. 1175 (BCSC)

²² Hunter v. Southam (1984) 14 C.C.C. (3d) 254 (SCC)

²³ Hunter v. Southam (1984) 14 C.C.C. (3d) 254 (SCC) at p.114.

²⁴ Hunter v. Southam (1984) 14 C.C.C. (3d) 254 (SCC) at p.115.

²⁵ R. v. Debot [1989] 2 S.C.R. 1140 (SCC) per Wilson at p.1166.

²⁶ R. v. Debot [1989] 2 S.C.R. 1140 (SCC) per Wilson at p.1166.

²⁷ R. v. Proulx (1992) 76 C.C.C. (3d) 316 (QueCA)

Intoxicated

Under s.41 of the *LCLA*, it is an arrestable offence for a person to be or remain in a public place while intoxicated. The term intoxicated was defined in *Besse v. Thom* (1979) 96 D.L.R. (3d) 657 (BCCoCrt.) reversed on other grounds (1979) 107 D.L.R. (3d) 694 (BCCA) as follows:

[T]he condition of being stupefied or drunk from the consumption of alcohol or drugs to such a marked degree that a person is a danger to himself or others or is causing a disturbance. [emphasis added]

It appears that the level of inebriation contemplated by this definition is substantial. Like most subjective/objective standards, the test for intoxication under the *LCLA* is not whether the person was in fact intoxicated, but whether the person was "apparently" intoxicated to the police officer. The officer's subjective belief must be supported by objective indicia²⁸.

Impaired

There is no specific test for impairment under s.253 of the *Criminal Code*. Rather, it is an issue of fact whether the driver's ability was impaired by alcohol (or drug). Any degree of impairment of the ability to drive, ranging from slight to great, will sustain a conviction²⁹. In *R. v. Andrews* (1996) 104 CCC (3d) 392 (AltaCA) leave to appeal to Supreme Court of Canada refused 106 CCC (3d) vi, the majority of the court recognized a distinction between "slight impairment" generally, and "slight impairment of one's ability to operate a motor vehicle" specifically. Justice Conrad stated:

Every time a person has a drink, his or her ability to drive is not necessarily impaired. It may well be that one drink would impair one's ability to do brain surgery, or one's ability to thread a needle. The question is not whether the person's functional ability is impaired to any degree. The question is whether the person's

ability to drive is impaired to any degree by alcohol or a drug. In considering this question, judges must be careful not to assume that, where a person's functional ability is affected in some respects by consumption of alcohol, his or her ability to drive is automatically impaired.

The court also noted that when a person's functional ability (like walking, talking, and performing basic tests of manual dexterity) was impaired by alcohol, a logical inference could be drawn that the ability to drive was also impaired. Absent driving pattern or expert testimony, a slight departure from normal conduct in most cases will not, however, lend itself to a safe conclusion that the ability to drive was impaired by alcohol. Rather, the more marked the departure from normal behaviour, the greater the indication, or inference, that one's ability to drive is impaired.

Affected

The standard of being affected by alcohol is not defined in the *MVA*, but it "is clearly less than that of impairment."³⁰ As such, the motorist's ability to drive need not be impaired, which would warrant charges under s.253 of the *Criminal Code*. However, there must be enough objective indicia to cause the officer to believe driving ability is affected by alcohol. But it is not enough simply to conclude that the driver has consumed alcohol, as was the requirement of the original provision in the 1960's. The wording recommended for use by the Ministry of Public Safety and Solicitor General in imposing a prohibition reflects the legal standard:

Ministry of Public Safety and Solicitor General card wording (01-05-25)

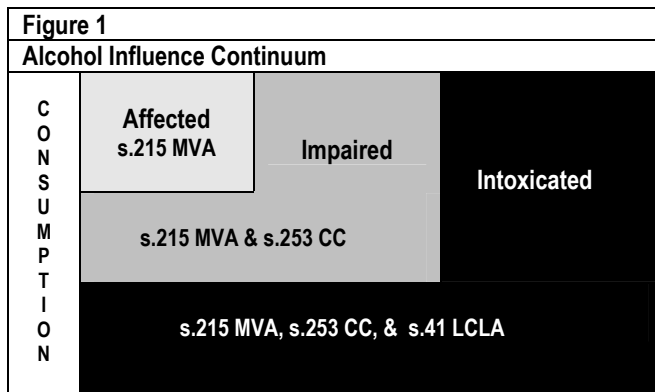
I have reasonable and probable grounds to believe that your ability to drive a motor vehicle is affected by alcohol and I therefore direct you to surrender your driver's licence. You are now prohibited from driving a motor vehicle for a period of 24 hours from this time and date. [emphasis added]

²⁸ R. v. Ronnie [1999] B.C.J. No 813 (BCPC)

²⁹ R. v. Stellato, (1993) 78 C.C.C. (3d) 380 (OntCA) affirmed Supreme Court of Canada [1994] 2 S.C.R. 478

³⁰ R. v. Mackenzie, 2001 BCPC 301

From the preceding information, it becomes evident that the affected standard is a lesser, but included standard of impairment. Thus, an officer need not form the opinion that a driver is impaired to issue a 24-hour prohibition. Furthermore, both affected and impaired are included standards of intoxication (see Figure 1).



If a person were impaired and provided breath samples over 80mg%, they could be charged with *Criminal Code* offences under s.253, served an Administrative Driving Prohibition, and served a 24-hour driving prohibition under the *MVA*. Similarly, if a person were to reach a state of intoxication, as defined by the courts for the purposes of the *LCLA* and be found driving or in care and control of a motor vehicle, all three statutes could apply (an arrest under s.41 *LCLA*, criminal charges under s.253 *Criminal Code*, and a 24-hour *MVA* prohibition).

Right to Counsel



Section 10(b) of the *Charter* provides that an arrested or detained person has the right to retain and instruct counsel

without delay and to be informed of that right.

s.10(b) *Charter*

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

There is little doubt that a motorist is detained for constitutional purposes when they are

stopped driving by the police³¹. However, during a s.215 investigation the police do not have to inform a person of their right to a lawyer. This has been held to be a reasonable limit under s.1 of the *Charter*. For example, in *R. v. McGowan* [1995] BCJ No. 1100 (BCPC), Justice Stansfield stated:

In my view, however, the "operational requirements" of section 214 authorize a peace officer to undertake the initial investigation of a driver who appears to have been drinking, including a minimal roadside detention for that purpose, without having to advise of section 10 rights. It is intended to be a summary process. If the officer decides to let the driver go on his way, albeit with his liberty to drive suspended for 24 hours, rather than to require the driver to accompany him to the police station for a breathalyser test, then there is no requirement that the section 10(b) warning be given. I believe that to be a reasonable limit on the section 10(b) *Charter* right, and one which will be in the interest of the many drivers who would rather receive the 24 hour prohibition than be exposed to the substantially greater jeopardy of a continuing criminal investigation and possible criminal conviction.

On balance I have concluded it is more important that there remain this expeditious means of dealing with the enormous social problem of drinking and driving, giving rise as it does to a relatively minor limitation on personal liberty. To hold that the officer at the roadside in the preliminary stage of a drinking/driving investigation has to advise the person of his right to counsel (with the attendant obligations regarding making a telephone available, supplying duty counsel's number, and so on) would be to change fundamentally the operation of the process envisaged by the Legislature.

Nor do the police have to advise of the right to counsel once the 24 hour prohibition is issued, since the driver "is no longer detained and no longer in control of the police"³².

³¹ see for example *R. v. Nguyen*, [1993] BCJ No. 586 (BCPC)

³² *R. v. Nguyen*, [1993] BCJ No. 586 (BCPC)

Even when the police administer roadside sobriety tests to raise their suspicions to the reasonable grounds standard required by this section, there is no need to provide a s.10(b) warning. In *R. v. Bonin*, (1989) 47 C.C.C. (3d) 230 (B.C.C.A.) leave to appeal to Supreme Court of Canada refused 50 C.C.C. (3d) vi, British Columbia's top court ruled that the operational requirements of s.214, along with s.27(2) of the province's *Interpretation Act*, implicitly permit the police to briefly delay informing the driver of their right to counsel until sobriety tests are complete. The court recognized the need for a police officer with a suspicion that a driver's ability is affected by alcohol to have the necessary means to elevate that suspicion to the reasonable grounds standard required by s.214 (now s.215). The court concluded that even though the driver was detained when asked to perform physical co-ordination tests, holding off in providing a s.10(b) warning was a reasonable limit prescribed by law under s.1 of the *Charter*.

Terminating a Prohibition

Subsections 215(6), and (7) create the statutory framework for terminating an alcohol related driving prohibition. Other than the expiration of 24 hours, the driving prohibition may be terminated in two ways:

- undergoing a "test" administered by a peace officer where blood alcohol content (BAC) does not exceed 50mg%; or
- the driver produces a medical certificate signed after the prohibition stating their BAC does not exceed 50mg% (s.215(7)).

Peace Officer Administered Test

Section 215(6) allows for termination of a prohibition if the driver forthwith requests and does undergo a test that indicates a BAC not in excess of 50mg%. Interesting, the original legislation (s.203 as it was then) required a BAC not in excess of 80mg%, consistent with the *Criminal Code* level. The section today reads:

s.215(6) *Motor Vehicle Act*

If a driver, who is served with a notice of driving prohibition under subsection (2), forthwith requests a peace officer to administer and does undergo as soon as practicable a test that indicates that his or her blood alcohol level does not exceed 50 mg of alcohol in 100 mL of blood, the prohibition from driving is terminated

The type of test required under this section is not specified. However, in *R. v. Brush* (1977) 35 CCC (2d) 177 (BCSC), the accused argued that the "test", referred to in s.203 as it was then, referred to the "Borkenstein Breathalyzer test". In rejecting this argument, Justice Murray stated:

...s203(3)(a) refers only to "a test". It does not refer to a "Borkenstein Breathalyzer test" and it is clear that there are various other tests which a driver can take which will indicate that his venous blood contains more or less alcohol than that indicated by the subsection. Other "tests" that occur to me are blood tests, urine tests and even physical tests.

Although the legislation describes only a "test", the standard prohibition wording provided by the Ministry of Public Safety and Solicitor General uses the phrase "breath test" (see below), while the reverse of the driver's copy of the "Notice of 24-Hour Prohibition" uses the phrase "breathalyzer test" (see below).

Ministry of Public Safety and Solicitor General card wording (01-05-25)

However, if you do not accept this prohibition, you have a right to either request a breath test or obtain a certificate from a medical practitioner. In the event that your blood alcohol level is shown not to exceed 50 milligrams of alcohol in 100 millilitres of blood by the test or certificate, this prohibition from driving is terminated. [emphasis added]

Reverse of Notice of 24-Hour Prohibition (MV 2634-071998)

If you do not accept this prohibition, you have the right to either request a breathalyzer test or obtain a certificate from a medical practitioner. In the event your blood alcohol is shown not to exceed 50 milligrams of alcohol in 100 millilitres of blood by the test or certificate, this prohibition is terminated. [emphasis added]

Arguably, a breath test could include both approved instruments, such as the BAC Datamaster C, or approved screening devices, such as the Alcometer SL-2 or Alco-Sensor IV. Usually these approved screening devices are calibrated to provide a warning when the breath sample exceeds 50mg%. Therefore, in the absence of a "warn" or "fail" reading, the prohibition would be terminated.

Although the standard prohibition wording provided by the Ministry of Public Safety and Solicitor General has a paragraph explaining how a prohibition can be terminated, "the validity of [a driver's] suspension [is] not affected by the failure of the officer to inform [the driver] of the means by which [the] suspension could be terminated."³³ In other words, the prohibition is valid even if the officer does not explain the contents of s.215(6) or (7). However, if the driver raises the issue of BAC with the police officer, it is incumbent on the officer then to advise the driver of ss.215(6) and (7)³⁴. As well, the testing provision arises after the prohibition is served, not before, and a test need not be given as a matter of course before imposing the prohibition.

Obligation to Administer Breath Test

In *R. v. Jewer*, (1989) 16 M.V.R. (2d) 70 (BCCoCrt) the accused requested a breathalyzer test under s.214(6) (now s.215(6)), but the officer refused because he did not believe the accused would blow over 80mg%. The Provincial Court trial judge ruled that when ss. (6) and (7) were read together, the officer was given the discretion as

³³ *R. v. Nguyen*, [1993] BCJ No. 586 (BCPC), see also *R. v. Wolff* (1979) 46 C.C.C. (2d) 467 (BCCA)

³⁴ *R. v. MacLennan* [1984] BCD Crim Conv 5766-02 (BCPC)

Impaired Driving Fast Facts

Canada (2002)

- 94% of impaired driving offences are impaired driving *simpliciter* or BAC exceeding 80mg%. Failure to provide a breath or blood sample account for 5% of offences while impaired causing bodily harm or death account for 1%.
- Saskatchewan had the highest provincial rate of impaired driving charges at 618 per 100,000, while the Northwest Territories was the highest overall at 1,038 per 100,000 followed by the Yukon at 764. Newfoundland has the lowest rate of impaired driving charges at 183 per 100,000. Of Canada's 25 Census Metropolitan Areas, Regina had the highest rate of impaired driving at 383 per 100,000.
- Impaired driving rates are highest:
 - among males (87%)
 - among adults 19 to 24 years
 - during weekends (Friday-Sunday)
 - during early morning hours (midnight-4am)
 - during June
- Impaired driving rates are lowest:
 - among females (13%)
 - among adults 65 and older
 - on Tuesdays
 - during January and February
- The conviction rate for impaired driving is 73%.
- In PEI, 91% of impaired drivers receive imprisonment, while in Nova Scotia only 4% do. However, the average sentence in PEI is only 17 days while in Nova Scotia it is 182 days.
- The median time from first court appearance to case completion was 99 days. 38% of cases received five or more appearances.
- In 1982 there were 143,424 impaired drivers charged, while 20 years later (2002) there were only 66,682 people charged.

Source: Juristat. Statistics Canada. Impaired Driving and Other Traffic Offences-2002.Vol.23, no.9

British Columbia

- In 2001, 118 people died in alcohol related crashes.
- Only 17% of BC residents believe a drinking driver would be convicted of impaired driving.
- 40% of police officers were reluctant to proceed with or recommend a criminal charge because drivers were unlikely to be convicted.
- The conviction rate for impaired driving in BC is 70%.
- Between 1995 and 2001 the number of impaired driving charges recommended by police decreased from 8,738 to 6,932, while the number of 24-hour prohibitions increased from 38,791 to 43,923 during the same period.

Source: Drinking and Driving Issues and Strategies in British Columbia. Discussion Paper. June 2003. #PSSG03025-1

to whether or not a breath test was administered. The accused appealed. Justice Godfrey of the British Columbia County Court concluded that the officer's exercise of discretion in not administering a breath test was unreasonable and arbitrary, which invalidated the 24-hour suspension. Justice Godfrey stated:

When I look at the wording of the legislation, it seems to me that implicit in the use of the phrase "forthwith requests a peace officer to administer and does undergo as soon as practicable ..." is an obligation on the part of the police officer to not unreasonably refuse such a request...The whole point of s. 214(6) is to allow a citizen an opportunity to prove that he is below .05 and the police are the only people who possess the breathalyzer machines. The officer's refusal was completely unreasonable in the circumstances and as such, I am satisfied vitiates the licence suspension. This is not a case where there was some other emergency that prevented him from providing the test or a problem with locating a breathalyzer machine. The only reason here for the refusal was that he did not believe a Criminal Code charge would result from allowing the accused to take a breath test and to my mind, that makes this refusal to provide a test unreasonable on the part of the police officer.

Medical Certificate

Section 215(7) provides for a second method of terminating a prohibition. It allows for a driver to produce a medical certificate signed after the prohibition stating their BAC does not exceed 50mg%. It reads:

s.215(7) Motor Vehicle Act

If a driver who is served with a notice of driving prohibition under subsection (2) produces, to a peace officer having charge of the matter, a certificate of a medical practitioner that

- (a) states that the blood alcohol level of the driver did not exceed 50 mg of alcohol in 100 mL of blood at the time the certificate was signed, and
 - (b) was signed after he or she was prohibited from driving,
- the prohibition from driving is terminated.

A plain reading of this section permits the driver to produce a medical certificate anytime within the 24-hour prohibited period, thereby terminating the driving prohibition. This is different than s.215(6) which requires the "test" forthwith.

The Significance of 50mg% BAC



Section 215 does not create a *per se* BAC legal limit for driving in British Columbia. Under s.215(9), it is not necessary that a police officer hold the opinion that a driver's

BAC exceeds 50mg% before a person's licence is suspended nor does a breath test have to be given in order to impose a prohibition. In other words, the officer need only believe, on reasonable and probable grounds, that driving ability is affected by alcohol. It is not necessary that the police obtain a confirmatory breath test. But, as previously mentioned, if the driver chooses to undergo a test forthwith and the results indicate a level not in excess of 50mg%, the prohibition is terminated. Similarly, if the driver opts for producing a medical certificate (<50mg%) anytime within the 24 hour period, the prohibition is also terminated.

This is different, for example, from s.253 of the *Criminal Code*. In that section, there are two separate and distinct offences; impaired driving (or care or control) and drive (or care or control) while over 80mg%. A person could be convicted of impaired driving with a BAC below 80mg% or convicted of over 80mg% without sufficient evidence to convict on impaired driving. Compare this to s.215, although not a charge, which requires reasonable and probable grounds driving ability is affected by alcohol, independent of any reading. The only link to a BAC of 50mg involves the provision that terminates the prohibition.

In the discussion paper entitled, *Drinking and Driving Issues and Strategies in British Columbia* (June 2003), the authors note that currently a

24-hour prohibition is only available if the police have reason to believe driving ability is affected by alcohol, not whether BAC is greater than 50mg%. As a proposed strategy, it was recommended that a 24-hour prohibition be established that is connected to a BAC measured on an approved screening device.

Despite the absence of a link to a threshold BAC, the question still remains whether the knowledge of a reading from an approved screening device can provide the necessary grounds to meet the requirement that a person's ability to drive is affected by alcohol? In other words, if a police officer is aware a person has a BAC greater than 50mg%, can the officer infer ability to drive is affected by alcohol to the reasonable and probable grounds standard?

In a recent Alberta Court of Appeal judgment³⁵, the Court ruled, "it is clear that a breathalyzer reading can itself be relied on as evidence of impairment". In this case, two experts testified that impairment occurs in all persons at BAC levels in excess of 100 mg%. If a breathalyzer reading (through the certificate of analysis) can be used as strong evidence proving impairment to the criminal standard of proof beyond a reasonable doubt, what would preclude a roadside screening device reading from being used as reasonable grounds to believe a person's ability is affected by alcohol?

There is a body of empirical, or scientific, evidence suggesting that impairment has been reported at relatively low alcohol levels. In the Canadian text *Drugs and Drug Abuse*³⁶ its authors write:

In general we can say that well-learned tasks are less affected by alcohol than are newly learned tasks, and the tasks akin to natural movement are also less affected. However, driving is not just a composite of individual tasks such as stopping or starting. Its related tasks involve the brain's ability to process

information and to make judgments, and alcohol has a much greater deleterious effect on processing information than on physical skills.

Driving is a "divided-attention task." That is, it involves several simultaneous tasks. Impaired drivers whose physical driving skills may not be adversely affected by relatively low blood alcohol levels may nevertheless become involved in accidents because they cannot integrate quickly enough the many pieces of information that must suddenly be considered in an emergency or in a suddenly complicated driving situation. [p.60]

And further:

Drivers should be reminded that their reaction time and judgment can be affected even if they "feel sober" after drinking. Even low levels of alcohol consumption are associated with slowed reaction time and decreased ability to handle complex driving situations. [p.269]

In a 2000 report commissioned by the U.S. Department of Transportation National Highway Traffic Safety Administration entitled *A Review of the Literature on the Effects of Low Doses of Alcohol on Driving-Related Skills*, Moskowitz and Fiorentino reviewed 112 scientific articles regarding the effect of alcohol on driving-related skills. In examining 13 behavioural areas including driving, divided attention, drowsiness, psychomotor skills, cognitive tasks, tracking, choice reaction time, vigilance, perception, and simple reaction time, the following was reported:

In some cases impairment was reported at BACs as low as [9mg%]. By the time subjects reach BACs of [30mg%], the number of impaired behavioral areas is greater than the number not impaired. As BACs increase, the number of areas showing impairment increase. [3.2]

Further, they reported this major finding:

This review of the literature provides strong evidence that impairment of some driving-related skills begins with any departure from

³⁵ R. v. Eliuk, 2002 ABCA 85

³⁶ Addiction Research Foundation (1998) Toronto, ON: The Addiction and Mental Health Services Corporation

zero BAC. By [50mg%] the majority of studies have reported impairment by alcohol. By BACs of [80mg%], 94% of the studies reviewed reported impairment. [4.1]

Since reasonable and probable grounds (credibly based probability³⁷) is a lower standard than proof beyond a reasonable doubt, and affected is a lesser, but included standard of impairment, it stands to reason that based on scientific research and scholarly opinion, that a breath test indicating a driver's BAC in excess of 50mg% would provide the grounds necessary to impose a 24-hour prohibition. It is not the reading itself that warrants the prohibition, but making a rational inference from the research that suggests the majority of people are impaired (which includes affected) at 50mg%.

The ASD Trump Card



Section 254(2) of the *Criminal Code* allows a police officer to demand a sample of a driver's breath into an approved screening device if the officer has a reasonable suspicion the driver has any alcohol in their

body. The provision reads:

S.254(2) Criminal Code

Where a peace officer reasonably suspects that a person who is operating a motor vehicle ...or who has the care or control of a motor vehicle..., whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

The legal standard is a reasonable suspicion of alcohol consumption alone, not the amount or behavioural consequences of the consumption³⁸.

³⁷ Hunter v. Southam (1984) 14 C.C.C. (3d) 254 (SCC) at p.115.

³⁸ R. v. Gilroy [1987] A.J. No. 822 (AltaCA)

Nor does the officer need to believe a crime, such as impaired driving or over 80mg%, has been committed. Rather, the test is only a reasonable suspicion of the existence of alcohol in the person's body³⁹. As a matter of practice then, a roadside breath sample can be demanded from a driver on a reasonable suspicion of alcohol consumption. There is no need to believe the person's ability to drive is affected or impaired by alcohol. Thus, a roadside sample can be demanded on a reasonable suspicion of consumption and the readings, if appropriate, can be used to support reasonable and probable grounds. The right to counsel under s.10(b) of the *Charter* is also suspended when a roadside screening device demand is made. It has been held to be a reasonable limit, demonstrably justified under s.1 of the *Charter*⁴⁰.

Document Service

Under s.215(2) MVA the driver may be served a notice of driving prohibition. This notice must be in a form established by the Insurance Corporation of British Columbia (ICBC) (s.215(11) MVA) and, unless terminated under s.215(6) MVA (peace officer administered test not exceeding 50mg%), must be delivered to ICBC

(s.215(10) MVA). Therefore, if a driver produces a medical certificate (BAC not in excess of 50mg%), the Notice of Driving Prohibition is nonetheless submitted to ICBC, presumably still forming part of the driver's record. On the other hand, a prohibition terminated by a test under s.215(6) is not forwarded to ICBC and will not be reflected on the driver's record.

³⁹ R. v. Lindsay (1999) 134 CCC (3d) 159 (OntCA), see also R. v. MacPherson (2000) 150 CCC (3d) 540 (OntCA)

⁴⁰ R. v. Thomsen (1988) 40 CCC (3d) 411 (SCC)

Summary

Section 215 MVA is a summary procedure that allows a police officer to prohibit a motorist from driving for 24 hours if the officer has reasonable grounds to believe driving ability is affected by alcohol. There is no need to believe an alcohol related crime has been committed, nor is it necessary that the influence alcohol has on the driver meets the impaired standard. All that is required is an honest belief, justifiable from an objective point of view, that driving ability is affected by alcohol. The objective component imposes a responsibility on the police to act with restraint and after careful assessment⁴¹ while serving to avoid and provide a safeguard against arbitrary and indiscriminate police action, preventing officers from being the ultimate judges of their own decisions⁴². No right to counsel warnings are necessary during the 215 investigation, nor is one necessary when the prohibition is served.

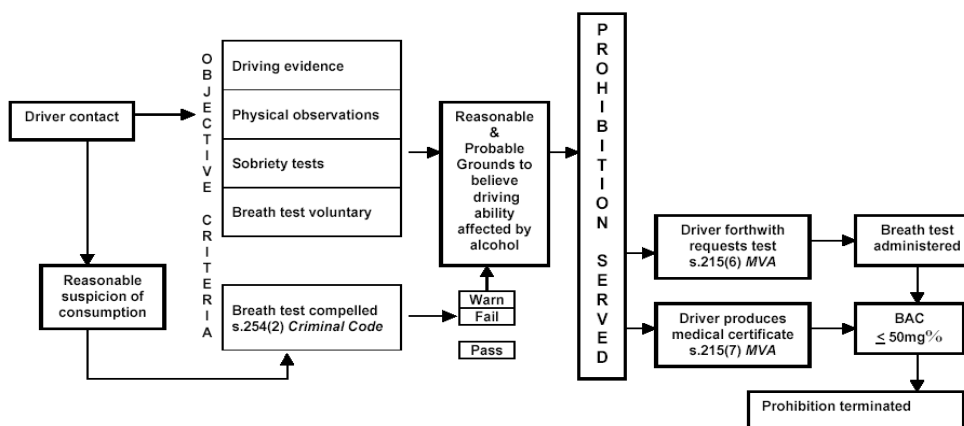
Once issued, the driver has two options in which to terminate the prohibition. One is to forthwith request the administration of a test by the officer, which must not be unreasonably refused.

The second involves the driver obtaining and subsequently producing a medical certificate. In both cases, the driving prohibition will end if the driver's BAC does not exceed 50mg%. In the former, the Notice of Prohibition is not submitted to ICBC while in the latter case it is.

If the driving prohibition is submitted to ICBC it will be entered on the recipient's driving record. A driver with one or more 24-hour prohibitions on their driving record within a two-year period may face a longer driving prohibition by the Superintendent of Motor Vehicles.

Procedurally, it makes sense simply to read the 24-hour roadside prohibition from the card provided to police officers by the Ministry of Public Safety and Solicitor General. This explains the recourse available to the driver under which the prohibition may be terminated, avoiding any legal challenges as to whether the driver was properly advised of his options.

Editor's Comments: The editor would like to thank Ms. Jill Walker, Director Hearings and Appeals, Office of the Superintendent of Motor Vehicles for her feedback on this article.



2002 Canadian Impaired Driving Rates (including rates of imprisonment and average sentence length)

Province/Territory	BC	AB	SK	MB	ON	QC	NB	NF	NS	PEI	YK	NT	NU
Impaired Driving Rate*	211	417	618	314	202	276	311	183	251	351	764	1,038	314
% Imprisoned	8%	10%	6%	n/a	19%	10%	13%	28%	4%	91%	14%	n/a	n/a
Avg. Sentence (days)	112	69	53	n/a	58	141	47	77	182	17	59	n/a	n/a

* per 100,000 people, n/a=not available

Source: Juristat, Statistics Canada, Impaired Driving and Other Traffic Offences-2002, Vol.23, no.9

⁴¹ R. v. Sundquist (2000) 145 C.C.C. (3d) 145 (SaskCA) at p.158.

⁴² R. v. Perrault [1992] R.J.Q. 1848 (QueCA)

Note-able Quote

Each day is an opportunity to change everything—
Joe Roberts

WCB COP CASES



The following are a number of recent WCB review cases involving police officers. The full report of these decisions are available at www.worksafebc.com.

Incident: Curling

Review reference#:5453

Date: December 1, 2003



The worker, a police officer, injured his knee while competing in an all police curling bonspiel. The worker was scheduled to

work a few days before the date of injury, but was granted administrative leave with full salary so he could represent the department. The worker's application for compensation was denied because he was involved in a recreational activity not covered by the Workers Compensation Act. He requested a review of the Board's decision and sought medical costs and wage loss benefits, arguing the purpose of the bonspiel was to foster good community relations, monies raised went to charities, and that fitness is a job requirement.

The reviewing officer denied the worker's request and confirmed the Board's decision. WCB Policy states that recreational, exercise, or sports activities are not normally considered part of a worker's employment except in exceptional cases. Because the worker was on administrative leave, the sports activity fell outside working hours. As such the WCB has developed policy guidelines in cases involving police officers. Factors to be considered include employer directed participation, public relations, full wages paid, employer team financial support, team composed of fellow employees, and no involvement

with commercial team or recreational league. In this case the worker met some of the guidelines, but not all. He was paid full salary for missed shifts, the team was made up of only police officers, and did not involve a commercial team or recreational league. However, participation was voluntary and the employer did not fund or subsidize the activity. Furthermore, community members were not allowed to participate and the bonspiel's primary focus was competition among police officers, even though money raised was used for charity. This case did not meet the criteria for an exceptional case.

Incident: Post Traumatic Stress Disorder

Review reference#:2622

Date: December 1, 2003

The worker, a 36-year old police officer who had 7 previous WCB claims, was attacked by a man with a knife in 1998, but was not physically injured. He received assistance from his department's trauma team and was off work for a short period on paid administrative leave. He was subsequently diagnosed with Post Traumatic Stress Disorder and received treatment from a psychologist. In 2002, the worker found out the attacker only received a 6-week conditional sentence and experienced an anxiety attack. The worker applied for compensation but his claim was denied because he did not submit the forms within the required one-year time period of the Post Traumatic Stress Disorder Injury (1998).

The worker requested a review of the WCB decision claiming "special circumstances" that prevented him from submitting the form within one-year. He contended he did not submit the form because he was placed on administrative leave and believed his employer and psychologist were taking care of his claim. In the opinion of the reviewing officer the worker should have known from the day of the attack that Board benefits might be appropriate. Furthermore, he had an extensive record for WCB claims and was familiar with the WCB application policy at the

time of the attack. The worker's request for a review was denied.

Incident: Fall

Review reference:#1927

Date: November 6, 2003

The worker, a 51-year old police officer, fell in a boat and suffered fractures to his mandible, which required surgery. As a result, his ability to open his mouth was restricted even after receiving physiotherapy. His claim for a permanent disability award was denied because he had no permanent functional impairment, only a number of subjective complaints. The worker requested a review of the decision.

The review request was allowed and the decision was returned to the Board. In making their earlier decision, the Board did not have the benefit of two reports from the worker's dentist, which demonstrated the worker's mouth opening was on the low end of normal. The most recent report was evidence of a permanent reduction in mouth opening of 29%. The review officer ordered the worker's mouth opening be measured by an oral medicine specialist and the decision was sent back to the Board to estimate the impairment of earning capacity and appropriate permanent partial disability award.

Incident: Ozone Therapy Request

Review reference:#4371

Date: November 6, 2003

The worker, a 51-year old police officer, received WCB benefits after it was determined that his multiple chronic symptoms, including bacterial and viral infections, arose from exposure to contaminated water after he entered a pond to assist the removal of a driver from an overturned vehicle. The worker had traveled to the United Kingdom to undergo ozone treatment, but was denied reimbursement for his travel expenses, and the early mortgage penalty payment and re-mortgaging legal fees necessary for him to pay

his living expenses. He requested a review of the Board's decision.

The worker's requests were denied and the Board's decision confirmed. Health Canada does not recognize benefits from ozone therapy and the treatments were not reasonably necessary to cure the worker's compensable symptoms. Furthermore, the worker's decision to re-mortgage was purely a personal decision and its consequences, like early mortgage adjustment penalties and legal fees, are not the responsibility of the Board.

Incident: Slipping

Review Reference:#4759

Date: November 6, 2003

The worker, a 42-year old police officer responding to an urgent call for assistance, injured his right knee after running around a corner and slipping on some wet leaves. He reported this to his employer on the day of the injury. Assuming he had sprained his knee, the worker applied ice but did not seek medical attention. About two months later the worker's knee had still not fully healed and he therefore sought medical attention and was diagnosed with a torn medial meniscus and sprain. However, his claim was rejected by WCB because there was no medical documentation to confirm that a work related injury occurred. The worker sought a review of the Board's decision arguing it did not fully investigate the incident and the injury. The employer supported the Board's decision submitting there was insufficient medical evidence of a work related injury.

The reviewing officer accepted the worker's request and the Board's decision was varied. For a claim to be compensable, there are three requirements:

1. a personal injury;
2. the injury occurred while working; and
3. the injury was caused by work.

The reviewing officer found ample evidence that the incident occurred while working and resulted from work. The remaining question, whether there was a personal injury, was also answered in the affirmative. The reviewing officer accepted the worker's statement that his knee was swollen and remained partially swollen until he sought medical attention. In short, his symptoms were continuous from the date of injury until diagnosis. In this case, despite the lack of prompt medical attention, the worker did sustain a personal injury arising out of and in the course of his employment and therefore his claim was compensable.

Incident: ERT Entry

Review Reference:#1163

Date: August 21, 2003



The worker, a police officer and member of the Emergency Response Team (ERT), injured his back while using a

35-pound ram to break down a door. He underwent a microsurgical discectomy, completed a Work Conditioning Program, and subsequently returned to full-time duties. WCB found he was left with a permanent partial disability and awarded him a partial disability of 7.59%. The worker sought a review of the Board's decision, requesting the disability award be increased by 2.5% because it did not accurately reflect his loss of earning capacity. He submitted that there are several things he can no longer do since the injury, which eliminated his opportunities for advancement within the department, and he also lost 5% in ERT specialist pay. Furthermore, he contended that the injury and chronic pain did not allow him to function in his usual employment.

The reviewing officer denied the worker's request and the Board's decision was confirmed. The *Workers Compensation Act* allows WCB to estimate the impairment to earning capacity from the nature and degree of a worker's injury. When there is both anatomic and/or surgical

impairment, and a loss of range of motion in the spine, the final impairment rating is the greater of the two. In this case, the 7.59% award had appropriately considered and accounted for the worker's pain symptoms, particularly since the worker had two previous non-compensable discectomies, one in 1977 and one in 1986, which were considered in the overall impairment rating.

SAFETY ALERT

Beware of the handcuff key belt buckle. The "post" of the buckle that threads through the belt hole is actually a handcuff key!!!



OBSERVATIONS MADE DURING CONSENT ENTRY REASONABLE

R. v. Erickson, 2003 BCCA 693



The accused was arrested for assault against his girlfriend. His effects, including his house keys, were taken from him and he was lodged in cells. The accused asked the police that his parents be allowed to attend his home to remove his dog and obtain clothing for his two children. The investigating officer, who was considering obtaining a warrant and concerned the parents might remove potential evidence of the assault from the home, explained that they would arrange his request provided the police could accompany his parents into the home. A second officer, who knew nothing of the details of the assault investigation, was requested to accompany the parents and to ensure only children's clothing and the dog were removed. The officer was also told to keep his eyes open in case he observed anything that might be evidence of an assault.

While in the house, a cat entered the main floor and the accused's mother informed the officer that the cat did not belong in the house. The cat ran down the stairs, into the basement, and the officer gave chase to retrieve it. While in the basement retrieving the cat, the officer observed venting, electrical cords, and ballasts leading from a door under which light could be seen. Later, the accused's mother took a bag of garbage from the home and placed it on the street along side other bags that had already been placed outside. The officer seized the garbage, took it to the police station, and found it to contain a bloody shirt and several marihuana seedlings.

This, along with the observations, was reported to the investigator of the assault who made arrangements for a second visit later that day so the dog could be removed. A tele-search warrant was subsequently obtained under the *Controlled Drugs and Substances Act* and evidence relating to a charge of unlawfully producing a controlled substance was seized. The entry and search were ruled lawful in British Columbia Supreme Court and the evidence was admitted⁴³.

The accused appealed to the British Columbia Court of Appeal arguing, in part, that the consent was invalid. He suggested, among other grounds, that he was not presented with a real alternative to the police entry of his home and, if proper consent was given to go into the home, it did not include entry into the basement.

Consent

In dismissing the appeal, Justice Saunders for the unanimous court first noted that a consent search is not unreasonable under s.8 of the *Charter* provided it is voluntary and properly informed. In this case, the trial judge was not in error when he concluded the accused's consent was voluntary and that he was aware of the circumstances. Justice Saunders stated:

[T]he finding of the trial judge that consent was given by [the accused] has a solid foundation in the evidence. It was not the police who initiated the entry. They responded to the request for the keys to enable [the accused's] mother...to enter and obtain clothes for the children and to deal with the dog. [The accused] was, at the time, under arrest for assault and understood that he was in a position of some legal jeopardy. [para. 16]

As to the suggestion implicit in the issue of the keys that the police used the keys to improperly obtain consent, I do not consider that the police were required to allow [the accused's] parents entry to the premises without a police officer present. The house was the location of the alleged assault. In the circumstances it was reasonable for the police to restrict entry and hence preserve evidence until a search in connection with the assault was authorized by a search warrant, by controlling use of the keys. I see no wrongful action in relation to the keys. [para. 18]

Although the entry and observations made in the basement constituted a search, the police actions were proper and reasonable. The appeal court held:

[The accused's] consent to enter his home was restricted to those areas where his mother moved, as the purpose was to preserve evidence in relation to the assault investigation. This did not extend to the basement. The question is whether that search was unreasonable within the meaning of s. 8, and if so, whether the fruits of that search should be excluded under s. 24 of the *Charter*.

The circumstances of the entry included the attempted recovery of a Rotweiler dog with the intention to lock the house after departure. [The accused's] mother stated that she did not think the cat belonged to the house. She wanted it out. Someone was required to seek out the cat, either to ensure that it was provided for in the house or otherwise to remove it. A parent would be required to descend to the basement, in which

⁴³ See R. v. Erickson, 2002 BCSC 785

case [the attending officer] was permitted by the consent to accompany him or her or he would have to go down alone. It was inevitable that the cat's presence would have drawn the police to the basement, exposing the accoutrements of the grow operation that were in plain view. And [the attending officer] did not go beyond observing that which was in plain view.

Although it was contended before us that the instruction by [the investigator] to [the attending officer] to "keep his eyes open" coloured [the attending officer's] observations while in the basement, I do not agree. Police officers are trained observers. There is, in my view, nothing wrong with a reminder to be observant. The question that such a reminder raises is whether the observations caused the police officer to 'snoop' around outside the consent, for example, to open doors, drawers or cupboards, or rifle among possessions. The facts found by the trial judge do not suggest anything of that sort of behaviour. In the result, that admonition adds nothing to the understanding of whether the search of the basement occasioned by [the attending officer] following the cat was unreasonable. [paras. 22-24]

The attending officer's observations of the basement were not unreasonable and therefore did not offend s.8 of the *Charter*.

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

Note-able Quote

*It cannot be denied that police officers must confront many frustrating individuals and situations in the course of performing their duties...Society has invested in its police officers a special authority to deal with individual members of that society, a special position of trust...But there is a reciprocal expectation that police officers who are invested with substantial rights of interference with individual liberties, exercise those rights with scrupulous propriety*⁴⁴—British Columbia Provincial Court Justice Weitzel

⁴⁴ R. v. Cronmiller et al, 2004 BCPC 1

ETHICS & CHARACTER IN LAW ENFORCEMENT

POLICE ACADEMY WORKSHOP

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715 McBride Blvd. New Westminster, BC

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0900-1630

Registration Fee:

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Keynote Speakers:

Dr. Edwin Delattre, author
“ Character and Cops: Ethics in Policing”

Dr. Michael Caldero, co-author
“ Police Ethics: The Corruption of Noble
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Topics:

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Recruitment, hiring and selection
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Racial profiling

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