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A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On February 28, 2004, 53-year-old RCMP Corporal Jim Galloway was shot after gunfire erupted at the scene of a standoff at a home in Spruce Grove, Alberta. Officers were originally called to investigate a report of a bullet hole in a vehicle. A resident told investigating officers that there was an agitated man in a nearby residence and he was armed. The RCMP emergency response team was called in to seal off the area.

The suspect attempted to leave the area in a vehicle. Gunfire erupted and Corporal Galloway and the suspect both sustained severe injuries. They were taken to hospital by ambulance where Corporal Galloway and the suspect were pronounced dead.

Corporal Galloway joined the RCMP in 1969 and its police dog section in 1975. Among his many personal initiatives to aid the search and rescue (SAR) community was his work in helping Alberta search dog teams form a province-wide association, called the RCMP Civilian Search and Rescue Service Dog Association, and teaching and implementing standards for SAR dog teams.

In 2002, Corporal Galloway received a Certificate of Achievement in Halifax at SARSCENE, the annual search and rescue workshop sponsored by the National Search and Rescue Secretariat.

Corporal Galloway had 35 years of service with the RCMP and is survived by his wife and family.

This information provided by the Officer Down Memorial Page available at www.odmp.org/canada

'ACTIVE' POLICE SUPERVISION MOST INFLUENTIAL

If police supervisors want to have the most influence on their subordinates, they should consider leading by example and working alongside them. In a recent U.S. Department of Justice publication (June 2003) by Dr. Robin Shepard Engel entitled *How Police Supervisory Styles Influence Patrol Officer Behavior*, the author examined how much influence four supervisory styles—traditional, innovative, supportive, and active—had on subordinate performance. "The most important finding was that style or quality of field supervision can significantly influence patrol officer behaviour, quite apart from quantity of supervision," said the report.

The traditional supervisor expects aggressive enforcement, rather than community oriented activities, and is more likely to take over encounters with citizens or instruct officers how to handle situations. They are "highly task oriented and expect subordinates to produce measurable outcomes—particularly arrests and citations—along with paperwork and documentation." As well, traditional supervisors are more likely to punish, rather than reward,

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HIGHLIGHTS IN THIS ISSUE

Plus 20 Case Summaries

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

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and their ultimate concern is controlling subordinate behaviour.

Innovative supervisors tend to form relationships and have more positive views of subordinates. They are not very task orientated but generally encourage new police methods and philosophies, like community policing and problem solving efforts, through coaching, mentoring, and facilitating. Innovative supervisors are more likely to delegate decision making, rather than take over situations, and are less concerned with enforcing rules and regulations than the traditional supervisor.

Supportive supervisors provide inspiration and protect subordinates from unfair discipline and criticism. They "are less concerned with enforcing rules and regulations, dealing with paperwork, or ensuring that officers do their work. They may encourage officers through praise and recognition, act as counsellors, or display concern for subordinates' personal and professional well-being."

Active supervisors perform a dual role—street officer and supervisor. They are heavily involved in field operations, engage in patrol work themselves, and embrace a philosophy of leading by example. "These supervisors attempt to strike a balance between being active in the field and controlling subordinate behaviour through constant, direct supervision. Supervisors with an active style are characterized by directive decision making, a strong sense of supervisory power, and a relatively positive view of subordinates", but are sometimes viewed as micromanagers.

The study found that active supervisors had the most influence over patrol officer behaviour, including:

- Less time per shift on administrative tasks;
- More time per shift on problem solving and other community-policing activities;
- More time per shift on proactive activities; and

- Subordinates are twice as likely to use force against suspects.

The number of arrests or citations was not affected by supervisory style. Rather, the longer a supervisor was on scene, the more likely an arrest was to occur.

As the study noted, "An 'active' supervisory style—involving leading by example—seems to be the most influential despite potential drawbacks. Indeed, active supervisors appear to be crucial to the implementation of organizational goals."

A complete copy of this report is available from the U.S. Department of Justice website at www.ncjrs.org/pdffiles1/nij/194078.pdf.

FORCING LAWYER RISKS ADMISSIBILITY OF BTA CERTIFICATE

R. v. Hesketh, 2003 BCPC 173

A police officer arrested the accused for impaired driving and read him his s.10 *Charter* rights, the breathalyzer demand, and police warning. He acknowledged understanding and was transported to the police station where he was asked if he wanted to contact a lawyer. He replied, "Don't need one. No way. No breath samples, period." The officer asked again whether he wanted a lawyer and the accused replied, "What's he going to do for me?", while shaking his head negatively. A call was nevertheless made to legal aid and he was placed alone in a telephone room to speak to counsel. Two breath samples were subsequently obtained. The time taken between arrival at the station and the first sample of breath, including the time necessary to facilitate contact with counsel, was about half an hour.

The accused was charged with impaired driving and over 80mg%. At his trial in British Columbia Provincial Court the accused argued that he had twice unequivocally, once by words and once by gesture, indicated he did not want to speak to a lawyer. In his view, the police did not respect his decision not to exercise his right to counsel and therefore, by taking the time to facilitate contact with a lawyer, did not take his breath samples as soon as practicable as required by the breath demand section of the *Criminal Code*.

Justice Lenaghan agreed. He found the officer acted contrary to the clearly expressed decision of the accused and unjustifiably delayed the taking of the breath samples. Although the officer was acting in good faith by trying to act in the accused's best interests, "the right to counsel is an individual constitutional right and that the decision to exercise it or not to exercise it is one that is exclusively that of the subject individual. It cannot be appropriated by another person, regardless of how well-intentioned that other person might be", ruled the judge. The certificate of qualified technician was excluded as evidence because the breath samples were not taken as soon as practicable.

Complete case available at www.provincialcourt.bc.ca

CANINE USE VIOLATES *CHARTER*

R. v. Yuen, 2003 ABQB 776

The accused, a suspect in transporting drugs, arrived at the Calgary airport on a flight from Vancouver. Police surveilled him as he departed the plane and he was eventually approached when he exited the departures level at the airport. He was asked for his plane ticket while a police dog sniffed his carry-on baggage that he had placed on the ground. The dog made a positive indication for narcotics on the bag and also showed an interest in the accused himself. He was arrested and provided his *Charter* right to counsel, but nothing was found in his bag. Police did, though, locate 495 grams of cocaine wrapped in plastic around the accused's midsection. He was charged

with possession of cocaine for the purpose of trafficking.

At his trial in the Alberta Court of Queen's Bench, the accused argued that his rights under the *Charter* had been infringed. Justice Phillips found that the police had detained the accused when he was stopped and asked for his ticket. However, this detention was lawful for an investigative purpose. The police had an articulable cause to detain him based on the information they had on him and his subsequent activities after arriving at the airport.

The warrantless dog sniff however, was an unreasonable search under s.8 of the *Charter*. "The police…may conduct a brief, minimally intrusive detention, such as asking to see one's plane ticket…but the law does not go so far as to their using a drug detection dog to search for contraband (such as drugs), where there is no concern of officer safety," said the judge. Without the dog sniff, the police did not have reasonable grounds to arrest. Therefore, the arrest was tainted and the common law power of searching incident to arrest could not be used to justify the finding of the drugs. Despite the *Charter* breach, the evidence was nonetheless admitted under s.24(2) because its admission would not bring the administration of justice into disrepute.

Complete case available at www.albertacourts.ab.ca

ASD DELAY REASONABLE, BUT DEPENDS ON CIRCUMSTANCES

R. v. Ritchie, 2004 SKCA 9

The police stopped the accused when he made a turn from the wrong lane and slowed to a near stop at a green light. He had an odour of alcohol on his breath, slurred speech, and was unsteady on his feet. A police officer demanded he provide a sample of his breath into an approved screening device (ASD) under s.254(2) of the *Criminal Code*, but had to radio for one to be brought to the scene. During this contact, the accused was uncooperative and made repeated demands as to his "options". It took 11 minutes for the screening device to arrive, but the accused refused to provide a sample. He was arrested, told of his right to a lawyer, and charged with impaired driving and failing to provide a breath sample.

At his trial in Saskatchewan Provincial Court the accused was acquitted of the impaired driving charge but was convicted of failing to provide a sample. He argued that the 11 minute delay while waiting for the arrival of the ASD did not comply with the requirement that the sample be taken "forthwith". The judge disagreed, concluding that "forthwith" does not mean immediately. In his view, the section allows for some flexibility and the police acted in good faith. However, the conviction was overturned by the Saskatchewan Court of Queen's Bench. The Queen's Bench justice interpreted the word "forthwith" to mean immediately—thus the police did not comply with the demand section. Furthermore, she ruled the delay provided an opportunity for the accused to be advised of his right to counsel while they waited for the ASD to arrive, or alternatively, the police could have transported him to the station for an intoxilyzer test, which was only 2 blocks away. The Crown appealed to Saskatchewan's top court.

In a unanimous judgment, the Saskatchewan Court of Appeal reinstated the conviction. After reviewing case law, Justice Sherstobitoff found the word "forthwith" was not synonymous with "immediately". Rather, it means "as soon as possible", which will depend on the all circumstances. Included in these circumstances is whether "there is any realistic possibility that the subject could successfully contact counsel and get legal advice." In this case, the Saskatchewan Court of Appeal ruled it was open to the trial judge to conclude that the 11-minute delay from the time the demand was made until the ASD arrival was reasonable and satisfied the meaning of forthwith. As for advising the

accused of his right to counsel, the court noted that there was no means available at the scene by which the accused could communicate with a lawyer. Taking him to the station for an intoxilyzer test, as suggested by the Queen's Bench justice, was also not an option. An ASD demand only requires a reasonable suspicion, but an intoxilyzer demand requires reasonable and probable grounds for which, absent an ASD result, there was no evidence.

Complete case available at www.canlii.org

PRIVACY NOT BREACHED BY PRESENCE OF VIDEO CAMERA

R. v. Cairns,
(2004) Docket:C39952 (OntCA)

The accused failed a roadside screening test and was taken to the police detachment for a breath sample. After police arranged contact with duty counsel, she was placed in the holding cell area equipped with a video camera and spoke in private for three to five minutes. The camera was not capable of recording audio and was not on when the accused was in the room, but she was not told of this. Subsequently. She provided two breath samples of 138mg% and was charged.

At her trial in the Ontario Court of Justice, the accused argued that her right to counsel under s.10(b) of the *Charter* had been violated. Although she did not testify that the camera's presence affected her conversation with duty counsel, she did say she believed the police were watching and listening to her. The judge concluded that the accused had not satisfied the constitutional burden in establishing she was not given privacy. In his view, there was no evidence the camera was on, that the police were watching, or that her conversation could be overheard. Her appeal to the Ontario Superior Court of Justice was dismissed, but she appealed further to the Ontario Court of Appeal.

Ontario's highest court affirmed the earlier judgments and dismissed the appeal. The right to counsel under s.10 of the *Charter* includes the right to privacy during the conversation with a lawyer. In this case, there was no actual breach of the accused's privacy—the police could not and did not overhear her speaking with duty counsel. However, that does not end the enquiry. It is nonetheless possible to establish a breach, if the accused could satisfy the court that she reasonably believed, based on the circumstances, that she could not consult with a lawyer in private.

In this case, the presence of the camera by itself was insufficient to establish a perceived breach. The accused did not ask about the status of the camera nor tell the police that she had concerns about her privacy. Duty counsel did not complain and she did not suggest that her communication with counsel was hampered. The Ontario Court of Appeal agreed with the trial judge that the accused failed to satisfy the burden, on a balance of probabilities, that her right to counsel was infringed.

Complete case available at www.ontariocourts.on.ca

PRISONER's PRIVACY IN EFFECTS GREATLY REDUCED

R. v. Blais,
(2004) Docket:C38311 (OntCA)

The accused was arrested by police and held at a detention centre. His personal effects were seized by jail staff and placed in a sealed, but transparent plastic bag. Sometime later, a detective went to the detention center and viewed the accused's belongings without opening the bag. He saw a key, which resembled another key taken from one of his co-accused that opened the door to a residence where stolen property was found. The detective returned a second time, compared the key again without opening the bag, and satisfied himself it was likely the same key. A search

warrant was subsequently obtained and the key was seized. The key, which formed part of the overall evidence, was admitted and the accused was convicted in Ontario's Superior Court of Justice.

The accused appealed his conviction to the Ontario Court of Appeal arguing, in part, that the two warrantless inspections of his effects amounted to unreasonable searches and tainted the search warrant used to obtain the key. In his view, the evidence should have been excluded under s.24(2) of the *Charter*.

The existence and degree of a reasonable expectation of privacy depends on the "totality of the circumstances", including presence at the time of search, possession or control, ownership, or historical use of the property or place searched, ability to regulate access to the place, and the reasonableness of any subjective expectation. In dismissing the appeal on behalf of the court, Justice Rosenberg concluded that once the accused's belongings had been lawfully seized by correctional authorities, his privacy expectation in those items was greatly reduced. He stated:

> [The accused'] expectation of privacy was that the state would preserve the goods and return them to him upon his release. He could not reasonably expect that agents of the state would not inspect those goods, although he could expect that the police would obtain a search warrant before actually taking them out of the possession of the gaoler who was under a duty to safeguard them. This is exactly what [the police] did in this case and I therefore see no violation of s. 8.

Moreover, even if there was a breach of the accused's privacy expectation, the court ruled the evidence was nonetheless admissible because the officer acted in good faith and tried to comply with the law.

Complete case available at www.ontariocourts.on.ca

STRIP SEARCHES: UNCOVERING THE BARE ESSENTIALS[1]

Personal searches of arrestees vary by degree of intrusiveness. They range from pat down or frisk searches, through strip searches, to body cavity searches. They do not, however, go so far as to justify the forced seizure of bodily samples from persons[2]. Like many *Charter* issues, there are competing interests. With personal searches the privacy interest of the individual collides with law enforcement's interest in finding evidence and ensuring safety.

As a general rule, the more intrusive or affront to human dignity that a search is, the greater the objective justification required. Moreover, the police must minimize the interference necessary to achieve their goals commensurate with respecting the privacy and dignity of the individual by conducting the strip search in a reasonable manner.

What is a Strip Search?

In *R. v. Golden* 2001 SCC 83, the Supreme Court of Canada adopted the following definition of a "strip search":

> [T]he removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of female), or undergarments.

Not all removal of clothing, however, will amount to a "strip search". For example, in *R. v. Kitaitchik*, (2002) Docket: C32740 (OntCA), the Ontario Court of Appeal reviewed police action in seizing the accused's clothing for a murder

[1] A similar article has appeared in both the Blue Line (February 2004) and The Thin Blue Line (Vol. 3 Issue 2) publications.
[2] *R. v. Stillman* [1997] 1 S.C.R. 607 (S.C.C.)

investigation. The day after his arrest, the accused was told to remove all of his clothing and he was immediately given a fresh set of his own clothing. The seizure occurred in a private room with only one other person present, no force or intimidation was used, and no attempt was made to examine his body. While reviewing the trial judge's admission of the clothing under s.24(2) of the *Charter*, Justice Doherty found that the accused had not been strip searched as described in *Golden*. He stated, "While the seizure of his clothing was clearly an intrusive act, it was not akin to stripping him for the purpose of viewing or examining his most private areas."

Can an Arrestee be Strip Searched?

Strip searches can properly be conducted as an incident to arrest. However, although a search incidental to arrest does not generally require reasonable grounds beyond the grounds necessary to support the arrest, a strip search is an exception to this common law rule. Strip searches represent a significant invasion of privacy, and are often humiliating, degrading, and traumatic experiences. Before undertaking a strip search, the police must possess reasonable grounds to warrant the search independent from the grounds justifying the arrest. Strip searches carried out as a matter of routine or policy, abusively, or for the purpose of humiliating or punishing the arrestee will be unreasonable.

The *Golden* Nuggets

In *Golden* the police strip searched the accused in a sandwich shop after he was arrested for making a drug transaction. He had initially resisted the efforts of the police to remove 10 grams of crack cocaine contained in a plastic wrap that he was holding between his buttocks by flexing his muscles. He was eventually forced to lie face down on the floor with his pants and underwear pulled down to his knees. After Golden accidentally defecated, an officer was able to remove the drugs when *Golden* relaxed his buttocks. He was transported to the police station where he was again strip searched. Golden was convicted at trial of possession of a narcotic for the purpose of trafficking, a decision upheld by the Ontario Court of Appeal. However, on further appeal the Supreme Court of Canada found the search unreasonable and a violation of *Golden's* rights under s.8 of the *Charter* to be secure against unreasonable search and seizure.

As a result of this case, the following principles concerning strip searches emerged:

- The common law power to search incidental to arrest <u>does</u> include the power to strip search.
- Although permissible as an incident to arrest, strip searches are presumptively unreasonable and the onus lies on the police to justify the strip search.
- Strip searches <u>must be conducted in a reasonable manner</u>. The physical manner or method of the search must be carried out in a just and proper fashion. The search must not be abusive and the scope of the intrusion must be proportionate to the objectives of the search and other circumstances of the situation. In deciding whether the manner in which a strip search was conducted meets the constitutional requirements of s.8 of the *Charter*, the following questions provide guidance:
  - Was the search conducted at the police station, if not, why?
  - Was the health and safety of all involved ensured?
  - Was the search authorized by a supervisor?
  - Was the officer the same gender as the arrestee?
  - Was the number of officers involved in the search reasonable?
  - Was the minimum force necessary used?
  - Was the search conducted in private so others could not observe?

- Was the search conducted as quickly as possible?
- Was the search conducted in a fashion that ensures a person is not completely undressed at any one time?
- Was the search only a visual inspection or was there physical contact?
- Was the arrestee provided the option of self-removal or medical assistance if a weapon or evidence is observed in a body cavity?
- Was a proper record of the reasons and manner of search kept?

- Strip searches are inherently humiliating and degrading regardless of the manner in which they are conducted and therefore cannot be carried out as a matter of routine or policy. Strip searches performed routinely or under policy will not be rendered reasonable unless there is a compelling reason justified in the circumstances.

- There is a distinction between strip searches on arrest and strip searches related to safety in full custodial settings, such as a prison. The appropriateness of routine strip searches of individuals entering into a prison population cannot be used to justify strip searches of individuals briefly detained by police or held overnight in cells. Although police officers have legitimate concerns that short-term detainees may conceal weapons, these concerns cannot justify routine strip searches of all arrestees regardless of the particular circumstances surrounding the arrest and must be addressed on a case-by-case basis.

- Strip searches are to be generally conducted at a police station except in cases of exigent circumstances where the police have reasonable grounds to believe that the search is necessary in the field such as an urgency to search for weapons that could be used to harm the officer, others, or the arrestee.

- A person should be provided the opportunity to remove items themselves or the assistance or advice of trained medical professionals should be sought to ensure material can be safely removed.

- When the reasonableness of a strip search is challenged, the Crown (police) bears the onus of proving on a balance of probabilities that it was warranted:

    - In the case of strip searches in the field, the police must demonstrate reasonable grounds to both justify the arrest and the strip search, exigent circumstances, and that the search was conducted in a reasonable manner.

    - In the case of strip searches at the police station, the police must demonstrate reasonable grounds to both justify the arrest and the strip search, and that the search was conducted in a reasonable manner. Exigent circumstances need not be proven.

Following the *Golden* Thread

How has the reasoning in *Golden* since been applied? What follows are a number of recent cases where courts have considered the Supreme Court of Canada' s judgment.

In *R. v. B.B.*, 2002 BCCA 388, the accused appealed his conviction after a police officer detained him driving a motor vehicle under the *Controlled Drugs and Substances Act* and conducted a strip search by asking him to take down his pants and underwear. He remained seated in the car in a very dark area where there was little traffic and the officer stood in the open door of the car between the accused and anyone who may come by. The officer found a plastic baggie containing nine flaps of cocaine in the accused's genital area.

The officer testified he conducted the strip search in this fashion because (1) if the information had turned out to be incorrect, the

accused would be on his way and would not have to be taken down to the station to be searched, (2) it was very busy and there was a limited number of officers working, and (3) the need to protect the evidence from possible destruction by the accused during the drive to the station. In ruling that the accused's s.8 *Charter* right had been violated, the British Columbia Court of Appeal stated:

> [T]he reasons [the officer] gave for strip searching [the accused] at the scene, rather than at the police station did not meet the requirements for a lawful strip search as an incident of arrest set forth in Golden. It cannot be justification for a strip search in the field that, if the search turns out to be negative, the citizen searched can then go on his or her way. This rationale suggests that a strip search is really a way of doing detained citizens a favour by saving them a possible trip to the police station. I think it is fair to say that the majority of citizens would rather be spared the favour. In fact, the evidence here is to the effect that [the officer] was motivated by the desire to save himself a trip to the police station, if possible, in order to avoid the time and paper work which such a trip would involve. Had there been evidence of a significant need for his services at the time of this arrest, beyond the usual requirements of patrol duty, that would have been a valid consideration in determining whether exigent circumstances existed which justified a search in the field. There was, however, no such evidence of exigent circumstances here. Further, there is no evidence of a concern that [the accused] might be armed; nor is there any persuasive evidence that [the accused] could have disposed of the cocaine while being taken from his car to the police station. Presumably he would have been handcuffed in such a manner as to prevent him from removing anything from his pants. He would also have been in the custody of [the officer] and in the company of the ride-along, who could have kept him under observation for the short drive to the police station.

However, the evidence was admitted under s.24(2) because the police protected the accused's privacy interest as best they could under the circumstances and did not have the benefit of *Golden* at the time.

In *Ilnicki v. MacLeod*, 2003 ABQB 465, the plaintiff brought an action against the police alleging his *Charter* rights were violated, including a s.8 breach when he was strip searched. The plaintiff had been arrested by police on an unendorsed warrant for no insurance. He was taken to the police station where he was subjected to a strip search, which he resisted. A wrist lock was applied and the accused subsequently sustained a strain to his arm. Although the arrest was lawful, Justice Acton found the strip search unnecessary and unreasonable in the circumstances. The plaintiff's custody was a short term detention like the type mentioned in *Golden*. Furthermore, the use of force was inappropriate. No other alternative actions were attempted, like warning him first that force would be applied if he did not cooperate, telling him he would have to stay in the search room until he complied, or consulting with the sergeant about how to gain compliance. As a result, the plaintiff was awarded $5,000 for the indignities of the strip search and $6,000 for the arm strain.

In *R. v. Pringle*, 2003 ABPC 7, the accused was arrested following his erratic driving and for evading police. He was transported to the police station where he deliberately avoided providing a breath sample so the 2-hour limit would expire. He allegedly struck a police officer and was sent to the Edmonton Police Service downtown division where he was routinely strip searched and lodged in a holding cell until his release, rather than being released as originally intended. The accused was charged with impaired driving, refusal, failing to stop for police, and assaulting a police officer. Relying on *Golden*, Justice Lefever ruled that an arbitrary policy for conducting strip searches without information that the detainee may be carrying drugs or a

weapon is unjustified. In this case, the accused was sent downtown to teach him a lesson and punish and humiliate him by subjecting him to a degrading strip search. It was "high handed and without lawful justification" and a "gross abuse of the police power of detention". The accused was acquitted of all charges.

In *R. v. Dispersio*, [2003] O.J. No. 2917 (OntCJ), the accused was arrested after he failed a roadside screening device. He was transported to the police station where he also failed breathalyzer tests. Since he refused to provide his correct address and indicated that he would not attend court, he was taken to the police detention facility. While there, he was strip searched by an officer prior to being lodged in cells where he would be held for a bail hearing. The officer conceded that he had no specific reasons to suspect drugs or weapons were concealed and testified that he did the search for safety reasons because of his own individual practice, not as part of any departmental policy. The accused undressed himself and was never completely without clothes. Justice Takach found it difficult to distinguish between short-term detainees and those entering a larger prison population. In the judge's view, the concern for prisoner and officer safety is identical for both short term and long term custody and the failure to search temporarily detained individuals creates the same danger. "As an aside, whether lodged for short term or long term, there is a significant public interest in protecting a suspect not just from others, including other inmates and those in authority, but as well from the suspect himself. It is not unknown that prisoners lodged for a short term have harmed themselves or even taken their own lives", said the judge. In this case the search was held to be reasonable.

In R. v. Agostinelli, [2002] O.J. No. 5008 (OntCJ), the accused was arrested for impaired driving and transported to the police station for breathalyzer samples. After providing two samples, the accused was strip searched in a hallway in the presence of two officers, without being told why. The area of the search was not private and one where others might see what was happening. Although he was not touched by the police, he lowered his pants and underwear and made a complete turn. However, there were no reasonable grounds the accused had concealed weapons, evidence, or instruments. The judge found that the police were following a rule that all persons be stripped before being lodged in a cell. As a result, the court concluded there was no compelling reason for the search and that it was not reasonable. The search took on an element of punishment; designed to humiliate, demean, and intimidate. The accused's charges were stayed.

In *R. v. Keewatin*, 2003 ABPC 67, the accused was arrested on an outstanding provincial warrant for being drunk in a public place. He was subjected to a cursory search, handcuffed, transported to the police station, and placed in a holding cell. The female officer decided to send the accused to the downtown detention facility for a bail hearing, but first had him submit to a strip search before a male officer for safety reasons. The search took place in the accused's cell and he was asked to remove his clothes. During this process, the officer saw a bulge the size of a golf ball containing crack cocaine in one of the accused's socks. The strip search continued but no other contraband was found. Although the manner of the search was handled in an exemplary fashion, Justice McNab ruled that it was nonetheless unreasonable. A more thorough hands-on, pat down search should have been conducted before jumping to the strip search. If this had occurred, the cocaine would have been found and at that point a strip search would have been far more defensible. Blindly following a policy without considering the particular circumstances of a case does not make the strip search either necessary or lawful. The cocaine was excluded as evidence.

In *R. v. Hornick*, [2002] O.J. No. 1170 (OntCJ), five male police officers raided a private event

to conduct a liquor inspection where only women were gathered in varying states of undress to explore their sexuality. Two female undercover officers had earlier entered the premises and observed breaches of the provincial *Liquor Licence Act*. Justice Hryn concluded that the circumstances in this case were analogous to a strip search, even though the police did not ask the patrons to remove their clothing. Although the police had the authority to enter and conduct a liquor inspection, the way the police carried it out was unreasonable. Male officers were used when the attendees would reasonably expect that men would not be present. The police knew the patrons were in various stages of undress and there was no announcement or delay prior to entry, which would have allowed patrons to get their clothing. There was no urgency nor was there any attempt to have female police officers enter. As a result, all the evidence was excluded including the female undercover officers' observations made before the police entry.

In *R. v. S.F. & J.L.*, [2003] O.J. No. 92 (OntCJ), two young offender females were arrested for a month old robbery after they attended the police station in company of their parents at the request of the police. Both girls were held for judicial release and subjected to the booking protocol that required a strip search to determine whether they were hiding any weapons or contraband. Up until this point no search, not even a minimally intrusive frisk search, had been conducted. The strip search was overseen by a female officer in an area designed to provide a measure of privacy, but was partially captured on surveillance videotape. The search screen intended to afford privacy was not high enough and the girls' breasts and upper bodies were videoed. Nothing was found during the search. Justice Katarynych concluded that even though the police were concerned with safety, there were no reasonable grounds to believe that either girl posed a safety concern. The police response in this case did not reflect the specific circumstances that existed and the strip search was completely unnecessary. Furthermore, the manner in which the search was conducted was also unreasonable. Firstly, no pat-down search was conducted prior to the strip search. This left the girls more vulnerable than necessary because a frisk search may have been sufficient to address police concerns. Without it, the means to ascertain whether there was in fact a need for a more intrusive search was bypassed. Secondly, a portion of their naked body was captured on videotape, which resulted in "excruciating embarrassment". Consequently, the charges were stayed.

In *R. v. A.B.*, [2003] O.J. No. 2010 (OntSCJ), the accused was arrested for forcible confinement and assault after police responded to a 911 call and found his wife tied up with tape on her mouth. He was frisk searched at the scene and transported to the police station where he was strip searched by a lone male officer in a small room as part of a routine procedure prior to being placed in the holding cells. He was also strip searched again at the courthouse the next morning. At his provincial court trial the judge found the first search reasonable without considering the distinction between persons held at the police station and those going to court or jail. The second courthouse search, however, was ruled unreasonable because it was long after the arrest and was not based on any particular concern linked to the accused. Despite this *Charter* breach the accused was convicted, but appealed arguing, in part, that the first strip search was also unreasonable. Appeal Justice Durno of the Ontario Superior Court of Justice concluded that the first search was conducted as a matter of routine or policy and found the judge erred in failing to distinguish between station house detentions and those entering a larger population. However, in applying *Golden*, the court was "not persuaded that one strip search of those who will be attending court cells, in itself, is unreasonable, provided the search is conducted in a reasonable manner." The first strip search was

not unreasonable in this case, but the second routine strip search was without further justification. Nevertheless, the stay application was dismissed.

In *R. v. Clarke, Heroux, & Pilipa* [2003] O.J. No. 3884 (OntSCJ), the three accused were arrested for their involvement in a riot that occurred a month earlier when protesting demonstrators became violent and clashed with police. Clarke was arrested in the morning, and subjected to three separate strip searches—on arrival at the police station, later by investigators, and a third time when he could not make bail and was taken to the Toronto jail. Both Heroux and Pilipa were also arrested and strip searched at the police station. Nothing was found, but several breaches of the police strip search policy occurred, including no proper strip search reports and the complete removal of clothing. The accused brought an application for a stay of proceedings, in part, arguing that their s.8 *Charter* rights were violated when they were strip searched. Despite the absence of reasonable grounds to believe any of the three had weapons or drugs on them, Justice Ferrier found the strip searches conducted not *per se* unreasonable . They were conducted for the safety and security of the accused, the police, and other prisoners. He concluded that it would be rare when a strip search of a person entering a prison population, which he defined as persons reasonably expected to come in contact with others being detained by the state, would not be reasonable. The judge said, "The police could reasonably be concerned about an inadvertent introduction of a dangerous object into the police station. These concerns may not be satisfied even with a thorough pat-down search." However, the police in this case did not keep proper records of the strip searches, did not allow removal of the clothing in stages, and the second and third searches of Clarke were clearly unjustified and unreasonable. Furthermore, the court found the detentions of the accused arbitrary because they were not brought before a justice as soon as practicable and could have been avoided had alternative means been considered, thereby eliminating the need for the strip searches altogether. Nevertheless, the request for a stay was rejected.

In *Peart & Grant v. Peel Police Services Board*, [2003] O.J. No. 2669 (OntSCJ), two plaintiffs sued police following their arrest when they fled from a gas station in what was believed to be a stolen car. Among other issues, like racial profiling, the action claimed damages for assaults and indignities suffered as a result of breaches to their *Charter* rights, including strip searches. At trial, there was evidence that the general practice of the Peel police was to strip search all arrestees brought to the police station for safety reasons and to uncover evidence of any offence. Justice Lane found the searches to be reasonable. They were conducted shortly after the arrest at the police station in private with the view to protect the police and the prisoners or to find evidence. The police were investigating why the plaintiffs fled and "such a search could reasonably be expected to throw light on their sudden flight from the PetroCanada station by disclosing whether they had anything concealed on their persons which explained their conduct", said the judge. Here, the officers also conducted the searches in a reasonable manner. Although they were stripped entirely naked, it was only for a brief period. The police respected the privacy and dignity interests of the men under the circumstances and there was no body cavity search. The plaintiffs *Charter* rights were not violated by the strip searches and the action was ultimately dismissed.

In *R. v. Seenathsingh*, (2002) O.J. No. 5010 (OntCJ), the accused was arrested, while seated at a donut shop, for possession of marihuana. He was told to stand up and the officer saw that his pant zipper was down. This was consistent with the officer's experience in previous arrests where suspects leave their zipper down to allow easy access to drugs kept in the underwear. A

brief pat down was conducted and a piece of crack cocaine was found in his jacket. The accused pushed the officer and tried to run away, but was unsuccessful. Enroute to the station, the officer noticed the accused fidgeting in the back of the police car—a knife and some cocaine was found under the seat. He was booked in and strip searched resulting in a bottle of hashish oil and marihuana being found in his underwear. The accused argued at his trial that his *Charter* rights were violated. Justice Bovard, however, found the searches were lawfully carried out as an incident to the accused's arrest and therefore did not infringe s.8. The accused was convicted.

In *R. v. Ferguson*, [2003] O.J. No. 3242 (OntCJ), the accused was strip searched in the booking room with the doors closed after she provided breath samples of 220mg% and 205mg%, but before she was lodged in cells to sober up. Her private areas were never touched by the officer nor was she ever completely naked. The officer testified the search was conducted for safety reasons and to locate possible anti-depressant pills the accused was taking. Justice Baldwin found the search reasonable. Although there was nothing more than a mere suspicion that pills would be found, the search was justified on safety grounds. "It seems reasonable to me that a person being placed in the cells, even for a short duration, should not have weapons, even small ones like a razor blade, on their person," said the judge. The accused was extremely intoxicated with volatile emotions, she lacked good judgment, and she was incapable of taking care of herself which all helped provide objective grounds to justify the strip search. Furthermore, metal detectors were not being used by the police service at the time, which may now be a major factor in subsequent strip searches ruled the judge. Even though the officer failed to properly document the search as required by *Golden*, this was insufficient, in the judge's view, to render the search unreasonable. The stay application was rejected and the breath samples were admissible.

In *R. v. Douglas*, 2003 BCPC 392, the accused was strip searched at the Vancouver police lockup following her arrest where she resisted the efforts of police officers to restrain her during an alcohol involved traffic stop. At the lockup, the accused refused to submit to the search, but complied when an officer pulled out her handcuffs as if she would force the search. She was directed to take off all her clothing, turn around, bend over, spread her cheeks, and cough. At the time, the jail had a policy to strip search all detainees except bylaw offenders or those in custody for being drunk in public to be released when sober. Justice Bruce found the arrest and subsequent pat down search lawful. Furthermore, upon entering the Vancouver jail, corrections staff continue to have the authority to search incidental to arrest for general safety purposes including strip searches when a detainee is mixed with the general prison population. However, this does not include the right to strip search persons where the officer in charge has not yet decided to detain in custody. A blanket strip search policy with respect to these persons is not justified. Rather, the searching officer requires proper grounds to warrant the strip search—mere suspicion is not enough. Factors to consider include the person's history of secreting weapons or contraband, and their criminal record or demeanor, like violent behaviour. In this case, there were proper grounds for corrections personnel to be concerned with their safety. The accused was violent, had been fighting, and was to be charged with assault. However, despite possessing the requisite grounds for the search, it was not conducted in a reasonable manner. The search was not carried out in private—the window of the cell was open. The accused was entirely disrobed, rather than having her clothes removed in stages. And finally, when the accused initially refused to submit to the search, a corrections officer implied force when she

presented her handcuffs. Despite these concerns, a stay of proceedings was not warranted.

Interestingly, Justice Bruce went one step further and ruled that when prisoners object to a strip search an additional right to counsel is triggered. No case law was cited to support this contention even though the Supreme Court of Canada has previously ruled that the right to counsel derives from arrest or detention, not from the fact of being searched (*R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.)) It will be interesting to see if this line of reasoning is accepted by other judges. It seems unlikely that an additional right to a lawyer would be engaged only if the detainee objects to the strip search. Surely, if there is any right at all, as suggested by Justice Bruce, it should be duly afforded to all persons the police seek to submit to a strip search, regardless of whether they object or not.

The Bare Essentials

As a result of reviewing these cases a few basic tenets appear to develop. The common law power to strip search a person incidental to an arrest requires the following:

- a lawful arrest (the police had reasonable grounds);
- the search must be truly incidental (or connected) to the arrest;
  - safety; and/or
  - evidence
- the police must have reasonable grounds to justify the strip search independent from the grounds for the arrest itself; and
- the strip search must be conducted in a reasonable manner.

As a matter of practice, officers must feel comfortable and be proficient at conducting thorough pat down searches. A proper pat down may provide the necessary grounds to justify a strip search. For example, while frisking a person an unnatural bulge is detected. This may then provide a foundation on which to justify a more intrusive strip search. Moreover, police agencies need to consider metal detectors. Again, a positive reading on such an instrument may provide the police with the necessary grounds to initiate a strip. Remember as well, the definition of a strip search accepted by the Supreme Court of Canada involves the visual inspection of the private areas or undergarments. Asking someone to remove their hat, take off a bulky jacket, or kick off their shoes, would not appear to be captured by this definition. And don't forget to document, document, document. Keep current and stay safe!!!

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ARRESTEE MUST BE DILIGENT IN TALKING TO LAWYER

R. v. Wilford,
(2004) Docket:C40169 (OntCA)

The accused was arrested for impaired driving after he was found standing beside a vehicle driven into a ditch with the keys in the ignition, given the breath demand, read his right to counsel, cautioned, and asked if he wished to speak to a lawyer. He answered, "I'll blow first". The arresting officer believed this meant the accused would speak to a lawyer after he provided breath samples.

In between the two breath samples, the breathalyzer technician asked several questions. The accused admitted he had been driving, that he had three or four beers prior to the accident, and performed three sobriety tests at the officer's request. Following the tests, the accused did not renew his request to speak to a lawyer, but rather indicated he wanted to go home.

The accused testified at his trial in the Ontario Superior Court of Justice. He said that by stating he would blow first, he was postponing his right to counsel but should not have been asked any questions by the technician. Thus, he suggested, his answers to the questions were a violation of his s.10(b) *Charter* right. The trial judge found no *Charter* breach and admitted the evidence, but the accused appealed to the Ontario Court of Appeal. In dismissing the appeal, the court stated:

> The test for waiver of a Charter right is a strict one and that…"the standard required for an effective waiver of the right is very high". It is also well established that once a detainee states that he or she does wish to consult counsel, the police must "hold-off" and refrain from questioning the detainee until the right to counsel has been satisfied…Having heard the [accused's] response "I'll blow first", and in view of the importance of the right to counsel, it might have been more prudent for the police to have warned the [accused] that the technician might ask him to answer some questions or to perform certain sobriety tests. However, since a detainee must be "reasonably diligent" in asserting the right to counsel…we are not persuaded that the trial judge erred in law in finding that the [accused] had waived his right to counsel, particularly in light of the [accused's] admission on cross-examination that he did not intend to actually speak to a lawyer "until after you completed the first blow, sobriety test, the conversation and the second blow". [para. 10, references omitted]

Complete case available at www.ontariocourts.on.ca

MEDIATION SKILLS FOR THE LAW ENFORCEMENT SUPERVISOR

Kevin M. Gilmartin, Ph.D.

The services that any organization may request of it's supervisory personnel can be quite varied. Often times Supervisors/ Commanders are called upon to assist in an on-going conflict within the work place. These conflicts can take various forms including conflicts between two coworkers—a coworker and a supervisor—and on occasion a coworker and a citizen. The use of Supervisory individuals to resolve these conflicts appears a logical decision many times by the appropriate management authority, however it can lead to a good supervisory individual very quickly "getting in over their head". This requires the Supervisory employee to appreciate the basic difference between mediating a conflict and providing support services to employees effected by a conflict. One is primarily a counselor role, that of helping people deal with their thoughts and

feelings about a conflict and attempting to minimize the emotional dysfunction that can be a product of a workplace conflict. The other role is that of mediator.

The mediator's role is to create a process whereby the conflict is eliminated and the effected parties learn functional conflict resolution skills in addition to solving the present problem at hand. Although the role of both counselor and mediator have similar appearance at first glance they are essentially different processes with different outcomes and means to obtain their respective goals.

Supervisors/Commanders must clearly appreciate the differences and at all times be quite certain of which "hat they are wearing". It is also imperative that the supervisory person wears only "one hat". An individual cannot begin a relationship with an individual as a counsellor-type, discover a conflict and begin assuming the role of a mediator. A mediator has no vested interest in the benefit to either party in a conflict. A mediator's role is for the benefit of both individuals by creating conflict resolution. The mediator is neither negotiator, which would be attempting to benefit one side in a resolution, nor arbitrator, which is to weight the evidence by both sides and impose a solution. The mediator creates a setting whereby the parties resolve their own conflict with a mutually agreed upon solution.

Studies have demonstrated that the majority of Americans feel that the number one ranked source of emotional stress in their life is created by conflicts in their individual workplace. Providing a process whereby these conflicts are handled appropriately and effectively not only creates significantly more productive workplaces, but if the studies on stress are accurate, it produces personal lives that are more fulfilled and less reflective of strain and distress carried home from the work environment. The organization and all individual parties concerned benefit from conflict mediation.

Supervisors/Commanders functioning as a mediator need to realize that conflict within a work group in and of itself is not necessarily destructive or dysfunctional. Conflict, if handled correctly, can be quite constructive. It can signify a need for healthy change and can be the impetus for growth of the organization. It can be an opportunity for the parties involved to directly and truthfully communicate expectations they hold for each other which in the past often times had not been directly expressed. This non-direct or less than candid communication between parties in the workplace is often times the source of many conflicts that grow far beyond the initiating cause. Competent mediation of conflict can assist in the creation of a positive work environment where creative problem solving can take place and emotional investment in the unit productivity can be emotionally safe. Conflict that goes unaddressed or is poorly managed can rapidly create an environment of distrust, covert conflict, clique development, and a generalized air of passive hostility that can destroy the working atmosphere. Dysfunctional conflict can have a work unit feeling at risk emotionally, producing only minimal output and on occasion exploding into uncontrollable emotional or physical rage. When coworkers are aware of an unaddressed conflict in the workplace they can be forced to "take sides" in the issue or spend critical work time attempting to avoid the conflict; time that should be spent attempting to increase the functioning of the work organization.

The mediator needs to remember that conflict between people is, in itself, inevitable. It is not good or bad. The question is whether or not the conflict is competently mediated to become a functional situation or left to remain a dysfunctional entity within the workplace. "Good " workplaces like "Good" relationships or marriages are not determined by the presence or absence of conflicts, but by the presence or

absence of good conflict resolution and problem solving skills.

Supervisors/Commanders need to remember that the goal of conflict mediation is quite different than the goal of other crisis intervention types of procedures. In crisis intervention the goal typically is to resolve an emotional issue by permitting ventilation of emotions and expression of perceptions. In conflict mediation, although some of the same goals appear to exist, the major goal is to resolve the conflict by having the conflicting parties engage in a process whereby each party hears the perception of the other party in clear, uninterrupted, behavioural terms. Unlike the counsellor or crisis intervention role of the supervisor, the mediator role requires a structured authority based format. The mediator must create the setting where the conflict can be resolved by each party being "Structured" to hear the perceptions of the individuals with whom they are having the dispute.

Many times, conflicting parties, once they reach the point in the conflict of being more focused on the conflict than the workplace goals, lack the necessary communication tools to take the conflict one step further and bring it to resolution without assistance. The workers involved in a dysfunctional conflict begin going to great lengths to avoid the individuals with whom they have the conflict. This avoidance between the conflicting parties can grow to extreme isolation between the parties and facilitate the rapid development of an atmosphere of distrust and blame. The parties avoiding each other many times will take their perceived grievance to coworkers that are uninvolved in the dispute in a hope to create allies or receive support for their respective position in the conflict. Parties in dysfunctional conflicts are highly motivated to have coworkers perceive them as the reasonable individual who is basically a "victim" of the unreasonableness of the other disputant. Unaddressed, this type of conflict can leave coworkers feeling like they have to choose sides in a conflict situation. Although the conflict does not impact the uninvolved coworkers initially, as a dysfunctional conflict grows, the division in a work force can destroy the morale of a unit and increase feeling of burn-out, detachment, and overall apathy to the unit goals. Conflicts that have gone unresolved in a workplace have created situations that have ranged from economic destruction of a company or enterprise to the tragedy of episodes of workplace violence.

Workers many times lack the necessary communication skills to address emotional issues in the workplace. Reacting emotionally to work issues can be seen as inappropriate for the work place. Workers and supervisors can both believe than any emotional interaction at work is inappropriate. "That's a personal issue, keep it out of the workplace"—this thinking does not permit the situation many times to be self-resolving and subsequently suppressed feelings can lead to a continuum of emotionally driven conflict behaviours. The goal of the mediator is the creation of a setting, whereby each party hears the other conflicting party in it's entirety and at the same time has the opportunity to express their own beliefs, thoughts, and perceptions about the conflict situation.

The mediator's ultimate goal however, is to have the parties involved generate a mutually agreed solution to the problem. The solution is one generated by the conflicting parties and not one suggested or imposed upon the disputing parties by the mediator. The solution is created by the conflicting parties, the environment that permits the solution to be generated by the conflicting parties is created by the mediator. The mediation process is different at this point from other interventions with which the supervisors/commanders might be familiar. It is not the mediator's role to make suggestions, provide emotional interpretations, or generally to "Solve the Problem". The mediator is basically a structurer of a situation and an instructor in providing the disputants a problem-solving

format, which is potentially available for future conflict situations.

Mediation intervention basically revolves around a two-staged process. In the first stage the mediator has to obtain a thorough understanding of the issues and positions involved in the conflict. The second stage is the creation of a mutually agreed upon solution by the conflicting parties and the implementation of the agreed upon strategy for resolution.

In attempting to obtain a thorough understanding of the conflict, the mediator needs to know not only what is taking place, but the degree of emotional intensity and subsequent dysfunctional behaviours that are being generated as a function of the conflict.

To someone not personally involved in a long-term dysfunctional conflict in the workplace, the issues may seem petty, however the emotional energy invested in such a conflict can have major implications. The mediator must obtain as much information concerning the situation as possible. The mediator at this point can be at an extreme disadvantage. Where can the mediator obtain information about the conflict? How does the mediator know if the "independent or neutral" sources of the information about the conflict are themselves not involved or influenced by the conflict or by their own beliefs about the conflict? The mediator that forms preconceived beliefs or projects their own values into a conflict situation places in jeopardy their effectiveness as neutral uninvolved facilitators of conflict resolution.

Contamination by background information can impact a mediator through many sources. The mediator needs to remember in many organizations the informal pipeline or the formal chain or command both can be impacted by a conflict situation and have already chosen sides in the conflict. The information provided by these "Independent" parties may really only be an attempt consciously or unconsciously to communicate to the mediator the beliefs supporting their chosen side in the conflict. If a conflict situation is of a magnitude significant enough to require the services of a mediator, the chances are quite good the agency head requesting the mediation has already drawn some conclusions concerning the conflict and quite possibly is providing a biased background appraisal of the situation.

The best source of information about a conflict is obtained directly from the conflicting parties. Hearing the beliefs, thoughts, and perceptions about a conflict can best be understood when the mediator hears them directly from the individual or individuals that hold the beliefs. The idea of speaking to the involved parties themselves is generally agreed with by the agency requesting the mediation with one caveat; "as long as they are seen separately". This is a time for extreme caution by the mediator. The mediator must create a setting, whereby each party can express their entire "side of the story" without being interrupted or drawn into a debate with their disputing coworker about the accuracy of any given point. The mediator has a choice to make at this point in the information gathering stage of an intervention. How does the mediator hear the complete "Side of the story" from each party? Commonsense would dictate that if the ultimate goal of the mediator were only to obtain the information about a conflict, the least difficult course of action would be to interview each party separately. This decision, although easiest in the short-term, usually creates an atmosphere destructive to the ultimate goal of the mediation. It is here that the mediator needs to appreciate that the ultimate goal of the intervention is the creation by the conflicting parties of a mutually agreed upon solution to the conflict. The mediator is not merely an investigator of the facts and beliefs, but an architect of the setting that permits the conflicting parties to resolve the conflict.

In virtually every case the mediator makes a serious mistake by interviewing the conflicting

parties separately. Usually the decision to "Interview" the conflicting parties separately is rationalized using the logic of the crisis interventionist, who has different goals than the mediator of a conflict. The decision for separate interviewing is often times made for reasons, such as, it creates a less threatening environment, it permits each party a chance to speak their mind without fear of attack, it lets the interventionist create rapport with each party thus ultimately leading to a facilitated resolution. These beliefs, in support of the decision for separate interviewing of the conflicting parties, might very well be valid and accurate for the investigator trying to capture independent recollections and statements of a conflict, but actually can spell disaster to the mediator. The course of action for the mediator in almost every situation is to bring the conflicting parties together and to conduct all mediation relevant business in the presence of all involved principals. Structuring the mediation such that both parties must come together runs against the logic or game plan of most dysfunctional interactions. Those involved in a conflict many times would prefer to "speak about" the other party, as opposed to "speak with" the other party.

The decision to interview the conflicting parties at the same time and in each other's presence creates the most significant initial challenge to the mediator and is in reality the central difference between mediational information gathering and that of an investigator or crisis interventionist.

The mediator, in bringing the parties together, takes the "path of most resistance" initially, but is establishing a setting, whereby the ultimate resolution can occur. The decision to bring the parties together at the same time is based on an understanding of the dynamics behind dysfunctional conflict. The conflicting parties have been, in all likelihood, speaking about the conflict to everybody, but the party with whom they are having the conflict. The conflicting parties possibly have become proficient in portraying themselves as the "victims " of the behaviour of their adversary in the conflict. If the conflicting parties had the communication skills to approach each other and respectfully articulate their individual concerns while simultaneously respectfully listening to the concerns of the other party, by definition dysfunctional conflict would not exist. Respectful disagreement might possibly be present, but each party would speak and listen to the other party utilizing communication skills. That environment is self-correcting of disagreements and possesses none of the traits of the long-term dysfunctional conflict typified by avoidance, distrust, and solicitation of coworkers as allies to one respective side of the conflict or the other.

By interviewing the conflicting parties separately the mediator permits the conflicting parties to continue to potentially engage in the dysfunctional behaviour of trying to "win over" the mediator to their "side" of the conflict. Independent interviewing also ignores the fact that the conflicting parties distrust each other, possibly intensely, and are left to draw the conclusion that the mediator is "taking sides" particularly by the party not interviewed first. Separate interviewing or speaking with one party in a dispute without the other present puts the mediator at significant risk of being perceived as compromised in terms of neutrality. It also permits the parties to continue utilizing the dysfunctional communication style that permitted the conflict to be created and maintained without previous resolution. Creating an environment of direct and truthful communication that permits resolution is the goal of the mediator.

Each party can "assume" that everyone must have a position in the conflict. If a conflict is quite intense, parties can become so emotionally invested in their respective position that isolation from communication with the opposite party can assume paranoid degrees of distrust.

The mediator by bringing the parties together possibly is creating the setting, whereby the conflict is being discussed directly between the parties involved for the first time.

The mediator must not be naïve in terms of appreciating the potential demands created by bringing the parties together. Often times, it can be these very demands that cause an inexperienced individual attempting a mediation to speak with each party separately. It truly is emotionally safer and less challenging, but infinitely less effective. Interviewing the parties separately also permits the belief to be created from the initial intervention that somehow the mediator is going to "Solve" the problem. The "Solution" comes from the disputants not from the mediator.

By bringing the parties together from the onset of the intervention a stage can be created that permits the conflicting parties to begin actively practicing the behaviours that will ultimately lead to resolution, as opposed to passively waiting for the mediator to solve the problem. The mediator, by definition, cannot solve the problem. Unless the "Solution" is generated and agreed upon by both parties, whatever the mediator might have suggested would only be rejected, sabotaged, and undermined by the conflicting parties and not embraced as their own solution. It is at this point a mediator must continue to appreciate it is not their role to assume responsibility to solve the problem. It is the responsibility of the conflicting parties to solve the problem. The mediator is creating and structuring an environment and facilitating the utilization of functional communication skills that permit the parties to move past their dysfunctional communication styles and work towards mutual solution. The mediator cannot assume responsibility to solve the problem. The mediator cannot solve the problem, regardless of their skill or wisdom. Only the involved parties can generate a mutually agreed upon solution, support it, and implement it.

With both parties together, the mediator must create a functional problem solving setting. Failure to control the setting can create a failed mediation from the outset. The mediator must control the setting by advising the parties from the outset what the "Ground Rules" are and what behaviour is expected during the mediation.

A mediator is wise to assume the authority role of an unbiased party with interest in helping find the solution to the conflict and no interest in declaring one party a winner over the other party in the conflict. A mediator is wise to assume a somewhat detached, formal authority status-based stature in the mediation setting. It is not the mediator's responsibility to appear cordial, informal, warm or sociable. The somewhat emotionally distant stature by the mediator facilitates the development of the setting and maintaining the control needed to perform the resolution intervention.

It is imperative for the mediator to advise both parties at the outset what the rules are:

> "I am going to ask each of you in turn to tell me your perspective on this issue. I am going to speak with each of you beginning with Party A and then I am going to speak with Party B. I will listen to both parties and I am going to insist that while the other party is speaking to me about their side of the issue that you not interrupt or challenge what the other party is saying"

This "Ground Rule", although easy to articulate, is an ever-present challenge for the mediator to enforce during the mediation process. Each party will in all likelihood continue to practice the dysfunctional communication techniques that helped create the conflict. The mediator can expect statements by one party to be met with interrupted challenges to the accuracy, intent and factual basis of the conflicting parties articulation of their respective "Side of the story". The mediator must be prepared to immediately respond by regaining control of the situation.

Control can be regained by restatement of the ground rules or by the utilization of more subtle responses, such as ignoring the statement of the interrupting party and continuing to interview the appropriate party who is giving their respective "side".

One example of a restatement of ground rules by the mediator can be:

> "I am listening to Party A right now I will listen to you when they have finished"

The injection of structure is absolutely necessary to create a resolution-generating environment. The conflicting parties have the capacity to manipulate, distort, and undermine the mediation process if the mediator fails to create and maintain structured control of the setting. It is at this point the mediator must fully appreciate the defined goal of providing the structured situation. Many times disputing parties will challenge the format and attempt almost rebelliously to not permit a rational structured process to exist.

Each party in a dysfunctional conflict wants to be the "winner" and see their opponent as the loser. It is the role of the mediator to create a win-win situation by facilitating a mutually agreed upon solution.

Something as simple as the room arrangement needs to be considered. Some individuals attempting to create an intervention may want the conflicting parties "face to face" to air their differences. Typically this would not be an advisable strategy, as much as the conflicting parties potentially can begin arguing "at" each other, as opposed to, speaking "with" the mediator. It is advisable for the mediator to arrange seating that takes proximity and eye contact of the conflicting parties into consideration. The parties in the mediation intervention are to speak to the mediator not to each other.

This can be the most common loss of control by a mediator. The parties fail to abide by the ground rules and the mediator lacks assertiveness or skill to control the situation. Having the mediator sit between the parties is often an advisable strategy; not across the table from each other. Obviously the setting also would need to be private and free from intrusions.

The mediator must be ever vigilant to maintain the structure and integrity of the ground rules and operating premises. A mediator must be prepared for the more subtle manipulations or distractions to the intervention. Ploys, such as parties involved in a mediation asking questions of the mediator during the intervention can put the mediation under the control of the conflicting party by attempting to change the course of the process, as opposed to, under the control of the mediator.

The mediator has no responsibility to abide by the expectations of normal social conversation and to respond to questions politely. The mediator can assert control and authority by either ignoring questions directly or if needed by responding "I am asking you what your thoughts about this are, my thoughts are not the issue we are dealing with". A rather direct detached professional restructuring early on in an intervention can shape and maintain the necessary setting for conflict resolution.

One of the first goals of the mediator is to understand thoroughly, each disputant's beliefs and perceptions concerning the conflict situation. It is not the mediator's role to determine the accuracy of the beliefs. The mediator is not a fact-finder. The mediator is the developer of a problem resolving setting with the disputing parties generating the solution. A thorough understanding of each party's beliefs does not signify either agreement or disagreement with the beliefs by the mediator.

It is important for the mediator to remember in a great number of conflicts the difficulties lie not in the facts of the situation, but in the beliefs about the situation held and not directly communicated by each party to the conflict. By

creating a setting that has each party hearing the conflicting party express their individual beliefs about the conflict many times is an end in itself.

The techniques of dysfunctional communication, such as, isolation and avoidance many times have the disputing parties unaware of what actually the other party believes. In creating a setting with each party "hearing out" the other party "uninterrupted" can at times greatly facilitate a resolution in itself. It may actually be the first time one party has heard what the other party believes and can rapidly lead to communicating where the conflicting parties "got at odds" over misunderstanding of simple behaviours.

Dysfunctional communication techniques lead to projection of intent onto the other party without any feedback loop for reality checks or "checking it out directly". The results of such a communication style are often distrust, anger, projection of blame onto the other party, and intense isolation from any functional problem solving techniques.

It is of paramount importance for the mediator to understand in detail each party's position on the issue. It is best that each party be interviewed one at a time until the complete story is given before moving on to the second party. Moving point by point between parties at this time does not permit the mediator to either maintain control or gain a full understanding of the central issues involved. Parties, in turn, can begin by "putting on the table superficial or superfluous" issues to test the waters and see what happens before they "risk" saying how they really feel about an issue. These tests by the conflicting parties can be to determine if the mediator is going to take sides on the issues or is going to be injecting what the mediator thinks is "fair" and imposing that on the parties. Each party is given a structured and facilitated opportunity to express completely "their side of the story".

It is the skill of the mediator that creates the setting, whereby emotionally charged mistrust is transformed into articulated perceptions by each party in behavioural terms. Behavioural terms means describing "what" the other party is doing specifically, not describing how the party "feels" about their disputant's actions.

As the mediator develops the setting for each party to discuss their perceptions of the issues, careful attention continues to be needed to prevent loss of structure and control. The mediator must assist each party in being able to express their thoughts, feelings, and beliefs in behavioural terms. This can be one of the biggest challenges to the mediator who is working with parties many times who are only reacting to their own emotional feelings about the situation and have long since abandoned any effort at attempting to articulate their thoughts clearly and as objectively as possible. It continues to be of paramount importance that the mediator focuses the conversations to them and not let the dialog deteriorate to eyeball-to-eyeball exchanges of accusations between disputants directly.

The facilitator must generate non-leading open ended questions that facilitate the speaking party in defining "what and how" is going on in the conflict situation from their perspective. The mediator is wise to steer clear of the "why" of events taking place. "Why" leads to projection of emotions, values, and judgments into the situation with each disputing party attempting to vilify their adversary and put themselves forth as the reasonable "victim". Using "What-How-When-Where" as prompts forces each party to articulate behaviour and not respond with emotional tirades and accusations.

It is important that the mediator not permit the parties to discuss events from the long-term past, but to keep the parties focused on the "here and now". Many times conflicting parties will attempt to "muddy the waters" by forcing numerous potentially irrelevant issues into the

mediation process. The facilitator needs to deal with one major issue at a time. The mediator, however, must not decide prematurely what the major issue is, but permit the parties involved to define the problem from their perspective. It is at this point many times mental health professionals performing mediation confuse mediation with psychotherapy by interjecting their interpretation of what is transpiring between the parties. Whether the interpretation is accurate or not, is basically irrelevant to mediation. All that counts is that each party is given the structured and facilitated opportunity to express completely their story. It is only important what the disputants say and hear from each other in a mediation because they are the parties that will generate the mutually agreed upon solution to the issue.

One of the biggest challenges for the mediator is assisting each party with expressing emotionally laden thoughts into behavioural terms. "He just does it to make me mad" would need to be responded to by the mediator with the prompting question "What are they doing that you believe they are doing to make you mad?" The question forces the speaker away from their own interpretations of the opposing parties intentions and forces them to speak in terms of objective clearly defined behaviours, "What is the other Party doing?"

People often times can not agree with "why" someone is doing something, but they normally can agree with "What" they are doing. The facilitator must accept each party's perceptions nonjudgmentally. The mediator is not a judge or problem solver, but rather a facilitator of a structured process. If a given party's version of the events in question is inaccurate the mediator can rest assured that the disputing party will point out their beliefs about the inaccuracy when they are permitted to articulate their own statement of the events.

By utilizing active listening skills and reflection techniques the mediator has each party in turn, clearly and in behavioural terms, complete their respective version of the events. This process has the mediator utilizing communication skills, such as reflection of content, summarization of events, and reflection of emotion. The mediator can put the summarization to test by reviewing what the respective disputants believe about the conflict. One example of this might be:

> "John, am I correct that you are angry at Joe because you believe he intentionally leaves the equipment dirty after he uses it?"

The mediator should reflect back each major point of the disputant's "side of the story" before moving onto the next party. The mediator can test that each party has finished expressing their version of the situation when they respond to the question "Is there anything else you would like to add?" in a negative mode. A "No" response by each party in turn lets the mediator know that each side in the conflict has had the opportunity to fully articulate their thoughts to the point of completion. The mediator would at this point reflect the summary content back to each party to assure individual agreement.

Once each party has agreed with the mediator's summary of their respective problems in behavioural terms, the facilitation of the mutually agreed upon solution begins. It is important that the mediator not play problem solver and make suggestions. The mediator must elicit remedies point by point from the disputants. At this juncture the mediator begins moving between parties after each specific point of the problem is addressed. This is unlike the initial information-gathering phase where the mediator remains with one party through to completion of their respective statement of the issue.

The resolution is reached point by point in specific terms. Generalized statements of agreement by each party, such as "we'll get along from now on", are not mutually agreed solutions

but rather generalized "feel good" platitudes often times utilized as a means of avoiding the more behaviourally specific problem solution.

The basic question the mediator utilizes at this phase is:

"What do you suggest to remedy this issue?"

If either party reverts to accusations or projection of emotion onto the other party the facilitator brings the person back to behavioural terms and focuses on the solution. At this point the problem has already been defined and the parties are being asked to put forth solutions to remedy the specific aspects of the situation. "What do you suggest", can be repeated after each negative response by either party. It forces the individuals into the solution phase and away from remaining in the dysfunctional non-productive re-articulation of projection of blame onto the other party for the problem.

The mediator must remain neutral and not project their own solutions or feelings into the situation. If the mutually agreed upon solution appears one-sided to the mediator, it is of no importance. It is not the mediator's perceptions that count, but rather the perceptions of the conflicting parties. If a mutually agreed upon solution of behavioural changes is arrived at by the disputing parties, the mediator has completed their major work.

Once the "solution " has been arrived at by each party, the mediator would need to get each side to "sign off" on the specific behavioural changes they have agreed to perform. "Signing off" can be taken quite literally. Many situations benefit by the mediator putting in writing the specific agreed upon behaviours that constitute the solution. Having each party read their agreed upon behavioural changes and sign the agreement reinforces the idea of contractual commitment to the behavioural change.

For some parties involved in a dysfunctional conflict the structured communication process of competent mediation is a new experience. In order to see that the solutions are actually being put into use, it is important that the mediator follow-up with the disputing parties after a reasonable period of time has passed. This is to determine if each party is in fact producing the behavioural change they agreed upon. This follow-up session not only determines if the agreed upon changes are taking place and reviews the accountability of each party, but also reinforces the concept of functional problem solving.

The mediator must remember that problem solving is a skill and that many of the parties involved in protracted disputes or dysfunctional conflict lack the necessary skills for functional problem solving. If the mediator has been successful in providing the structured setting and process to reach resolution by the parties involved, an important training and skills development process has also taken place. Both parties in the conflict have learned how to approach the other involved individuals directly and to communicate, in behavioural terms, thoughts, expectations, and perceptions about an event while at the same time, respectfully permitting the other parties involved the same privilege. Workforces that communicate and problem solve with these traits rarely find themselves unable to move past a conflict situation. Conflict begins to signify the potential for growth, not the need to create angry fragmented groups of coworkers.

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 www.gilmartinharris.com.

Note-able Quote

By three methods we may learn wisdom: First, by reflection, which is noblest; Second, by imitation, which is easiest; and third by experience, which is the bitterest-Confucius

PRIVACY DEPENDS ON CIRCUMSTNACES

R. v. Burley,
(2004) Docket: C39484 (OntCA)

The accused was arrested for impaired driving causing bodily harm and read his right to counsel after he lost control of his vehicle with two child passengers. He complained of back pain and was taken to the hospital by the arresting officer where he was provided an opportunity to speak to a legal aid lawyer. The accused was taken to a small ambulance attendant room, equipped with a desk, two chairs, and a telephone, where he was left alone to speak in private. The officer told the accused he would be out of earshot and stood 20 feet away down the hallway while maintaining a line of sight to the doorway, but could not see or hear him.

At his trial in the Ontario Court of Justice, the accused testified he was uncomfortable speaking to legal aid because he saw an elbow in the doorway that he thought belonged to a police officer. Because he constantly would move the phone from his ear to check on where the police officer was, he said he was deprived of adequate consultation. However, he never complained to the police. Rather, he said the police treated him courteously.

The accused was acquitted. The trial judge concluded that the officer acted in a commendable fashion, but held the accused was not afforded an opportunity to speak in private, contrary to s.10(b) of the *Charter*. The Crown appealed, submitting that the accused's belief was subjective and unreasonable and that the privacy afforded was more than adequate. The accused argued that the trial judge was correct and that he made no error in holding that privacy was infringed.

In ordering a new trial, Chief Justice McMurtry, for the unanimous Ontario Court of Appeal, ruled that the totality of the circumstances—the individual factual context—must be considered in deciding whether there was an absence of reasonable privacy in speaking with counsel. In this case, the evidence was incapable of supporting the trial judge's conclusion. The Court stated:

> [The accused] was informed of his right to counsel and he did speak to duty counsel while alone in a room. He had a good rapport with the only officer present during the call and was told by that officer that he would not be standing within earshot. The [accused] spoke to counsel for five to six minutes. At no time did he suggest to the officer present that he was concerned about his privacy. He did not ask that the door be closed or that he be given an opportunity to make a second call. [para. 25]

As a consequence, the accused's belief he could not retain and instruct counsel in private was not reasonable.

Complete case available at www.ontariocourts.on.ca

J.P. ENTITLED TO MAKE INFERENCES FROM I.T.O.

R. v. Shiers, 2003 NSCA 138

A police officer swore an Information to Obtain (ITO) a search warrant to search for drugs at the accused's apartment. A confidential source told police that marihuana had been purchased from the accused outside his residence. He obtained the drugs from a large plastic bag containing about 150-200 grams of marihuana in one gram amounts. The warrant was issued by a justice of the peace and police located 292 grams of marihuana, electrical scales and score sheets. He was charged with possession for the purpose of trafficking.

At trial in Nova Scotia Provincial Court, the judge reviewed the warrant. Although there was

information connecting the accused to drugs and connecting him to the apartment, the judge found there was insufficient evidence to connect the drugs to the accused's apartment, the target of the search. In her view, the source only described what occurred outside the address and there was nothing to connect the trafficking to the residence. The judge found the ITO was insufficient to justify the warrant, the search thus violated s.8 of the *Charter*, and the evidence was excluded under s.24(2). The accused was acquitted.

The Crown appealed to the Nova Scotia Court of Appeal. Justice Fichaud, authoring the unanimous judgment, first noted that a reviewing judge is not to substitute their opinion on the sufficiency of information for that of the issuing judge. Rather, the test is whether there was a proper basis upon which the issuing judge could have granted the warrant. This includes drawing reasonable inferences from the evidence contained in the information to obtain.

In this case, the question was whether the issuing judge, drawing reasonable inferences from the material in the ITO, could have concluded that there were reasonable grounds to believe that drugs or evidence were in the accused's apartment. In holding that the trial judge did not consider drawing reasonable inferences, Justice Fichaud stated:

> The issuing judge, by drawing reasonable inferences from the quantity of drugs said to be in [the accused] possession at the time of the transaction and the way in which they were packaged, the evidence that [the accused] was known to be involved in the drug trade, the fact that the transaction took place on the street in front of his residence and other facts and opinions disclosed in the Information to Obtain, could conclude that there were reasonable grounds to believe that the items targeted by the search were in his residence.
>
> The reviewing judge did not consider whether the issuing judge could have drawn such reasonable inferences.
>
> Rather, the reviewing judge noted that there was nothing on the face of the Information "to suggest that [the accused] had been seen entering or leaving that residence let alone seen entering or leaving approximate in time to when Source "A" had contact with [the accused]."
>
> It is correct that the Information does not state whether or not [the accused] re-entered his residence after the transaction. But the issuing judge was entitled to draw a reasonable inference that (1) at some point, [the accused] would return to his residence along with the remaining marihuana in the plastic bag; and (2) items such as scales and score sheets would remain at [the accused's] residence even if [the accused] was temporarily absent.
>
> By overturning the warrant without considering whether there was evidence in the Information from which the issuing judge could reasonably draw the connecting inferences, the reviewing judge substituted her discretion for that of the issuing judge, which was an error of law. [paras. 23-27]

Nova Scotia's top court concluded that there was sufficient material in the ITO that the issuing judge could have reasonably inferred that there were drugs, scales, and score sheets in the accused's residence. The warrant was valid and the search and seizure did not violate s.8 of the *Charter*. The appeal was allowed, a conviction substituted, and the matter was remitted to Provincial Court for sentencing.

Complete case available at www.canlii.org

Note-able Quote

Ours is a world of nuclear giants and ethical infants. We know more about war than we know about peace, more about killing than we know about living. We have grasped the mystery of the atom and rejected the Sermon on the Mount—Omar Bradley

DRIVER NOT DETAINED WHEN OFFICER APPROACHED PARKED CAR

R. v. Calder,
(2004) Docket: C38748 (OntCA)[3]

A police officer followed a car into the parking lot of a plaza. He approached the vehicle on foot and spoke to the driver sitting in the vehicle, thereby detecting a strong odour of alcohol coming from his breath and noted his eyes were bloodshot. After admitting to consuming three beers, a roadside screening test was administered and the accused failed. He was arrested, cautioned, advised of his right to counsel, and given the breath demand. At the police station, two breath samples exceeding the legal limit were taken.

At his trial in the Ontario Court of Justice, the accused was acquitted of over 80mg%. The trial judge dismissed the charge after concluding there was no legal justification for approaching the accused because there was no basis for believing he violated the *Highway Traffic Act* or any other legislation. He found the accused had been arbitrarily detained and, in his view, the officer "conscripted…the evidence of the odour of alcohol as he approached the vehicle". As a result, the failure on the screening device was inadmissible for the purpose of providing grounds for the breath tests and the breathalyzer results were excluded.

The Crown appealed to the Ontario Superior Court of Justice. Justice Killeen set aside the acquittal and ordered a new trial. He found the trial judge erred:

> There are reasons to be found in the uncontradicted evidence for concluding that the officer's conduct toward the defendant at his car did not constitute a detention within s. 9 at all. There is no evidence that the officer blocked off the defendant's car with his cruiser in any way, nor is there any evidence that, when he was at the defendant's car, he restrained or inhibited the defendant in any way. He simply asked the defendant a straightforward question about his driver's licence and, in the course of doing so, smelled alcohol, saw glassy eyes and received an admission from the accused that he had been drinking.
>
> At that point, the officer arguably had a reasonable suspicion that the defendant had alcohol in his system, giving the officer the right under s. 254 of the Code to demand a roadside test, as he did. If a detention occurred when the demand was made it was justified under s. 254 and could hardly be called arbitrary nor could it, for that matter, lead to an argument that the roadside test somehow became an unlawful seizure within s. 8 of the Charter. [paras. 30-31]

The accused appealed to the Ontario Court of Appeal, but in a unanimous endorsement it was dismissed. The Court ruled:

> Like the Summary Conviction Appeal Court judge, we disagree with [the trial judge's] analysis. The officer needed no legal authority to approach the [accused] while he was sitting in his vehicle in the public parking area and he needed no legal authority to speak to the [accused]. There is no evidence upon which it could be said that the [accused] was detained by the officer within the meaning of detention as explained in R. v. Therens (1985), 18 C.C.C. (3d) 481 (SCC). [para. 3]

Complete case available at www.ontariocourts.on.ca

'DECONSTRUCTING' GROUNDS FOR WARRANT IMPROPER

R. v. Saunders, 2003 NLCA 63

Three confidential police informants provided information that the accused was receiving hash oil and keeping it at his house. One source told police he had bought

[3] See R. v. Calder [2002] OJ No. 30121 (OntSCJ) for more detailed facts of the case.

some at the accused's house while the two other sources said drugs were there. On the basis of this information the police obtained a *Controlled Drugs and Substances Act* (*CDSA*) search warrant, executed it, and found drugs and money. The accused was charged with possession of a controlled substance for the purpose of trafficking contrary to s.5(2) of the *CDSA*.

At his trial in the Provincial Court of Newfoundland and Labrador, the trial judge ruled the police had violated the accused's s.8 *Charter* right to be secure against unreasonable search or seizure. In his view, the warrant was improperly issued by the justice of the peace. As a result, the evidence was excluded and the accused was acquitted.

The Crown successfully appealed to the Nova Scotia Court of Appeal arguing that the trial judge failed to examine the "totality of the circumstances" when assessing the sufficiency of the information used to support the warrant. Other issues raised included whether a justice must specifically state on the warrant that they are satisfied reasonable grounds exist and whether night-time searches are restricted under s.11 *CDSA*.

Totality of the Circumstances

In a 2:1 judgment, the Nova Scotia Court of Appeal allowed the appeal and ordered a new trial. In the majority's opinion, "the trial judge 'deconstructed' every paragraph (and many phrases within paragraphs) in the information to obtain, concluding they suffered from some inadequacy." As Chief Justice Wells noted:

> …the trial judge engaged in a critique of the information to obtain ... almost as if he were correcting a student's term paper ... and not an assessment of the sufficiency of the information in the "totality of the circumstances". The approach taken by the trial judge was like that of a person who views a painting square centimetre by square centimetre to identify defects ... which has its place ... but then fails to step back and view the painting as a whole. [para. 11]

And further:

> If one "deconstructs" each item of information from source "A" and then that from source "B" and then that from source "C" and applies the test as against each item individually, as did the Trial Judge, then the answer may well be "no", as the trial judge concluded. But, if one considers the "totality of the circumstances" one sees that the information from the three sources is corroborative *inter se;* because of this, the whole of their information becomes greater than the sum of its parts. To put it another way, the sequence of pictures drawn by the three sources tells a consistent story: [the accused] sold hash oil, he kept it at his residence, he had hash oil at his residence on April 1, 2001. As such the whole could enable the justice of the peace to conclude that credibly-based probability had replaced suspicion. [para. 15]

As a result, the majority viewed the whole picture as capable of supporting the authorizing justice's issuance of the warrant.

Warrant Defect

The trial judge concluded that the justice must be satisfied that reasonable grounds exist and that such a statement must be contained in the warrant itself. Otherwise, there would be no way to determine if the issuing justice reached an independent conclusion. Although the justice must be satisfied that there are reasonable grounds to issue the warrant, the majority held that there is nothing in law requiring a justice to specifically state, on the face of a s.11 *CDSA* warrant, that they are satisfied reasonable grounds exist. As Chief Justice Wells stated, "it would seem more reasonable to take the justice's signature on the warrant as signifying that he had satisfied himself as to the various requirements set out in section 11 of the *CDSA*."

Night-Time Searches

The trial judge found that there must be something in the information from which a justice could draw an inference that the night-time search request had a reasonable basis. Again, however, the majority along with Justice Welsh disagreed. Section 487 or 487.1 *Criminal Code* warrants cannot be executed at night unless the preconditions under s.488 are satisfied. On the other hand, s.11 of the *CDSA* authorizes searches at any time. Justice Wells stated:

> While he specifically acknowledged that "the information to obtain [a search warrant under section 11 of CDSA] does not have to comply with section 488(b) of the Criminal Code," the trial judge nevertheless concluded "there must at the very least be something in the information to obtain from which the justice can draw an inference that the request to search at night has a reasonable basis". With great respect to the trial judge, that conclusion produces precisely the same result as would flow from a determination that section 488(b) did apply to a search warrant authorized pursuant to section 11 of the CDSA.
>
> The trial judge failed to recognize that Parliament had separately imposed, by section 488, a prohibition on the nighttime execution of search warrants granted under sections 487 or 487.1 of the Criminal Code unless the specified preconditions were met. When Parliament later enacted the CDSA and delimited the search warrant granting authority in section 11, it enacted that certain of the provisions of the Criminal Code relating to the granting and execution of search warrants (e.g. 487.1, 489.1 and 490) would also apply to search warrants issued pursuant to section 11 of the CDSA. It did not direct that section 488 was to apply and did not, separately in section 11 of the CDSA, preclude execution of a search warrant by night unless (a) the justice is satisfied that there are reasonable grounds for it to be executed by night; (b) the reasonable grounds are included in the information; and (c) the warrant authorizes that it be executed by night. The courts must assume that Parliament was attentive to the prohibition against nighttime execution and the required preconditions for any exception set out in section 488 of the Criminal Code. In all of these circumstances the inference, again, is inescapable: Parliament deliberately decided not to apply the same prohibition and exception preconditions to search warrants granted under the authority of section 11 of the CDSA.
>
> The decision by the trial judge amounts to a determination by him that Parliament either ought to have so provided in section 11 or ought to have made section 488 of the Criminal Code apply to section 11 search warrants and he was going to apply the law as though it had. The trial judge has no jurisdiction to make such a determination and this Court has no jurisdiction to approve of a decision that so offends the separation of powers principle inherent in the Canadian Constitution.
>
> Whether a court agrees or disagrees with that decision of Parliament, it has no right to make legal determinations that fly in the face of it, unless it does so in the exercise of the mandate imposed on courts by the Constitution. We say this being mindful of the fact that the place searched, pursuant to the warrant in issue, was the respondent's dwelling. However, no constitutional challenge to section 11 of the CDSA was mounted, either before the trial judge or before this Court. The matter was not mentioned by either party or by the trial judge. There is therefore no basis for the trial judge effectively reading into section 11 of the CDSA the requirements he sought to impose in this case.
>
> We conclude, therefore, that the determination by the trial judge that, in the case of a search warrant issued pursuant to the authority of section 11 of the CDSA, "there must at the very least be something in the information to obtain from which the justice can draw an inference that the request to search at night has a reasonable

basis" is, on the law as it presently stands, in error. [paras. 30-34]

Another View

Justice Welsh disagreed with the majority that the trial judge erred. In his view, a careful paragraph by paragraph review is necessary to assess the reliability of various pieces of information to identify any deficiencies in order to determine whether the totality of the circumstances lacks a valid or substantial foundation. He found that there was insufficient information to establish the reliability of any of the informants, even if their information is consistent with each other. Further independent police corroboration could have buttressed the warrant, but was not undertaken. Justice Welsh found the search warrant invalid, the search of the accused's residence a s.8 *Charter* violation, and would have dismissed the Crown's appeal.

Complete case available at www.canlii.org

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

collected by Cst. Ian Barraclough

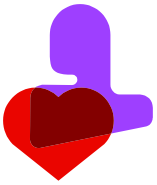
Judge Takes a Whipping

In January Judge Peter Garcia, driving relatives to his courthouse in Covington, LA, noticed an odd sight directly across the street in the municipal cemetery. Two women in pink lingerie and holding S&M accessories were posing for a photo shoot among the gravestones. Garcia grabbed his camera to take his own souvenir photo, which apparently angered the women, who pursued Garcia back to his car, lecturing the unknown-to-her judge about various "rights" she thought she had not to be photographed. When Garcia ignored her, she began to thrash the judge's car with her whip before he finally drove away. (Edited from a Times-Picayune news story, January 2004.)

Laws of Irony Strictly Enforced

Convicted murderer Paul Charles Denyer, who told police back when he was arrested that he had picked three women to kill because he "just hate(s) (women)," began the application process at Barwon Prison in Lara, Australia, for hormone treatment and surgery to become a woman. (Edited from a News Limited (Australia) news story, January 2004.)

Thief Fakes Heart Attack to Outwit Police



A crafty German thief escaped police in Berlin after his arrest by faking a heart attack and fleeing when his handcuffs were removed for treatment, authorities in the western city of Duesseldorf said Wednesday. "He started complaining of chest pains in custody and said he was having a heart attack," a police spokeswoman said. "It seems he gave quite a convincing performance, and you can't be too careful in these situations."

The 40-year-old's condition improved dramatically as soon as his hands were freed for a scan in hospital and he ran half naked to the nearest emergency exit. A subsequent police search found no trace of the man. (Edited from a Reuters news release, January 2004.)

Chilling Crime

Three men who went streaking through a Denny's restaurant were forced to chill out and wait for the police when they spotted a thief drive off in their getaway car with their clothes inside. Stranded naked outside Denny's in the January weather, the three young men huddled together in the parking lot until police arrived. "I don't think they were hiding. I think

they were just concealing themselves," police spokesman Dick Cottam said. The three entered the restaurant before daybreak, wearing only shoes and hats.

They left their car running so they could make a quick getaway…but the streakers had the tables turned on them in Denny's as they stared out the window in disbelief. A man who just finished his breakfast inside the restaurant drove off in their car. No charges were brought against the streakers. "I think it was just three kids who decided to fool around," Cottam said. He added, "We always tell people to not leave their car running." (Edited from an Associated Press news report, January 2004.)

Works Slows Down At An Israeli Police Station

Israeli police had to close an entire floor of their station because the pungent scent of tons of confiscated marijuana was making them high, an Israeli newspaper reported. The drugs, smuggled from Egypt, are kept in a storeroom of a police station in the southern town of Dimona. Police have confiscated so much pot that their storeroom is filled to capacity. "Every time I came to work I felt…like I was high," the Maariv newspaper quoted one officer as saying. "The smell of marijuana was killing us - it was impossible to work." The newspaper said a police medical officer ordered personnel to move to another floor until all the drugs could be destroyed. (Edited from a Reuters news release, January 2004.)

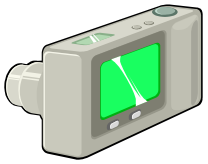
Knife-Wielding 90-Year-Old Kiwi Sends Intruder Packing

A 90-year old New Zealand man grabbed a carving knife from his kitchen and chased away a masked intruder who had threatened his wife with a butter knife. The intruder waved the flimsy weapon at David Saulbrey's wife when she tried to ring the police to report a break-in at their home near Wellington, the Dominion-Post newspaper reported.

Saulbrey, who failed to hear the hapless intruder's demand for money because he was not wearing his hearing aid, then beat the burglar in a search for a more threatening weapon. "Once I got the carving knife I said, "Now you bastard, you're in for it!"

"With that he threw his knife at me and took off out the door," Saulbrey told the police. "I was that bloody wild I would have stuck (the knife) in his Adam's apple," he said. New Zealand police said they did not recommend confronting an armed intruder but praised Saulbrey's bravery. "He's a tough old bugger. You wouldn't think he was 90, that's for sure," Detective Scott Cooper was quoted as saying. (Edited from a Reuters news release, January 2004.)

Saying 'Cheese' Incriminates Camera Thieves



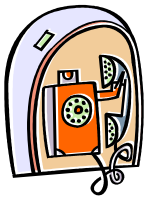
Two Chinese thieves captured more than they had bargained for when they took pictures of each other with stolen digital cameras, reported the China Daily newspaper in January. They were both arrested when trying to sell the cameras to passersby in eastern Changzhou city, arousing suspicions of the police. "Having stolen some cash and three digital cameras, they were so excited that they took photos of each other," the newspaper said. "But neither of them knew how to delete the stored pictures."

Mustache Means Money

Police in northern India are being paid an extra 65 cents a month to grow a mustache to give them more authority, a newspaper reported in January. Mayank Jain, a superintendent with the

Madhya Pradesh state police, told The Asian Age that research showed that police with mustaches were taken more seriously. However, he added, the shape and style of police mustaches would be monitored to ensure they did not take on a mean look. (Edited from a Reuters news release, January 2004.)

Car Thieves Call Police for Help



Two Danish car thieves called police for help when they realized the angry victim of their latest crime was in hot pursuit in another car. The car's owner decided to chase the men after witnessing the theft from his home in northern Denmark, the local daily Berlingske Tidende reported. The hapless thieves, aged 19 and 21, called the police to report themselves and asked to be picked up at a nearby road, the newspaper said. (Edited from a Berlingske Tidende news story, January 2004.)

Skeletons in the Closet

Three fugitives scrambled into an attic to elude police but surrendered when they found a human skeleton in their hideaway, Florida police reported. The two men and a woman were wanted on probation violation charges and climbed into an attic to hide when police tracked them down in Daytona Beach, police Sgt. Al Tolley said.

Police noticed a hatch leading to an attic above a second-story bedroom, and opened it. One of the suspects called out, "Get me out of here. There's a dead body up here," Tolley said. The three were arrested and investigators were still trying to identify the skeletal remains. A tenant told police she had lived there about three months and had noted a foul odor but could not locate the source. (Edited from a Reuters news release, January 2004.)

ASD NEED NOT BE TESTED BEFORE DEMAND MADE

R. v. Danychuk,
(2004) Docket:C39898 (OntCA)

A police officer stopped the accused driving after observing a vehicle weaving over the broken lines of a lane. An odour of alcohol was detected coming from inside the vehicle and the accused admitted to drinking two beers. He complied with a request to accompany the officer back to the police car and sit in the rear. A roadside screening device (ASD) breath sample was demanded, but the accused refused. The officer cautioned him about the consequences of refusing. When asked if he would provide a sample, the accused said, "No, I will go to court." Although the officer had the screening device beside him, it had not been tested.

At his trial in the Ontario Court of Justice the accused was convicted. The judge concluded that the officer had the ASD available forthwith, to be tested and then presented to the accused for a breath sample. However, on appeal to the Ontario Superior Court of Justice the conviction was overturned and an acquittal was entered. In the appeal justice's view, it had not been proven that the ASD was available forthwith because it had not been tested to ensure it was ready to accept a sample—the officer had not yet presented it, and the purpose of the test and the consequences of refusing had not been explained.

The Crown successfully appealed to the Ontario Court of Appeal. Subsection 254(5) of the *Criminal Code* creates an offence for a person to fail or refuse, without reasonable excuse, to comply with a demand for a breath sample into an ASD under s.254(2). The demand requires the person to "provide forthwith" a breath sample. This imposes a duty on the police to administer the test "as soon as reasonably practicable or

within a reasonable time having regard to the provision and circumstances of the case." As Justice Blair, authoring the 3:0 judgment, noted:

> The rationale for this requirement is that unless the police officer is in a position to require a breath sample to be provided before there is any realistic opportunity for the detained person to consult counsel, that person's s.10(b) Charter right to counsel may be unjustifiably infringed, and therefore a demand cannot be validly within the scope of subsection 254(2). [para. 15]

Justice Blair disagreed with the accused's submission that a valid demand requires proof the police were immediately ready to administer the test or that they advised the motorist of the process and consequences of not complying with the demand. Justice Blair stated:

> As I read the language of subsection 254(2) and appreciate its context, however, I see nothing in it mandating - either expressly or by implication - that before a demand may be made the approved screening device must be warmed up and tested as operational and the police officer must have explained the process and the consequences of a failure to comply. Respectfully, it is an unwarranted extension of the foregoing authorities to read such requirements into the section where the accused had categorically refused to provide the requested breath sample, and the summary conviction appeal judge erred in law in doing so.
>
> [The accused] refused, unequivocally, to provide a breath sample. This court has held, in such circumstances, that the Crown need not even demonstrate the device in question was an approved screening device as a prerequisite to a valid demand…In addition, this court and others have held that in such circumstances the Crown does not have to show an approved screening device was in the possession of, or immediately available to, the police officer at the time of the demand…
> In my opinion, while it may be sensible for a police officer to make sure the device is working and the motorist apprised of the process and the consequences of non-compliance, it cannot be said - in the face of these authorities - that these matters constitute prerequisites to a valid demand for a breath sample under subsection 254(2), in my opinion…[paras. 19-21, references omitted]

And further:

> A demand will not be a valid demand under subsection 254(2) if the police are not in a position to administer the test "forthwith", i.e. in a timely fashion before there is any realistic opportunity to consult counsel…However, these cases do not stand for the proposition that the police must be in a position to "make the demand good" the instant the request is made. In fact, the opposite is true. [para. 23, references omitted]

In summary, Justice Blair held:

> A timely demand is validly made pursuant to subsection 254(2), in my opinion, where (a) the individual to whom the demand is made has been operating a motor vehicle, or has care or control of that vehicle, (b) the peace officer who makes the demand reasonably suspects that the individual to whom the demand is being made has alcohol in his or her body, and (c) the police officer is ultimately in a position to require that the breath sample be provided before there is any realistic opportunity to consult counsel. Where, as here, there has been an outright refusal to provide a breath sample, it is not a prerequisite to such a demand that the Crown establish the approved screening device was present at the scene, tested and ready to accept a sample, or that the police officer presented the device to the driver and explained the purpose of the test and the consequences of a failure to provide a sample. [para. 26]

The appeal was allowed and the conviction was restored.

Complete case available at www.ontariocourts.on.ca

ANTICIPATORY WARRANT: LAST, NOT FIRST RESORT PROVISION

R. v. Brooks,
(2003) Docket: C35693 (OntCA)

As a result of confidential information and surveillance, the police had reason to believe the accused was involved in a dial a dope cocaine trafficking scheme. She would contact customers by cell phone and arrange a meet to deliver the cocaine. She only kept a small quantity with her, and would return to her residence to get more drugs when her supply ran low. The police received information that the accused was going to be very active the next day. They obtained a general warrant under s.487.01 of the *Criminal Code* from the Ontario Court of Justice allowing them to enter and search the accused's residence for cocaine and other evidence, provided certain pre-conditions were met after conducting surveillance. Before executing the warrant on her home, the following would need to be satisfied:

- three hours before entry, the police must observe the accused as a driver or passenger in a motor vehicle and on reasonable grounds believe she was delivering drugs; and
- upon her arrest and search, the police needed to find cocaine in or ejected from the vehicle.

The pre-conditions were satisfied and the police searched the accused's residence. Marihuana, a loaded handgun, crack cocaine, and other evidence were found. At her trial in the Ontario Court of Justice, the evidence was admitted and the accused was convicted of cocaine possession for trafficking, marihuana possession, and weapon possession. The trial judge concluded that the pre-conditions were not only unauthorized by the warrant provision, but also unnecessary to the validity of the warrant. In his view, the warrant was valid without the unauthorized pre-conditions and the evidence obtained was admissible.

The accused appealed to the Ontario Court of Appeal arguing, among other grounds, that the police had other provisions in the *Criminal Code* or *Controlled Drugs and Substances Act* available to them to obtain a search warrant. Therefore the statutory requirement of s.487.01(1)(c) was not satisfied. Justice Moldaver, writing the unanimous appeal judgment agreed.

Section 487.01, also known as an anticipatory search warrant, allows the police to execute a warrant provided certain pre-conditions are met. However, s.487.01(1)(c) only allows a general warrant to be issued if "there is no other provision [in the *Criminal Code*] or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done." It is a last resort, rather than a first resort provision.

In this case, "leaving aside mere possibilities, the police had no reason to believe that the [accused's] arrest would trigger the destruction of drugs or other evidence at her residence before the police could obtain a conventional warrant to search it." In other words, the police could have arrested the accused and then applied for a traditional search warrant to enter and search her residence. Since the police did not comply with the statutory pre-condition of s.487(1)(c), the warrant was invalid. As a result, the accused's s.8 *Charter* right protecting her against unreasonable search or seizure was violated.

Despite the breach however, the Ontario Court of Appeal admitted the evidence under s.24(2). The police acted in good faith, had reasonable grounds to search the residence, and the exclusion of the evidence, not its inclusion, would bring the administration of justice into disrepute. The accused's appeal was dismissed and her conviction upheld.

Complete case available at www.ontariocourts.on.ca

OWNERSHIP CLAIM DOES NOT ALTER SEARCH INCIDENT TO ARREST

R. v. Mohamad,
(2004) Docket: C36120 (OntCA)

After receiving information from Custom's officials investigating the exportation of a stolen vehicle to Amsterdam, a police detective attended a used car business where a Yukon truck was reportedly parked that had the same vehicle identification number (VIN) as the VIN declared on the vehicle subject for exportation. The officer blocked in the Yukon truck being driven on the lot and spoke to the driver. The officer noticed that the Yukon's VIN was glued to the dashboard, rather than riveted in accordance with manufacturer standards. This was also the case for a van parked beside the truck, causing the officer to conclude the original VINs had been removed and false VINs attached.

The driver said the truck belonged to the owner of the used car business, Mr. Jebo. Jebo was arrested for possession of stolen property and a tow truck was called to attend the scene to remove the truck and van for forensic examination. The van was unlocked and the keys were in the ignition. The officer entered the van, took a look around, and saw a briefcase. He looked inside the briefcase and saw documents with the accused Mohamad's name. As the tow truck arrived, the accused approached the officer telling him the briefcase was his and that he had forgotten it in the van after test driving it an hour earlier. When asked about the van, the accused said he was going to but it. A further search of the briefcase revealed the presence of a dealer's licence plate, air tickets to Amsterdam, and shipping documents for the van to Amsterdam.

The officer left to give instructions to the tow truck operator, but on return discovered the accused had removed the briefcase from the van and entered a neighbouring building. The officer located the accused and told him to take the briefcase back to the van so he could thoroughly search it before giving it to him. He returned the briefcase to the van and its contents were searched. In it, police found sealed envelopes containing counterfeit VIN plates, stickers, parts, and certification labels. The accused denied knowledge of these items or how they came to be in his briefcase. Other documentary evidence was also found in the briefcase including the accused's passport and driver's licence. He was arrested and charged with possession of the stolen truck and van as well as a third vehicle later found at the used car business.

At his trial in the Ontario Superior Court of Justice, the accused argued that the police had no authority to open and search the briefcase once it was learned he owned it. In his submission, he had not been arrested, was not a suspect in any crime, and no basis existed to issue a search warrant until after the briefcase was opened. Thus, he contended his rights under s.8 of the *Charter* had been breached and the evidence was inadmissible. The Crown, on the other hand, asserted that the police were permitted to search the van and its contents to discover and preserve evidence as an incident to the arrest of Jebo, the business owner.

The trial judge agreed with the Crown and found no *Charter* violation. In his view, the officer had seized the stolen van and had the authority, as an incident to Jebo's arrest, to inspect it and its contents. The fact the accused had appeared on the scene and claimed ownership of the briefcase did not alter the officer's authority to search. The accused appealed to the Ontario Court of Appeal arguing, among other grounds, that the trial judge erred in admitting the evidence from the briefcase search.

Section 8 of the *Charter* protects a person's reasonable expectation of privacy against

unreasonable governmental intrusion. Thus, for a person to argue that their s.8 right has been violated, they must first demonstrate that they had a reasonable expectation of privacy. If this burden is met, the next consideration is whether police conducted the search reasonably. Whether a person has a reasonable expectation of privacy depends on the totality of the circumstances—it's a contextual approach. Here, the accused did not contend he had privacy in the stolen vehicle, but rather only in the contents of the briefcase. In holding that the owner of a briefcase has a privacy interest in its contents, Justice Cronk stated:

> In the contemporary context, briefcases often house highly confidential personal and business information. They can serve, in a practical sense, as portable offices for their owners. In my view, owners of briefcases generally have a reasonable expectation of privacy in the contents of their briefcases. [para. 25]

However, even where a person can establish a privacy interest in the thing searched, the search will not infringe s.8 if the police have the lawful authority in the circumstances to search it. One such authority, search incident to arrest, was described by Justice Cronk as follows:

> Search incident to arrest does not require a warrant or independent reasonable and probable grounds for the search. In those respects, it is an exception to the ordinary requirements for a reasonable search. Rather, the right to search derives from the fact of the arrest, which itself requires reasonable and probable grounds or an arrest warrant. If the arrest is unlawful, the search is also unlawful…[para. 28, references omitted]

In this case, the accused did not contest the lawfulness of Jebo's arrest, the manner of the search, or its warrantless nature. Rather, he suggested that once the accused claimed ownership, continuing to search the briefcase contents exceeded the incidental search scope because there were no grounds to believe the accused committed a crime or that the briefcase contained evidence.

The law is clear that a search incidental to arrest requires a legitimate purpose connected to the arrest. As Justice Cronk noted, "The legitimate purposes of search incident to arrest extend to the protection of evidence from destruction at the hands of the arrestee or others and to the discovery of evidence that can be used at the arrestee's trial." The officer testified he was looking in the briefcase to locate evidence concerning the theft of the van and the "re-VINing" scheme. He said he had seized the van and the trial judge found he had a duty to inspect it and its contents to discover and preserve any evidence. The Ontario Court of Appeal agreed. Justice Cronk held:

> [The officer] had one of the purposes of a valid search incident to arrest in mind when he conducted his search of the briefcase, that is, the discovery of evidence concerning the charges against Jebo. It was open to the trial judge to accept [the officer's] assertion of a bona fide subjective belief that he was authorized to search the briefcase for that law enforcement purpose. There is no suggestion that [the officer's] belief changed at any point throughout the occasions when he searched the contents of the briefcase.
>
> In my view, [the officer's] subjective belief that searching the contents of the briefcase might lead to the discovery of evidence concerning the charges against Jebo was a reasonable one in all of the circumstances. The Plymouth van, which contained the briefcase, was directly implicated in the charges against Jebo. The van and the briefcase were located on the premises where Jebo was arrested and [the officer] searched the contents of the briefcase a short time after Jebo's arrest. The search of the briefcase, therefore, was closely connected to the arrest of Jebo.
>
> Viewed in that context, I agree with the trial judge that the [accused's] attendance at the

> van and his claim to ownership of the briefcase did not "alter the scope of [the officer's] authority" to search the briefcase. Although [the officer] knew the [accused] from "the past", the record before us does not indicate how he came to know the [accused] or how well he knew him. There is no suggestion that his prior knowledge of the [accused] was sufficient to persuade him that the [accused's] assertion of ownership of the briefcase was true or that, in light of it, the [accused] was an innocent and uninvolved third party.
>
> [The officer] was not obliged to simply accept the [accused's] assertions of ownership of the briefcase and of an innocent explanation for its presence in the stolen van, and to terminate the search of the briefcase on the basis of those assertions. That proposition, urged by the [accused], defies common sense and, if accepted, would render the search incident to arrest power meaningless in circumstances where, but for the ownership claim, it is being lawfully exercised for the purpose of discovering or preserving evidence relating to a crime. [paras. 37-40]

And further:

> Here, on each occasion that [the officer] opened the briefcase, he undertook his search of its contents for the purpose of discovering evidence relating to the crimes for which Jebo had been arrested. The searches were grounded in Jebo's arrest and were carried out in a vehicle known to have been stolen.
>
> In these circumstances, I conclude that the requirements for a valid search of the [accused's] briefcase under the search incident to arrest power were met. The search of the contents of the briefcase was not unlawful or unreasonable and, hence, the evidence obtained from that search was admissible. [paras. 47-48]

The accused's appeal against conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

STATUTORILY COMPELLED STATEMENT VIOLATES *CHARTER* s.7

R. v. Zwicker, 2003 NSCA 140

A motor vehicle, owned by the accused, was involved in an accident, but the driver failed to remain at the scene as required by law. The accused was served a notice under s.258(1) of Nova Scotia's *Motor Vehicle Act* (*Act*) requiring a registered owner, at the request of a peace officer, to supply the name and address of the person in charge of the vehicle at the time of a violation of the *Act*. Failure to furnish such information is a summary offence. The accused admitted she was the driver at the time of the accident and she was charged with failing to stop at the scene and failing to yield the right of way under the *Act*.

At her trial in Nova Scotia Provincial Court, the judge concluded that the admission of the statutorily compelled statement provided pursuant to the *Act* violated the accused's rights under s.7 of the *Charter*—the principle against self incrimination—and was inadmissible under s.24. The accused was acquitted. The Crown appealed to the Nova Scotia Court of Appeal arguing that the trial judge erred in both finding a s.7 breach as well as excluding the statement as evidence.

Justice Hamilton, writing the unanimous judgment, upheld the trial judge's ruling. Section 7 of the *Charter* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Because the accused could be imprisoned, although remote, if she were found guilty of the "quasi criminal" charges under the *Act*, it was nonetheless a real possibility and thus had the

potential of depriving her of her liberty. Therefore, s.7 of the *Charter* was engaged. The Nova Scotia Court of Appeal also agreed with the trial judge's assessment that the admission of the statutorily compelled statement would offend the principles of fundamental justice. The four main factors to consider in such a determination are:

- whether there was coercion;
- whether there was an adversarial relationship;
- whether the statement would likely be unreliable; and
- whether there was potential for abuse of power in the obtaining of the statement.

In this case, the trial judge concluded the coercion factor was neutral. The Crown had unsuccessfully argued that because people choose to drive or not, those that do drive freely consent to the application of s.258 of the *Act*. However, an adversarial relationship existed. The accused was personally served the notice by a police officer and they received a response the next day. As well, there is a strong incentive for someone to lie if the statement is not protected from being used against the person—thus the prospect of an unreliable statement is very real. Finally, abuse of power was a factor properly considered by the trial judge. As Justice Hamilton stated:

> Once a person is compelled by s. 258 of our Act to tell the police what may often be one of the essential elements of an offence, they may be more apt to believe they should provide more detail. Personal delivery of the notice under s. 258 of our Act gave the police a foot in the door so to speak that may lead, intentionally or unintentionally, to the police seeking more information and depriving the owner of the principle against self-incrimination. [para. 37]

The statement was properly ruled inadmissible and the appeal was dismissed.

FINDING FUN IN FITNESS

Sgt. Kelly Keith, JIBC

Running

If you want to increase your endurance try PLYOMETRIC strides, also known as bounding. This is an exaggerated running stride that places stress on the running muscles through a range of motion that is greater than normal. Find a smooth, gradual hill that is not too steep—grass is best. Run up the hill—springing—off your toes with each stride and land on the ball of your other foot. Just after your foot touches the ground, let your heel touch the ground and simultaneously allow your knee to bend more than normal. This pre-stretches your muscles in preparation for the next leg extension and toe-off.

Bound up the hill for 30-50 yards, jog down, and repeat three or four times. Do this once per week adding one or two reps per week until you can do 10 reps with good form, then lengthen the distance to 100 yards. You will not only improve your running, you will also decrease your injuries and increase your strength. Make sure to stretch your quads and calves after your workout! You may be self conscious about how this looks, however the benefits will come fast and will far outweigh the downside !

Workout

Try working out on a mirror image basis of your muscles. The workout is done on a super-set model. The pairings are as follows:

- Chest/Back/Shoulders - Day 1
- Biceps/Triceps/Abs/Lower Back - Day 2
- Quads/Hamstrings/Calves - Day 3

On Day 1 your first set is bench presses followed immediately by rows to complete your first set and so on and so on. Don't get caught up in which specific exercises you do. However, by doing your workout with these pairings and

super setting each set (change order every other workout such as rows then bench press on following work-out) it will give you a change of pace.

Tips to Increase Bench Press

- Plant your feet firmly on the floor and drive them hard into the floor;
- Use a thumb lock grip (wrap thumbs around the bar);
- Vary your bench press grip width from workout to workout. However, the optimal grip is one that results in a 90 degree angle at your armpit and 90 degree at your elbow when the bar touches your chest at the bottom;
- Don't press the bar in a curved motion—go straight up;
- Incorporate deep dumbbell work; and
- Pull your shoulder blades together and contract your lats.

Nutrition

Meat cuts with "loin" in them tend to have less fat such as pork tenderloin. If you buy ground turkey—ensure it is ground turkey "breast". Remember—"FAT FREE" does not mean healthy. Take a look at how much sugar is in fat free yogurt then compare this with natural unflavoured yogurt that you can add fruit to and you will have a low fat healthier snack !

Food For Thought

While reviewing the recruits' fitness reports, I constantly see them working on their strengths rather than their weaknesses. For example, a thin recruit that can run is spending three times the time and energy on aerobic exercise, rather than strength exercises. Spending time on our strengths can often be more fun, however, by spending time on our weaknesses we will become better rounded. How do you spend your fitness related time - on your strengths or weaknesses?

Note-able Quote

If there's no wind, row—Unknown

CRIMINAL HARASSMENT: CONTENT MATTERS

R. v. Scuby, 2004 BCCA 28

The accused left nine telephone messages for a police detective who was a member of the Domestic Violence Unit. The detective had been investigating the accused as a suspect in a break and enter that occurred at his former girlfriend's mother's home. Five messages, all in short succession, were left on the mother's answering machine and the other four, again in rapid succession, were left on the detective's workplace voice mail. The messages were threatening in tone against the detective and his family. The accused was charged with criminal harassment for the repeated communication. However, in British Columbia Provincial Court he was acquitted. The trial judge concluded that the content of the messages, rather than their repeated nature, led to the detective's fear. In the judge's view, the harassment envisioned by s.264 must be grounded in the "repeated communication", not the words used.

An appeal by the Crown was successful. In setting aside the acquittal and ordering a new trial, Justice Prowse of the British Columbia Court of Appeal found the trial judge erred in separating the quantity of the calls from their content in determining whether the detective was harassed. A court must consider the content, context, and repetitious nature of the calls, rather than the number of calls by itself. Justice Rowles, in an accompanying opinion, added, "[t]he 'communicating' found in s.264(2)(b) comes from the verb to communicate, or to share or exchange information or ideas. The act of communication means the transmission of information, thought or feeling so that it is received and understood. While it may not be so in every case, generally an examination and consideration of the content of the message would be essential to the

determination of whether a complainant was 'harassed' by the repeated communication." In other words, the content, not just the number of calls, is relevant in assessing whether a person is harassed.

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

OFFICERS DOWN

Sgt. Dave Schmirler, Abbotsford Police

At around 2am on Monday February 16, 2004 officers Matthew Bowens (21 years) and his partner Jennifer Fettig (26 years) initiated a traffic stop on a rusted 1989 Chev pickup owned and driven by Eric Lee Marshall (22 years). Marshall had apparently tried to pick up a local prostitute. Although taught a technique in the academy where one officer remains at the car watching the occupant(s), both officers returned to their patrol car to initiate computer queries. Neither must have sensed any danger as they did not notify dispatch of the stop. The press would later call it a "routine traffic stop".

Had the computer check been completed the officers would have learned that Marshall had no criminal record. However, they would not have known that he had recently decided to set up a drug operation and was in possession of a street purchased .40 caliber Glock. As both officers sat in their car Marshall exited his truck and went to the rear. From here he began firing into the patrol car, blowing out the window and wounding Bowens. Marshall fled to a nearby fence line. Bowens exited his car, called for assistance, and moved to cover at the rear of his patrol car. This was the last broadcast that he would make. From a distance Marshall continued to fire at the officers hitting Fettig in the face as she sat in the passenger side of the car. Bowens would be shot nine times, including a shot to the head. Marshall took Bowen's gun and fled the scene.

Matt Bowens would die at the scene and Jennifer Fettig would die hours later. Investigators found 22 x .40 calibre shell casings. Published reports indicate neither officer returned fire. The shooting was partially captured by the in-car camera.

With the deaths of officers Fettig and Bowens, a disturbing trend of officers being killed together continued. Since January 2003, 14 officers (seven pairs) have been killed in North America.

February 2003—Alexandria, LA

PFC David Ezernack and patrolman Jeremy Carruth were shot and killed during an SRT operation to arrest a man who had ambushed an officer the previous day, firing an automatic rifle into the car. The suspect opened fire on SRT members effecting the arrest.

March 2003—New York, NY

Detective James Nemorin and Detective Rodney Andrews were involved in the undercover purchase of a Tec–9 gun when they were each shot in the head as they sat in their vehicle. Surveillance units, who had been forced to leave their view of the officers, heard the exchange on the audio hook up.

June 2003—Fayette, AL

Corporal James Crump and Officer Arnold Strickland (along with a police dispatcher) were killed in the booking area of the Fayette Police Department when a vehicle theft suspect grabbed one of the officers' service guns.

December 2003—Abbeville, SC

Sergeant Daniel Wilson was taken hostage and shot while attending to a property dispute. The suspects called police to report that an officer had been shot—then opened fire on two other officers responding to the call. Constable Donnie Ouzts was struck and killed. The attack was pre-planned.

December 2003—Mishawaka, IN

Corporal Thomas Roberts and Patrolman Bryan Verkler were shot and killed after they attempted to lure a "shots fired" suspect out of a house. The suspect exited and opened fire on officers, killing both.

January 2004—Athens, AL

Officer Anthony Mims and Sergeant Larry Russell were ambushed and killed while responding to a call of a man wanting to speak with the FBI. Mims was shot and killed in his car as he arrived and Russell was shot and killed as he attempted to get out of his car.

For those of us in Canada, do we write this trend off as a "United States" problem? Do we remember Constable Denis Strongquill? He and his partner approached three occupants in a truck because they matched the description of armed robbery suspects. The suspects shot at the police car, chased it into the town of Russell, and rammed it in front of the detachment office. Constable Strongquill was killed because he was trapped in his police vehicle after suspects rammed it. He never had a chance to exit and was unable to return fire due to a pistol malfunction.

For police officers and trainers, this disturbing trend forces us to analyze what is happening. Are we still thinking tactically at every call? Do we abandon safety procedures in favour of efficiency and convenience? Is there a better way to do things? More importantly, are we prepared to defend against a determined adversary waiting in ambush or that is willing to initiate an armed or relentless assault? Do we really train to expect the unexpected? Do we in fact expect the unexpected on every call? As determined suspects, sometimes with military training or mental illness, ambush and attack officers with incredible lethal force we have to elevate our thinking. Do we think we have safety in numbers at the expense of tactics?

I don't know the answers. I can only try and change my mindset and help those I am responsible for. I only hope that the deaths of others would cause us to think and reflect.

STRAIGHT SHOOTIN' FROM THE BENCH

"Surely, the officer was not supposed to read the appellant his [s.10 Charter] rights while he was asleep."—Madame Justice L'Heureux-Dubé in *R. v. Feeney* (1997), 115 C.C.C. (3d) 129 (S.C.C.)

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"It would be impractical to expect of an officer swearing an information [for a search warrant] in these circumstances the precise prose of an Oxford grammarian, the detailed disclosures of a confessional and the legal knowledge of a Rhodes scholar."—Justice Gibbs in *R. v. Melenchuk* (1993), 24 B.C.A.C. 97 (B.C.C.A.)

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"No one but lawyers and judges would have any difficulty deciding that the appellant, whom I shall call ``the accused'', imported nearly a pound of heroin into Canada when he arrived at the Vancouver International Airport… This would especially be so when, upon being informed by a customs officer that he would be X-rayed, the accused admitted, as was later confirmed, that he had that quantity of packaged heroin in his stomach and intestines."—Chief Justice McEachern in *R v. Oluwa* (1996), 107 C.C.C. (3d) 236 (B.C.C.A.)

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"[Proof beyond a reasonable doubt and the presumption of innocence] are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law."—Justice Cory in *R v. Lifchus,* [1997] 3 S.C.R. 320 (S.C.C.)

POLICE PERMITTED TO PROTECT CRIME SCENE

R. v. Edwards & Edwards, 2004 ABPC 14

The police were investigating a homicide near a nightclub and cordoned off the area using yellow tape. Several vehicles were parked within the restricted area and officers were posted to keep persons out of the crime scene until identification officers had cleared. The two Edwards brothers sought to have access to their vehicle, which was parked within the taped off area, but were denied. They insisted they had the right to enter, argued with police, and yelled obscenities. A crowd began to gather and the two brothers were subsequently arrested for causing a disturbance.

At their trial in Alberta Provincial Court, Justice Allen examined whether it was within the scope of police duties to prohibit public access to property within the boundaries of the crime scene. The Justice concluded that restricting persons from accessing their property on city streets amounted to an interference with their personal liberty, but was justified under the police common law duty to investigate crime.

In this case, the accused's vehicle was legally parked and had the misfortune of becoming part of a temporary crime scene. However, "[p]reventing the accused from intruding upon an area that may have contained incriminating evidence was a justifiable use of police powers associated with investigating the murder…Investigating crime is crucial to apprehending suspects, and prosecuting offenders. The temporary inconvenience to the accused was necessary to properly secure evidence from the scene," ruled the justice. Both accused were convicted.

Complete copy available at www.albertacourts.ab.ca

SAFETY SEARCH OF DETAINEE REASONABLE

R. v. Davis, 2004 ABCA 33

The police responded to a call that the accused was engaged in several drug transactions. The attending officers saw the accused, who matched the description of the suspect. He was detained for investigation, handcuffed, and frisk searched. A bulge was detected around his shin, which turned out to be a cardboard Pringles chip container. Police opened the container to look for weapons and found it to contain crack cocaine. The accused was arrested, charged, and convicted in the Alberta Court of Queen's Bench with possession of cocaine for the purpose of trafficking. However, he appealed to Alberta's highest court, arguing the detention and search were unlawful.

In a 3:0 judgment, the Alberta Court of Appeal unanimously dismissed the appeal. The police had articulable cause to detain the accused to investigate whether he had just committed a series of drug deals. Since he was properly detained, the police were entitled to search him for safety reasons provided it was done in good faith. The appeal court rejected the accused's assertion that the only way the chip container could be searched is if the officer expected to find a weapon inside. The trial judge found it reasonable and prudent for the officer to open the container and determine its contents for safety reasons. Given the size and utility of the canister as a hiding place for a weapon, the trial court's ruling was not in error said Justice Berger. In all the circumstances the search was reasonable.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

An ounce of action is worth a ton of theory— Friedrich Engels

SUBTLE, BUT SIGNIFICANT NUANCE RESULTS IN BREACH

R. v. Webster, 2004 BCPC 19

The accused was read the breath demand and advised of his right to counsel from the standard police issue card after being stopped driving by police. The accused said he understood and told the officer he wanted to speak to a lawyer. The following conversation followed:

Officer: Do you want a lawyer?
Accused: Not at this point.
Officer: Will you want to?
Accused: Probably. I don't know.
Officer: Do you want counsel, either one you know or Legal Aid?
Accused: I'm from out of town. I don't know any in town.
Officer: There are several local lawyers, if you want to choose one, or there's Legal Aid that can be contacted. Is Legal Aid okay for you?
Accused: Legal Aid will be fine.

He was taken to the police station and spoke with duty counsel in private for about six minutes. Two breath samples were taken and a number of questions were asked in between the samples—he was charged with impaired driving and over 80mg%. In British Columbia Provincial Court, Justice Blake found the accused's right to counsel under s.10(b) of the *Charter* had been violated. In the judge's view, the accused erroneously believed his choice of counsel was limited to local lawyers, a fact the officer should have known when the accused said he did not know any in the area. The officer had a duty to correct this faulty assumption as part of the proper informational component of s.10(b). Nevertheless, the evidence was admitted because its admission would not bring the administration of justice into disrepute.

Complete case available at www.provinicalcourt.bc.ca

MANITOBA's TOP COURT UPHOLDS WARRANTLESS ENTRY & ARREST

R. v. Guiboche, 2004 MBCA 16

The police responded to a home where the body of a murdered woman had been found—she was brutally beaten to death. Her live-in boyfriend, the accused, was the suspect, but had fled the scene before police arrived. The police guessed he may have gone to his father's home, so several members attended to this house about three hours after finding the body. A police officer "snuck up" through the yard, entered an open porch, and knocked on the back door, which was answered and opened by the father. The officer stepped over the threshold of the door and said they were looking for the accused. The father told police he was upstairs and suggested they be quiet. After further discussion, the police went upstairs and found the accused asleep. He was arrested and articles of clothing were seized as evidence. Fingerprints, hand swabs, breathalyzer samples, and photographs were also taken following his arrest.

At trial in the Manitoba Court of Queen's Bench, the judge found the police had exigent circumstances, as defined under s.529.3 of the *Criminal Code*, to enter the dwelling-house without a warrant and effect the arrest. The officer testified he was concerned about officer safety and the preservation of evidence—such as blood, tissue, and fluids—from the extremely violent murder scene. The judge was not critical of the police for stealthing to the back door, stating they were not expected to announce their presence by a "march through the yard with a brass band." The evidence was admitted and the accused was convicted by a jury. The accused appealed his conviction to the Manitoba Court of Appeal arguing, among other grounds,

that the trial judge erred in finding the evidence properly admissible.

Justice Freedman, authoring the unanimous judgment, held that the trial judge erred in finding s.529.3 applicable in this case. As a pre-condition to allowing warrantless entries into dwelling-houses to effect arrests, s.529.3 requires the police to have reasonable grounds that the person to be arrested is present inside. In this case, the police admitted they had no grounds to believe the accused was there until after they entered. Prior to that point, it was only a possibility he might be there.

The Entry and Arrest

The appeal court did not end its analysis in considering the application of s.529.3. The justices went on to conclude that the warrantless entry and arrest was nonetheless lawful—through informed consent. Justice Freedman was satisfied that the accused's father gave permission by his actions for the police to enter to look for the accused—even though there were no actual words of consent. The consent to enter was given by a person who had a reasonable expectation of privacy in the dwelling-house, which obviated the need for a warrant. The accused's father was the homeowner and as the court noted, "was an active participant assisting the police, and his conduct and communication showed more than mere acquiescence or compliance." Justice Freedman stated:

> Once [the officer] made clear the purpose of his attendance (i.e., they were looking for the accused), [the accused's father] could have said nothing, or he could have declined to speak, or he could have questioned [the officer], or he could have asked [the officer] to leave. Instead, without any further action by [the officer], [the accused's father] told him that the accused was upstairs, and not to say anything. Moreover, he entered into a discussion with [the officer], and provided him information about the layout of the upstairs, where the accused was. This was clearly in connection with the purpose of the visit. [The accused's father] knowingly and willingly facilitated the police's achieving their objective. [para. 58]

Once the police found the accused, they were entitled to arrest him because they had the necessary reasonable grounds to do so required under s.495(1) of the *Criminal Code*. As for stepping over the doorway threshold and the impact it had on the legality of the arrest, Justice Freedman stated:

> It is clear to me that in relation to their entry into the house, the police acted in good faith, without trickery, without misleading…and, importantly, without any degree of force whatsoever (unlike in *Feeney*). They knocked on the door, and [the accused's father] opened it, stepping back. [The officer] stepped over the threshold, without any words of invitation by the homeowner to do so. That act, in and of itself, is insufficient to render unlawful what followed. [para. 56, references omitted]

A warrant to enter was unnecessary and the arrest was therefore lawful.

The Search

A person can only have standing to challenge the validity of a search and seizure if they can first establish they had a reasonable expectation of privacy. Although a homeowner has a reasonable expectation of privacy in their own home, a visitor, depending on the circumstances, may not necessarily have the same expectation. "For all persons, their dwelling-house is, at law, their castle, but it is not necessarily anyone else's castle", said Justice Freedman.

In this case, the accused did not testify or call evidence. The only evidence before the court established that he did not live with his father, but rather lived at the victim's residence for seven to eight years. The accused failed to establish any reasonable expectation of privacy at his father's house and his s.8 *Charter* rights were not engaged. His father's house was nothing

more than a "hideout" and the evidence was properly admitted at trial. His appeal was dismissed.

Complete copy available at www.canlii.org

OFFICER's ALS CAUSED BY WORK INCIDENT

WCAT-2003-04407

In a landmark decision, British Columbia's Worker's Compensation Appeal Tribunal has held that a work related injury triggered amyotrophic lateral sclerosis (ALS)—a neuromuscular disease commonly known as Lou Gehrig's Disease—in an on-duty police officer. The officer was injured in an altercation after he was assaulted while responding to a domestic disturbance—his left shoulder hit the ground when tackled by the suspect. He applied for compensation, describing injuries to his shoulder, neck, back, hands, knee, and head. He was initially diagnosed with a non-disabling soft tissue strain and the claim was accepted by the Worker's Compensation Board (WCB) on a health claim basis only, with no time loss from employment. However, the symptoms persisted—including ongoing weakness, loss of coordination, spasms, muscle wasting, and slurred speech. After further medical examination the officer was diagnosed with ALS. The Board concluded that the shoulder strain was the only compensable injury and that the other ongoing problems and disability were related to the ALS, and were therefore non-compensable.

The officer appealed to the Worker's Compensation Review Division. The review officer found the cause and effect relationship between the incident and the onset of ALS had not been explained. Relying on various medical opinions that muscle wasting was too advanced to connect it to the assault and that research had not demonstrated a reliable correlation between ALS and trauma, in the review officer's view there was less than a 50% probability the officer's ALS had been caused or triggered by the assault.

The officer further appealed, this time to the Worker's Compensation Appeal Tribunal—the final level of appeal for WCB claims. An expert gave oral evidence that the trauma suffered during the incident likely triggered the ALS based on the following:

- the worker's young age—just over 30 years—only 10% of ALS victim's are under 40;
- the temporal relationship between the onset of the symptoms and the injury; and
- the symptoms first appearing in the injured area and spreading outward.

The expert also testified that there can be tremendous variability in the speed of symptom progression—the rapidity of onset and deterioration could be attributable to the officer's young age. In this case, the tribunal had two opposing positions regarding causation—compelling statistical information and studies against an expert's medical opinion. In favouring the expert's opinion over statistics, the Tribunal varied the Review Division's decision and ruled that the compensable work-related assault had precipitated the onset of the ALS.

Complete case available at www.wcat.bc.ca

Canada's Ten Largest Municipal Police Forces (2003)

Police service	Police officer total	Population per Officer
Toronto	5,315	492
Montreal	4,070	455
Peel Regional	1,454	718
Calgary	1,442	635
Edmonton	1,225	544
Winnipeg	1,211	522
Vancouver	1,192	487
Ottawa	1,107	738
York Regional	973	841

Source: Statistics Canada

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Overview

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Who Should Attend and Why?

This workshop is designed for corporate leaders or individuals who are leaders of tomorrow:

- Senior leaders and commissioned officers of municipal police departments and the RCMP interested in meeting their leadership challenges by anticipating and influencing change rather than merely reacting to it.
- Senior managers in justice and public safety.
- Senior managers in the public sector.
- High potential individuals and mid-career professionals ready to advance their leadership skills and desiring to make a significant difference.

You will leave this workshop better understanding yourself, the direction of your organization, and how to successfully lead your employees.

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