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IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On May 17, 2004, 38-year-old Cobourg Police Service Constable Chris Garrett was stabbed to death while investigating suspicious activity in an abandoned hospital. Two other officers had just left the scene when they heard gunshots from the area. When they returned to the location they found Constable Garrett suffering from a stab wound to his neck. He was taken to a local hospital where he died from his wounds. An 18-year-old suspect was arrested later in the day. He is survived by his wife and two children.

On May 23, 2004, 32-year-old Ontario Provincial Police Constable Tyler Boutilier died from injuries sustained in an automobile accident while responding to a call near Seeleys Bay. He was driving southbound on Highway 15 when his patrol car was struck by a vehicle driving the opposite way. He was transported to a local hospital where he succumbed to his injuries. Constable Boutilier had served with the Ontario Provincial Police for 4 years and was a member of the Emergency Response Team. He is survived by his wife.

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

HIGH SPEED PURSUIT IS A *YCJA* 'VIOLENT OFFENCE'

R. v. C.D.K., 2004 ABCA 77

A young person pleaded guilty to dangerous driving and possession of stolen property after he stole a vehicle and became involved in a 30 minute high speed pursuit. He ran two red lights, a stop sign, drove at speeds up to 120km/h in posted 60km/h zones, swerved to avoid traffic, and often drove on the wrong side of the road. Despite driving over a spike belt deflating all four tires, the accused did not stop until he collided with a fence.

At sentencing, the judge classified dangerous driving as a "violent offence" under the *Youth Criminal Justice Act* (*YCJA*), thereby permitting custodial sentencing under s.39(1)(a). In her view, "the violence of a car, speeding through the city chased by the police is, by anyone's definition, violent." The judge imposed a six month term of deferred custody, followed by one month probation. The accused appealed to the Alberta Court of Appeal arguing that the custodial sentence was inappropriate.

Sentencing a youth to a custodial sentence involves a two-stage process. First, the offence must be a "violent offence", or other classification under s.39(1) of the *YCJA*. Second, all sentencing alternatives short of custody must be considered before custody is imposed. In holding that the offence in this case fell within the parameters of a "violent offence" under the *YCJA*, Justice Ritter for the Alberta Court of Appeal stated:

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HIGHLIGHTS IN THIS ISSUE

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 e-mail Sgt. Mike Novakowski at mnovakowski@jibc.bc.ca

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> [I]f it is reasonably foreseeable that criminal conduct may result in bodily harm that is more than merely trifling or transitory, the offence is violent for the purposes of s. 39(1)(a) of the [YCJA]. In this instance the potential for harm is obvious. High speed chases are very dangerous and can easily result in serious injury or death. I therefore conclude that the sentencing judge did not err when she determined that the offence was violent and that a custodial sentence was available. [para. 7]

Complete case available at www.albertacourts.ab.ca

DETENTION DEPENDS ON CIRCUMSTANCES

R. v. Nicholas,
(2004) Docket:C36906, C36188, C36025 (Ont.C.A.)

The accused was approached as a person of interest in the investigation of a series of break and enters and sexual assaults committed by a person nicknamed the "Scarborough Bedroom Rapist". Acting on a Crime Stoppers tip, police attended his home and were directed upstairs to his room. He came out of the bathroom, wearing only a towel, and was told by the detectives about the investigation, that he was a person of interest, and that they wanted to speak with him. He agreed, but wanted to get dressed first.

After moving to a different room in the house at the request of police, a detective read a consent form and the accused agreed to provide a buccal swab to be used for DNA analysis relative to break and enter investigations occurring between June 23 to August 21, 1999. The detective again read the consent form—this time with a tape recorder on. The accused said he understood, was told he could speak with a lawyer or anyone else, and was asked if he had any questions. He signed the form, swabbed his

mouth, and turned the samples over. The police left, the samples were analyzed, and a match between the accused's DNA and the DNA left at two crime scenes was established.

A search warrant was subsequently obtained for his house and a handgun was found in his bedroom closet. The accused was arrested and charged with 13 criminal counts related to three incidents. Later, the police realized that the time frame outlined in the consent excluded one of the break and enter incidents occurring on September 13, 1999. To rectify this, they obtained and executed a DNA warrant under s.486.05 of the *Criminal Code*. Again his DNA matched the crime scene profiles.

At his trial in the Ontario Superior Court of Justice, the accused argued that he was detained at his home and improperly informed about his right to counsel contrary to s.10(b) of the *Charter*. Further, he submitted that he did not provide an informed and voluntary consent to the taking of his DNA sample. Thus, he contended the seizure was unreasonable under s.8 of the *Charter*.

The trial judge rejected both of these arguments. First, he found the accused had not been detained—the police never assumed physical control over him and any directions given were about where the conversation would take place. With respect to consent, the judge concluded it was both voluntary and informed. However, the court found the accused's s.8 *Charter* right was breached by the use of the DNA sample for the September 13, 1999 offence—because it was outside the time frame specified in the consent—but the evidence was admitted under s.24(2) of the *Charter* anyway.

The accused appealed his conviction to the Ontario Court of Appeal arguing he was detained, that his right to counsel under s.10(b) of the *Charter* was violated, and that his consent in providing the DNA sample was not valid.

The Detention

Even though a person is not physically restrained, they still may be subject to a detention within the meaning of the *Charter* if they are "psychologically detained". A detention of this nature arises when the police give a person a demand or direction and the person submits or acquiesces to the deprivation of their liberty because they reasonably believe they have no choice but to do so. However, in determining whether a person feels compelled to comply with the police their testimony is often a relevant—but not always necessary—factor. In this case the accused did not testify about whether he reasonably felt his freedom had been restrained, leaving it open to the trial judge to decide whether a detention occurred. In finding no basis for disturbing the trial judge's conclusion, Justice Abella, authoring the unanimous judgment, stated:

> There is no evidence of any kind in this case indicating that [the accused] felt psychologically compelled to speak to the police or to provide a sample. [The detective] testified that the police had not made any demand of [the accused], nor had they ordered him to do anything, and [the accused] did not express any concern or confusion either before sitting down at the kitchen table or after having the consent form read to him.
>
> While it was undoubtedly disconcerting to [the accused], dressed in a towel, to find the police waiting for him outside his bathroom door, this alone is an insufficient fact to ground a finding of detention given what happened next. He was permitted to change, and while it is true that the police waited for him outside his bedroom while he got dressed, the only direction they gave him was that they speak in the kitchen because the light in his bedroom was not working.
>
> The trial judge found that the suggestion by the police that they move to the kitchen was not a demand or direction, and that the

> police were polite and non-threatening to [the accused]. The consent form, which was read twice to [the accused], clearly stated that he could refuse to provide the sample. [The accused] was not arrested at the end of the interview and the police continued their investigation. The police were conducting the consent DNA sampling procedure with other residents and had over one hundred persons of interest. [para. 42-44]

The Consent

When the issue of consent arises in the context of a s.8 *Charter* argument the onus is on the Crown to establish, on a balance of probabilities, that the accused waived his constitutional protection to be secure against unreasonable search or seizure. The test for consent has been previously laid down by the Ontario Court of Appeal in *R. v. Wills* (1992) 70 C.C.C. (3d) 529 (Ont.C.A.) and involves the following six factors:

- Consent was given, express or implied;
- The person consenting had the authority to give consent;
- The consent was voluntary—free from police oppression, coercion, or other conduct negating the freedom to choose;
- The person was aware of what the police wanted to do;
- The person was aware of the right to refuse the police request—which may require, in some cases, expressly telling someone they have the right to refuse; and
- The person was aware of the potential consequences of giving the consent.

In addressing these aspects, Justice Abella held:

> The application of the factors in Wills to this case demonstrates that the Crown has established that [the accused] consented to the seizure of his DNA, at least in relation to the [two incidents occurring between June 23 to August 21, 1999]. The police informed [the accused] twice that they wanted to speak to him about a series of break-ins and sexual assaults. [The accused] was informed that the police were investigating a series of assaults, that he was a person of interest, that the sample would be scientifically analysed, and that it would be compared with evidence obtained from the crime scenes. The police explicitly told [the accused] that this comparison was to enable the police to identify the person responsible for the crimes and that the DNA sample could be used in criminal proceedings against him. The consent form stated that the police were seeking permission, and that [the accused] did not have to provide the sample. [para. 50]

The trial judge's ruling respecting the September 13, 1999 incident was also well reasoned and it was unnecessary to interfere with it. The accused's conviction appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

15 MINUTE ASD DELAY NOT REQUIRED IN ALL CASES

R. v. Einarson,
(2004) Docket: C40288 (OntCA)

The accused was stopped by police after she was seen driving out from a bar parking lot, go towards a R.I.D.E. spot check, and then make a u-turn before reaching the checkpoint. An odour of alcohol was detected on her breath, her eyes were red and glassy, and her speech slightly slurred. In response to questioning, she twice denied drinking. A demand for a breath sample into an approved screening device was made under s.254(2) of the *Criminal Code* and the accused failed. She was arrested for over 80mg%, read the breath demand, and subsequently provided two breath samples over the legal limit.

At trial the officer testified he was aware that if a person had consumed alcohol within 15 minutes of the roadside sample being taken, residual mouth alcohol could render a "false" fail and the test would be inaccurate (unreliable). In the officer's view, the reason he asked the questions about alcohol consumption—even though the accused could have lied—was because he believed he was obligated to eliminate the possibility the accused had consumed alcohol within the preceding 15 minutes before immediately administering the test. The trial judge rejected the accused's arguments that the officer could not rely on the fail reading because he should have waited 15 minutes to exclude the possibility alcohol was recently consumed. The accused was convicted.

On appeal to the Ontario Superior Court of Justice, the accused's conviction was set aside and a new trial was ordered. Superior Court Justice Spiegel ruled that because the officer did not know the accused had not consumed alcohol within the 15 minutes prior to the sample being taken, he should have waited 15 minutes to avoid the possibility of a false fail. Thus, the officer could not rely upon the potentially unreliable test result as forming part of his reasonable and probable grounds for the arrest and breathalyzer demand. However, a new trial was ordered to determine if there was still enough reasonable and probable grounds absent the ASD fail reading.

The Crown appealed the Superior Court order to the Ontario Court of Appeal. The question on appeal became whether the officer was entitled to rely on ASD results in forming reasonable and probable grounds when he knew there was a possibility that the accused had consumed alcohol within the 15 minutes prior to the administration of the test which, if she had, would result in an inaccurate test.

Justice Doherty, authoring the unanimous judgment of the Ontario Court of Appeal, first summarized the impaired driving investigative regime under the *Criminal Code*. He wrote:

> Section 254(2) is stage one of the two-stage investigatory process set out in s. 254 intended to facilitate the detection, arrest and conviction of those committing drinking and driving offences. Section 254(2) allows a police officer, on mere suspicion that a driver has alcohol in his body, to demand that the driver provide a sample of breath into an approved screening device. If the driver refuses to provide that sample, he or she may be charged with an offence under s. 254(5) of the Criminal Code. If the driver provides the sample and registers a "fail" on the screening device, there are no immediate criminal consequences. It is not a crime to fail the screening device, nor can the results be used to prove that a driver was impaired or that his or her blood/alcohol level was over the legal limit. However, if the driver registers a "fail" on the screening device, that result either alone or in combination with other observations made by the officer may provide the officer with reasonable and probable grounds to conclude that the driver had committed a drinking and driving offence. If the officer comes to that conclusion, he or she may arrest the driver and make a breathalyzer demand under s. 254(3). Refusal to comply with that demand absent reasonable excuse is a criminal offence under s. 254(5). If the driver complies with the breathalyzer demand, the results may be admissible against the driver on a charge of impaired driving or driving while having a blood/alcohol level over the legal limit.
>
> Section 254(2) provides a ready, quick and reliable means by which an officer can determine whether there are reasonable and probable grounds to arrest a driver for a drinking and driving offence and make a breathalyzer demand. The ready availability of the roadside screening device also has a valuable deterrent effect. Clearly, the roadside screening device serves these salutary purposes only if it yields accurate information.
>
> Although a driver who is subject to a demand under s. 254(2) is detained by the police, that

> section has been held to be a justifiable limit on the driver's right to retain and instruct counsel under s. 10(b) of the Charter…Section 254(2) is justified under s. 1 of the Charter as a necessary response to the pervasive problem of drinking and driving. In holding that s. 254(2) is a justified limitation on individual constitutional rights, the courts have stressed the requirement in the section that the sample be taken "forthwith" thereby significantly limiting the duration of the individual's detention. An unwarranted delay, even if relatively brief, will take the demand outside of the ambit of s. 254(2) and render the detention unconstitutional…
>
> A police officer who has cause to make a demand under s. 254(2) must administer the test "forthwith" if the detention is to remain within constitutionally permissible limits. At the same time, it is well-known by police officers that where a driver has consumed alcohol in the 15 to 20 minutes before the test is administered, the result of the test may be unreliable because of the presence of residual mouth alcohol. The whole purpose of administering the test under s. 254(2) is to assist the officer in determining whether there are reasonable and probable grounds to arrest the driver for a drinking and driving offence. If the officer does not, or reasonably should not, rely on the accuracy of the test results, it cannot assist in determining whether there are reasonable and probable grounds to arrest. Administering the test without delay in those circumstances would be pointless and would defeat the purpose for which the test is administered. [paras. 11-14, references omitted]

Justice Doherty concluded that any assessment of the timing of the breath samples requires a flexible approach on a case-by-case basis. Rather than demanding the officer wait 15 minutes before administering a test when there is a mere possibility a driver had consumed alcohol recently, the court must focus on the reasonableness of the officer's belief as to the accuracy of the test when it was administered. In this case, the unreliability of the test was speculative at best, considering what information the officer had. In summary, the court held:

> If an officer honestly believes that some delay is necessary to obtain an accurate sample and if that belief is reasonable in the circumstances, a test administered after an appropriately brief delay remains within the scope of s. 254(2). The fact that an officer had observed the driver leaving a bar moments earlier is a circumstance that has relevance to the question of whether it was reasonable for the officer to delay the taking of the test in order to obtain an accurate sample.
>
> The flexible approach to s. 254(2) accepts that different officers may assess similar circumstances differently in deciding whether some brief delay in the administration of the s. 254(2) test is necessary. Indeed, the reasonable and probable standard must reflect the particular officer's assessment tested against the litmus of reasonableness. In considering whether to rely on test results absent some brief delay, one officer may give more significance to the fact that the driver was seen leaving a bar just before he or she was stopped (particularly where the driver admits drinking in that bar) than another officer might give to that fact. The first officer might delay the taking of the test for an appropriately short time while a second officer may proceed without delay. Neither officer has necessarily acted improperly. If the officer decides to delay taking the test and that delay is challenged at trial, the court must decide whether the officer honestly and reasonably believed that an appropriately short delay was necessary to obtain a reliable reading. If the officer decides not to delay the administration of the test and that decision is challenged at trial, the court must decide whether the officer honestly and reasonably believed that he could rely on the test result if the test was administered without any delay.
>
> [T]he mere possibility that a driver has consumed alcohol within 15 minutes before taking the test does not preclude an officer from relying on the accuracy of the statutorily approved screening device. Where an officer

> honestly and reasonably concludes on the basis of available information that he can form no opinion as to whether the driver consumed alcohol within the prior 15 to 20 minutes, the officer is entitled to rely on the accuracy of the statutorily approved screening device and administer the test without delay. That is not to say that another officer might not assess the same situation differently and have legitimate concerns about the reliability of a test administered without a brief delay and act accordingly. In each case, the officer's task is to form an honest belief based on reasonable grounds about whether a short delay is necessary to obtain a reliable reading and to act on that belief. [paras. 33-35, references omitted]

The appeal was allowed and the conviction and sentence imposed at trial were restored.

Complete case available at www.ontariocourts.on.ca

CONTEMPORANEOUS RECORDING DESIRABLE, BUT NOT LEGALLY REQUIRED

R. v. Ducharme, 2004 MBCA 29

The accused was arrested as the "get-away driver" of a car used in a shotgun robbery of a Winnipeg hotel lounge. He was the last of five suspects apprehended in the robbery. He was arrested, handcuffed, cautioned, and transported to the police station by two police officers. One of the officers made notes of any conversations during this interval. The accused was paraded before the station duty sergeant and then placed in an interview room for an hour before being turned over to two Major Crimes Unit detectives. He was interviewed for 35 minutes by the detectives, which was recorded in five pages of writing. Following this question and answer interview, the accused said he was willing to give a more complete statement on videotape. He subsequently provided a 26 minute statement that was contemporaneously recorded on video.

At trial, all three statements—the notes made during the arrest and transport, the written preliminary interview, and the videotaped statement—were relevant to the charges against the accused. However, the accused argued that the Crown had failed to satisfy the confessions rule in establishing the statements made to police were voluntary beyond a reasonable doubt.

The accused testified the police extracted his statements by using physical force and intimidation—thus creating an atmosphere of oppression—by threatening to charge his common law wife, which would cause Child and Family Services to take his children. After weighing credibility, the trial judge ruled the statements admissible and a conviction was entered. However, the judge was troubled with the fact that the first interview was not recorded on audio or video tape, even though the equipment and facilities were readily available.

The accused appealed to the Manitoba Court of Appeal arguing, in part, that the trial judge erred in admitting the statements because no contemporaneous recordings were made—other than the final interview—to assess the voluntariness of the statements. In short, the accused was suggesting that without an electronic recording it must automatically be concluded the confession was improperly obtained.

Justice Kroft, delivering the judgment of the Manitoba Court of Appeal, dismissed the accused's appeal. In summarizing the current state of recording interviews, he noted:

> It is only recently that we reached a stage in criminal investigation where it can be said that when an accused person is in police custody, there will usually be no reason why interviews and interrogations cannot be recorded electronically and, more specifically, videotaped. Such a requirement is economically and technically feasible. A statutory requirement that videotaping, perhaps subject to exceptions, becomes a prerequisite of admissibility and would be capable of

> enforcement. Indeed, the Homicide Department of the Winnipeg Police Service already follows a self-imposed protocol for videotaping the statements that go on in its interview rooms.
>
> If such a policy were enshrined in law, it would protect accused persons from actual or threatened force or intimidation. At the same time, it would limit the possibility of police misconduct and protect them from false accusations of abuse or oppression. The trouble for all of us, including trial and appellate courts, is that there are no statutory provisions or Supreme Court dicta imposing the policy which we are now addressing. [paras. 22-23]

Although concurrent videotaping of a confession is usually desirable, the court rejected the contention that the contemporaneous videotaping of an interview was a legal requirement before it could be declared voluntary. In other words, "non-recorded interviews need not be automatically treated as suspect". However, there are definite advantages to videotaping statements. Verbal and physical interactions are recorded allowing a judge to know exactly what has transpired, greatly assisting them in assessing voluntariness. Any air of suspicion can be alleviated by providing a neutral, reliable, and accurate recording. After reviewing case law and other materials, Justice Kroft held:

> [T]he case before us has never been about the desirability of videotaping. The trial judge forcefully expressed his views and lest there be any doubt, it seems inconceivable to me that one could argue against the practice. The difficulty is that until either the Supreme Court articulates or Parliament legislates the duties of the police and lays out a protocol to be followed, the common law definition of voluntariness will remain in effect. That being the case, it cannot be said that the failure to videotape or electronically record will automatically mean the exclusion of the evidence on a voir dire.
>
> .....
>
> All of the foregoing leads me to the inevitable conclusion that the trial judge dealt with his dilemma in the only way he could. The concurrent video transcription of confessions is definitely to be preferred. It is, however, not an absolute legal requirement. The admissibility of confessions and inculpatory statements must be determined by a trial judge on the conclusion of a voir dire. If his or her findings of fact are not patently unreasonable and, if no error in law can be found, then an appellate court ought not to intervene by reason only of its preference for a recorded statement and the conviction appeal should fail. [para. 46, 48]

Complete case available at www.canlii.org.

WARRANTLESS ENTRY LAWFUL TO INVESTIGATE ALARM

R. v. Johnston, 2004 BCCA 148

At about 8pm a police officer responded to an alarm at a multi-unit commercial building. He arrived about three minutes after the dispatch, although unknown to the officer 45 minutes had elapsed from the time police received the alarm. He walked around the building to determine if the doors were locked, knocked on a door, and was admitted by a tenant, Mr. Ghannadzadeh, who told the officer that he believed the alarm was triggered by people upstairs doing tests. Mr. Ghannadzadeh asked the officer to check other parts of the building. The officer checked other doors and found a suite (#1401-B) with an unlocked door. He identified himself as the police, entered, and tripped the alarm. He opened a door at the rear of the suite and found a 100 plant marihuana grow operation.

Mr. Ghannadzadeh informed the officer of the accused's tenancy in suite #1401-B. The officer left the suite and saw a vehicle drive to the rear of the building. He was told by Mr.

Ghannadzadeh that the vehicle belonged to the tenant of suite 1401-B. However, by the time the officer approached the vehicle, the driver was gone. The officer went back to the suite and knocked on the door to determine if there was any connection between the accused and the initial alarm call. The accused answered, identified himself on request, and admitted he was part owner of the business operating out of the suite which housed the grow operation. The accused was arrested, provided his s.10(b) *Charter* right to counsel, and asked if he wished to contact a lawyer. He replied, "No, I'd like to call my wife", but was denied the opportunity. The officer then attended the police station and obtained a search warrant. The accused was subsequently charged with producing marihuana and marihuana possession for the purpose of trafficking.

At trial, the officer testified he detained the accused to determine why he had gone into the building and turned off the alarm. As for not advising the accused of his *Charter* rights before engaging in conversation, the officer said he was trying to confirm information. With respect to denying a phone call to his wife, the officer said the accused did not tell him he wanted to call his wife in order to retain counsel. The officer testified the accused had the right to call a lawyer, not his wife.

The trial judge ruled that the officer's warrantless entry was lawful—to ensure the security of the building for the safety of persons who might be present. As well, the officer acted in good faith. He acted appropriately and went no further than was reasonable. Also, the officer attended as promptly as reasonable and did not have to inquire into the immediacy of the alarm or the resources available. The trial judge also said:

> The peace officer was granted entry into the building by another tenant of the building. That tenant suggested a possible area of interest to search, and the peace officer gained access to premises of the accused through an unlocked door, which activated the alarm for a second time.

The accused appealed to the British Columbia Court of Appeal arguing, in part, that the officer's initial entry into the suite was unlawful and that his s.10(b) *Charter* right was breached.

The Entry

The accused suggested that since there was no criminal activity taking place when the officer arrived, his warrantless entry into the premises was a violation of s.8 of the *Charter*. In rejecting this view, Justice Oppal for the unanimous appeal court held:

> In this case, the officer was not acting unlawfully when he entered the premises without a warrant. Although the initial alarm had sounded some 45 minutes prior to his arrival, he was apparently under the impression that the alarm had sounded 10 minutes prior to his arrival. In any event, he was lawfully entitled to investigate what he reasonably believed to be a break and enter. Mr. Ghannadzadeh had told him that there were other persons in the building and asked him to check other parts of the building. The officer might have been subject to criticism had he left after his initial conversation with Mr. Ghannadzadeh during which the latter advised him that the alarm had sounded some 45 minutes earlier. It should be noted as well that at that stage the officer had no reason to believe that there was a marihuana grow operation on the premises. [para. 11]

The Right to Counsel

The appeal court also dismissed the accused's submission that the judge erred in failing to find a s.10(b) *Charter* breach because he was not allowed to call his wife. The court concluded:

> There is no doubt that immediately after the [accused] was detained the officer apprised him of his right to retain and instruct counsel without delay under s. 10(b). The [accused] advised the officer that he did not wish to contact a lawyer, but rather, that he wished to

> contact his wife. There would be some validity to the [accused's] argument on this issue had he told the officer that he wished to contact his wife so that she might be able to arrange counsel for him. However, he did not do that. The law is that a person who is arrested or detained and has been advised of his right to counsel under s. 10(b) must assert that right. [The Supreme Court of Canada has] held that s. 10(b) imposes two duties on the police in addition to the duty to inform an arrested or detained person of his or her rights. The first duty is to give the person a reasonable opportunity to exercise the right to retain and instruct counsel without delay. The second duty is to refrain from attempting to elicit further evidence from the detainee until he or she has had a reasonable opportunity to retain and instruct counsel. However, there is a *caveat* attached to the police obligations: the detained person must be reasonably diligent in attempting to obtain counsel. If the detained person is not reasonably diligent, then the correlative duties imposed upon the police to refrain from questioning him or her are suspended.
>
> In this case the [accused] did not tell the police that he wished to speak to a lawyer. [para. 25-26, references omitted]

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

LAUNDERING DOES NOT INCLUDE RECEIVING GOODS

R. v. Daoust & Bois, 2004 SCC 6

In an effort to establish whether the two accused were laundering merchandise at a pawn shop, an undercover police officer approached them on four occasions to sell "criminally obtained goods"—two new video recorders, a used video recorder, two new telephones, and a new alarm clock borrowed from a merchant assisting in the investigation. Although the goods were not actually stolen, the officer hinted they were "hot" or otherwise illegally obtained. In total, the officer received $60 for the goods.

At their trial in the Court of Quebec, they were convicted of laundering proceeds of crime under s.462.31 of the *Criminal Code*. In the judge's view, the transfer of possession of the property constituted the *actus reus* of the offence. The *mens rea*, in the judge's opinion, included the intent to conceal or convert the property along with the knowledge or belief the property was obtained illegally.

The accused appealed to the Quebec Court of Appeal, which overturned the convictions and substituted acquittals. The appeal court ruled the *actus reus* had not been satisfied. Justice Fish held that the possession of the property had not been transferred nor did the accused intend to "convert"—change, transform, or alter—the purchased merchandise. Rather, he concluded the accused were going to sell the property rather than cover up a supposed crime. The Crown appealed to the Supreme Court of Canada. In a unanimous judgment, the seven members of the Supreme Court dismissed the appeal.

The *Actus Reus*

In the indictment, the accused were charged with transferring the possession of property with the intent to conceal or convert it under s.462.31(1)(a) of the *Criminal Code*. However, the French *Criminal Code* version of this offence is narrower that the English version. The French version limits the transfer of property to an exhaustive list of enumerated acts, while the English version adds the expression "or otherwise deals with" which would open up other acts of laundering beyond those listed.

These inconsistencies in the *actus reus* between the French and English version required the court to apply the principles of bilingual statutory interpretation as follows:

- determine whether there is discordance between the two versions;
- if the two versions are irreconcilable, determine whether one or both versions are ambiguous—reasonably capable of more than one meaning. If there is ambiguity in only one version, they must be reconciled to a common meaning—the version that is plain and not ambiguous;
- if neither version is ambiguous, the common meaning is usually the narrower meaning of the two; and
- determine whether the common meaning is consistent with Parliament's intent.

In applying these rules to this case, the Supreme Court of Canada held that the two versions were identical except for the English addition of "or otherwise deals with". Therefore, the more restrictive French version prevailed.

The next question the court examined was whether the "transfer of possession" of property in the laundering proceeds of crime context includes buying property with the intention of converting it. In other words, does s.462.31 apply to the receiver of property? The court answered no.

In the court's view, "[t]he activities criminalized by this provision all concern the same person, that is, the person who originally has the object in his or her possession and seeks to dispose of it." Section 354(1) of the *Criminal Code*, on the other hand, "is aimed specifically at persons who receive or accept property despite knowing it to be of illicit origin." Thus, as Justice Basterache authoring the unanimous judgment noted, "buying or receiving property or similar acts involving the person who accepts or acquires the property do not constitute elements of the offence of laundering proceeds of crime." The Court ruled:

> In the present case, the evidence shows that the [accused] bought the merchandise believing it to be stolen. However, in light of the foregoing, the act of purchasing this merchandise is not the equivalent of "transfers the possession of", which is the element of the offence specified in the indictment and which the Crown must prove. For this reason, it is my opinion that the [accused] did not transfer the possession of the property within the meaning of s. 462.31. [para. 53]

The *Mens Rea*

The *mens rea* of laundering proceeds of crime includes the intent to conceal or convert property or proceeds and the knowledge or belief that the property or proceeds were derived from a designated offence. The Quebec Court of Appeal erred in holding that an intent to disguise must be proven to establish *mens rea* under s.462.31. Justice Bastarache wrote:

> The verb "to convert", in my view, cannot be given the meaning of "disguise" or "conceal" unless there is an express indication to that effect in the enactment. Absent this, the term "convert" must be given its ordinary, literal meaning. While Parliament might have, in enacting s. 462.31, intended to prohibit acts to disguise or conceal the illicit origins of property or its proceeds, this was only a secondary purpose that was part of a much broader one, that is, to ensure that crime does not pay…Section 462.31 has a broad deterrent effect, in that it is designed to prevent offenders from profiting from their crimes or from engaging in illegal activities, an objective that has nothing to do with disguising the origins of property or its proceeds.
>
> Moreover, to read an intent to disguise into "convert" would mean that the offence of laundering proceeds of crime would apply only to clandestine transactions, while leaving the same acts, if committed openly, unpunished…
>
> In short, I believe Parliament's choice of words is indicative of its intention to forbid "conversion" pure and simple, thereby ensuring that those who convert property they know or believe to have illicit origins, regardless of whether they try to conceal it

> or not, do not profit from it. I am therefore of the opinion that Parliament's intent and purpose in enacting s. 462.31 favours an interpretation of the word "convert" that does not include an intent to disguise. The interpretation given by the Quebec Court of Appeal to the term "convert" is too narrow and excludes from the scope of s. 462.31 activities that Parliament intended to prohibit.[paras. 63-65, references omitted]

The appeal was dismissed.

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

DID YOU KNOW

…that as of January 1, 2004 the RCMP was 22,239 strong. Personnel breakdown, including all ranks and civilians, was as follows[1]:

Position	Strength
Commissioner	1
Deputy Commissioner	5
Assistant Commissioner	24
Chief Superintendent	56
Superintendents	135
Inspectors	331
Corps Sergeant Major	1
Sergeant Major	7
Staff Sergeant Major	1
Staff Sergeants	704
Sergeants	1,568
Corporals	2,777
Constables	10,039
Other regular members	4
Civilian Members	2,585
Public Servants	4,001

Note-able Quote

The best way to succeed in life is to act on the advice you give to others—Unknown

[1] Source: http://www.rcmp-grc.gc.ca/html/organi_e.htm [May 17, 2004]

DESIGN, NOT POTENTIAL USE, DETERMINES LEGALITY

R. v. Jordan, 2004 BCCA 139

The accused was charged with possession of a prohibited weapon—pepper spray—under s.91(2) of the *Criminal Code* after police detained him while investigating an attempted break-in of a house in a nearby residential area. When requested by the police to empty his pant pockets, the accused produced a can of pepper spray labelled "First Defence Aerosol Pepper Protector MK-3" with the following warning, "The use of this substance or device for any purpose other than self-defence is a felony under law. The contents are dangerous. Use with care." Also, the back of the can indicated the contents contained a 10% solution of Oleoresin Capsicum—the active ingredient.

A prohibited weapon is defined under s.84(1) as including a weapon prescribed by Regulations to be prohibited. One such weapon is described in the Regulations as follows:

> Any device designed to be used for the purpose of injuring, immobilizing or otherwise incapacitating any person by the discharge therefrom of
> (a) tear gas, Mace or other gas; or
> (b) any liquid, spray, powder or other substance that is capable of injuring, immobilizing or otherwise incapacitating any person.

At the accused's trial in British Columbia Provincial Court an expert testified he examined the can and its contents, concluding it was a prohibited weapon because it was designed to be used for and was capable of immobilizing or otherwise incapacitating any person. The expert also testified, however, that had the can been "bear spray", it would have been legal since the manufacturer designs them for use against bears, not people.

The trial judge was not satisfied the Crown had proven the *actus reus* of the offence. He could not reconcile the difference between a person

having lawful possession of a larger can of bear spray and the accused unlawfully possessing a smaller can containing the same substance. In his view, the size and shape of the canister was insufficient to differentiate between the criminal possession of the pepper spray by the accused and the lawful possession of bear spray, for example, by a prospector. The accused was acquitted.

The accused's acquittal was successfully appealed by the Crown to the British Columbia Supreme Court. The Supreme Court justice substituted a conviction, opining that the evidence clearly showed that the canister found in possession of the accused was unequivocally a prohibited weapon. As for the *mens rea* component of the offence, the Supreme Court held that knowledge of the prohibited characteristics could be inferred. The accused further appealed to the British Columbia's top court. He argued that the Supreme Court decision found an error on a question of fact, which it was not entitled to do.

In allowing the appeal, the British Columbia Court of Appeal concluded the uncontradicted evidence of the expert accepted by the trial judge was that the canister in possession of the accused satisfied the definition of a prohibited weapon under the Regulations. However, the trial judge was not satisfied it was a prohibited weapon because the same substance sold as "bear spray" was not. This was an error Justice Ryan ruled, stating:

> In my view the trial judge erred in basing his decision on two legally irrelevant considerations: first, that the substance in both containers could be <u>used</u> to incapacitate humans; and second, that possession of the larger canisters of "bear spray" was not illegal. What is prohibited is an item <u>designed</u> to be used to incapacitate humans; that the substance in both types of canister may be <u>used</u> to incapacitate humans is immaterial.
>
> It was also wrong for the trial judge to ask whether the smaller can of spray should be illegal to possess when a larger canister of the same substance is not. What should or should not be criminalized is a question for Parliament. [paras. 20-21]

However, since the trial judge only addressed the *actus reus* of the offence and not the *mens rea* it was wrong for the Supreme Court justice to enter a conviction. As a result, the conviction was set aside and a new trial was ordered.

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

SAFETY SEARCH DURING DRUG INVESTIGATION REASONABLE

R. v. Bercier, 2004 MBCA 51

A police officer received information from a reliable and confidential informant that two unknown white males in their late teens operating a white Honda Accord would be buying "Crystal Meth" between 4:00 pm and 5:00 pm from another male. This drug transaction would reportedly occur that day outside the Club Regent Hotel and Casino. Police attended the hotel after 5:00 pm and saw a white Honda Accord parked in front of the hotel entrance. One young male was in the driver's seat of the Honda while a second young male stood along side the car speaking on a cellular telephone. The officer concluded that what he saw was what the informant described.

The officer approached and began to inform the accused, the male standing outside the car, that they had information he was involved in a drug transaction. The accused started to back away. The officer, thinking the accused may flee or engage in a confrontation, took hold of him by the forearm. He tried to further pull away, but was subsequently handcuffed for safety reasons—he was then pat frisked for weapons. Feeling something in the front pouch of the 'kangaroo' pullover sweatshirt, the officer looked inside the pouch and saw a clear plastic baggie containing marihuana. After he was arrested and

searched further, police found a variety of drugs and cash.

The accused was charged with possession of marihuana, cocaine, ectasy, and proceeds of crime. The trial judge found the officer acted properly in detaining and searching him. The police were not acting on a hunch, but had real information to act upon. The search, as well, was reasonable and the evidence discovered was admissible. Not satisfied with the outcome, the accused appealed his conviction to the Manitoba Court of Appeal arguing the officer lacked an articulable cause for the detention, thereby rendering it arbitrary, and also that the safety search exceeded its permissible scope.

In dismissing the accused's conviction appeal, Justice Monin of the Manitoba Court of Appeal found the detention and search lawful, writing:

> By acting on the information made available to them by the informant, there is no question that [the police] were acting within the general scope of the duties of a police officer to prevent crime and to protect life and property when [the officer] temporarily detained the accused to further the investigation. Further, the interference of the liberty of the accused was necessary for the carrying out of the police duty and, in my view, was reasonable having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. When analyzing the words spoken by [the officer] and his judgment call to handcuff the accused, it is important to keep in mind the brief time frame and the circumstances of the encounter. The police were investigating a drug transaction. It is therefore not surprising that [the officer] was concerned about the possibility of weapons and was uncertain about what the accused was going to do. The reasonableness of [the officer's] actions must be assessed in that context. And it is for these reasons that the patdown search for safety reasons met the two branches of the Waterfield test as well.
>
> .....
>
> Furthermore, I am satisfied on the facts of this case that there existed the basis to have an "articulable cause" if one is in fact required. The conduct of the police was not an indiscriminate and discretionary exercise of the police power. The actions of the police were not as a result of a hunch. This was not a subjectively based assessment made by police based on irrelevant factors such as the accused's sex, colour, age or ethnic origin. The tip received was not from an unknown source, and the details provided were sufficient for one to conclude that there existed compelling current information that could reasonably lead the officers to suspect that the accused was or was about to be involved in criminal activity.

Complete case available at www.canlii.org

FAILURE OF ONE SEARCH POWER DOES NOT TAINT ANOTHER

R. v. Andrews, 2004 MBCA 60

Police received information from a registered confidential informant that the accused was bringing cocaine from Mexico to British Columbia and would be distributing it in Winnipeg. Other information provided by the informant to the police was confirmed as accurate through a number of independent sources. About a month later, the police received further information the accused was enroute to Winnipeg with cocaine. A previously obtained dial number recorder warrant tracked the accused's cell phone across western Canada. The next day the police stopped and arrested the accused as he was entering Winnipeg. After being informed of his *Charter* rights and told he could call a lawyer at the police office, he was asked how many kilograms of cocaine he had. The accused replied, "Just the two in the cooler."

The police prepared an information to obtain a search warrant under s.11 of the *Controlled*

Drugs and Substances Act (*CDSA*), which included the informant information, the confirmation of that information, and the questioning and answer of the accused. The warrant was granted and police found two kilograms of cocaine in a cooler in the accused's van.

At his trial, the accused argued his rights were breached under s.10(b) of the *Charter* when the officer asked him about the cocaine before he had an opportunity to call a lawyer. He submitted that using the conversation in the information to obtain rendered the warrant unlawful and therefore the evidence should be excluded under s.24(2). Although the trial judge agreed the accused's s.10(b) right was violated, he concluded that even without reference to the accused's comment about the location and quantity of cocaine there still existed a sufficient basis for the search warrant.

The accused appealed to the Manitoba Court of Appeal contending that a sworn information under s.11 of the *CDSA* requires the informant information support the commission of offences current in time, rather than offences to be committed in the future—such as being in possession of a controlled substance at a later point in time.

Without addressing this s.11 argument, the Manitoba Court of Appeal examined whether the common law authority of search incidental to arrest allowed for the search. The accused submitted that it did not, since the police opted to obtain a search warrant and could not now rely on the incidental search power to justify the search. In the accused's view, if the warrant was unlawful, as he submitted, the search could not be made valid under a different search power. The Manitoba Court of Appeal disagreed and held the search lawful as an incident to arrest. The court stated:

> In the present case…the fact that the search took place subsequent to the arrest, when the vehicle was brought to police headquarters, does not negate the common law right of search for the purpose of discovering incriminating evidence…
>
> Where there are two parallel and concurrent means of effecting a lawful search, and one fails for some procedural reason, that failure does not taint the other process which is not found to be defective. [para. 17-18]

Complete case available at www.canlii.org

IMPROPELY DEMANDED ASD SAMPLE CANNOT BE USED FOR GROUNDS

R. v. Woods, 2004 MBCA 46

After stopping the accused driving at 10:30 pm, police noted a strong odour of liquor and demanded a roadside breath sample into an approved screening device under s.254(2) of the *Criminal Code*. The accused refused, was arrested for failing to comply with the demand, and was informed of his right to counsel and given the police warning. The accused said he wanted to speak with a lawyer but was told he would have to wait until at the office, since there was no cell phone available in the police car.

The officer waited for a tow truck which caused a delay in arriving at the police station. After speaking with a lawyer at 11:24 pm, the accused now told the officer he wished to provide a sample. The ASD demand was read again and the accused failed. He was then arrested for impaired driving and given a breathalyser demand, his right to counsel, and police warning. He again spoke with a lawyer, subsequently provided two breath samples—both 120mg%—and was charged with driving over 80mg% and impaired driving.

At his trial in Manitoba Provincial Court the accused was convicted of driving over 80 mg% and a stay of proceedings was entered on the impaired driving charge. The trial judge found

that the ASD sample had been taken "forthwith"—as s.254(2) of the *Criminal Code* requires—because the refusal was continuous from the time he was stopped until one hour and 10 minutes later when he changed his mind at the Public Safety Building. Thus, in her opinion the sample provided was in response to the demand made at the roadside.

On appeal to the Manitoba Court of Queen's Bench, the appeal justice concluded the accused's rights under s.8 of the *Charter* had been breached. In the appeal justice's view, the breath sample ultimately provided was in response to the demand made at the Public Safety Building—not the one made at the roadside—and went well beyond that contemplated by the meaning of "forthwith". Consequently, a verdict of acquittal was entered. The Crown appealed, this time to the Manitoba Court of Appeal.

Section 254(2) of the *Criminal Code* provides for the testing of the presence of alcohol in a vehicle operator's breath provided a peace officer reasonably suspects they have alcohol in their body. Under this section, a peace officer may make a demand requiring the person forthwith provide a sample of their breath into an approved screening device. As Manitoba's top court noted, this section provides "a convenient tool for confirming or rejecting a suspicion regarding the commission of an alcohol-related driving offence. It is a screening test to be administered immediately and with minimal inconvenience to drivers who are being arbitrarily detained." Justice Philp, authoring the unanimous judgment continued:

> When a demand is made by a peace officer to a person pursuant to s. 254(2), it is the providing of the breath sample by the person that must be done "forthwith." That is the plain meaning of the words of the section. However, the courts have construed the provision to require the peace officer, as well, to act with promptitude and to make the demand immediately after the person is stopped. [para. 19]

Since the accused provided the sample one hour and 10 minutes after the stop, it could not be said the sample was taken forthwith. Rather, the ASD sample provided at the Public Safety Building was a consequence of the invalid second demand. Justice Philp wrote:

> In my view, the accused's "agreement" (that is the finding the trial judge made) to provide a breath sample for an ASD test at the Public Safety Building, when he was under arrest and no longer had care or control of his vehicle, was not in response to the demand that had been made at the roadside over an hour earlier. That earlier demand was exhausted when the accused had refused to comply and was placed under arrest for so doing. The ASD sample was not provided "forthwith" even under the broadest interpretation of the word. The fact that the accused's refusal was the reason why the sample had not been provided earlier does not bring the test within the ambit of the section.
>
> I am further of the view that the demand for an ASD sample that [the police] made at the Public Safety Building fell outside the ambit of s. 254(2), both temporally and spatially, and was not authorized by it. The accused had no obligation to comply with that demand and would not have committed an offence if he had refused to do so. [para. 23-24]

This fail reading therefore could not be relied upon as part of the reasonable and probable grounds required for a breathalyser demand. The breathalyser analysis evidencing the concentration of alcohol in the accused's blood was inadmissible and the Crown's appeal was dismissed. The Court also noted, however, that there was no apparent reason why the accused could not have been prosecuted for the initial roadside refusal.

Complete case available at www.canlii.org.

Note-able Quote

It is better to know less and apply what you know, than to know more and do nothing—Unknown

BAD JOKE NOT INTENDED TO OBSTRUCT OFFICER

R. v. Rutherford, 2004 ABPC 64

The accused was released from prison on statutory release. His conditions included abstaining from all intoxicants and a no contact order with his wife. The police responded to a tip that he and his wife were about to check into a hotel. They located the accused at a bus shelter about 12 blocks from the hotel and asked him his name. He gave a false name, but the officer recognized him. He was arrested and police found crack cocaine in his possession. The accused was charged with being unlawfully at large, obstructing a peace officer, and possession of a controlled substance.

At trial the accused invited a conviction for possessing the cocaine, but argued there was insufficient evidence for being unlawfully at large or for the obstruct charge. He submitted that he was joking when he gave the false name and it was obvious the police knew who he was when they approached him at the bus shelter. The accused testified he had contact with his wife contrary to the statutory release conditions, but argued that a breach of that condition did not render him at large, in the sense of removing himself from the custody of the correctional authorities.

Unlawfully at Large

Section 145(1)(b) of the *Criminal Code* creates a hybrid offence for a person to be at large without lawful excuse. Alberta Provincial Court Justice Meagher concluded that a breach of a condition designed to control inmate behaviour on release, such as the no contact order, does not necessarily amount to an intention to abscond or withdraw oneself from the custody of correctional authorities which would render the person unlawfully at large. In other words, merely breaching a behavioural condition is insufficient to sustain a conviction for being at large without lawful excuse. However, failing to return to a designated institution as required or failing to remain within a designated area may bring liability under this section. Justice Meagher stated:

> In order for the accused to be convicted [for being unlawfully at large] the Crown must prove beyond a reasonable doubt that this accused intended to withdraw himself from the control, in the sense of custody, of the correctional authorities. In this case, merely because the accused breached the no contact provision in his Statutory Release Certificate, I am not prepared to find beyond a reasonable doubt that he intended to withdraw himself from the custody of the correctional authorities so as to make himself " at large", within the meaning of section 145(1)(b) of the Criminal Code of Canada. While this breach of condition may have affected the control exercised over this accused by the correctional authorities, thereby subjecting him to other remedies including the suspension of his parole, this particular loss of some degree of control does not amount to a withdrawal from the custody of the correctional authorities. … [para. 24]

Obstruction

A conviction for obstruction requires the Crown prove that the purpose of the accused's action was to obstruct the peace officer. In this case, the court accepted "the accused's evidence that his intention in giving a false name was a joke, albeit a bad joke, and not for the purpose of wilfully obstructing the peace officer." In finding the accused not guilty, Justice Meagher held:

> The onus is on the Crown to prove beyond a reasonable doubt, that at the time the accused gave the false name to the police, the purpose of the accused's action was to obstruct the peace officer. It does not matter that the result was that the peace officer was not obstructed in the execution of his duties. However, the explanation given by the accused, that he was only joking and that it was obvious

> that the police officers knew who he was, creates a reasonable doubt that he intended to obstruct the peace officer by giving a false name. [para. 25]

However, the accused was convicted of the drug offence.

Complete case available at www.albertacourts.ab.ca

NUMBER RECORDER WARRANT PROVISION UNCONSTITUTIONAL

R. v. Nguyen et al, 2004 BCSC 76

The police obtained a warrant under s.492.2(1) of the *Criminal Code* to record telephone numbers called from and made to three identified target telephones. These recorded phone numbers then provided a basis on which to obtain numerous telephone records. The four accused were subsequently charged jointly with conspiracy to traffic in cocaine and heroin.

The provision of s.492.2(1) allows the police to seek a warrant for the installation, maintenance, monitoring, and removal of a number recorder provided a justice is satisfied there are reasonable grounds to suspect an offence against a federal act has been or will be committed and that the use of the number recorder would assist the investigation. However, the standard of reasonable grounds to suspect—or reasonable suspicion—did not meet the minimum standard of reasonable belief, the constitutional threshold for searches and seizures under the *Charter* in connection with criminal investigations. As a result of this inconsistency, Justice Halfyard held the number recorder warrant provisions of no force or effect.

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

ABSENT FACTS SUGGESTING OTHERWISE, NO NEED TO ASK IF ALCOHOL RECENTLY CONSUMED

R. v. Szybunka, 2004 ABPC 52

A police officer working a Stop-Check program pulled the accused and his two passengers over after observing the vehicle drive from a nightclub parking lot. His eyes were red and an odour of liquor emanated from him. The officer suspected the accused was impaired and gave a demand for a roadside sample. As a result of the fail reading, the officer formed the opinion he had reasonable grounds to believe the accused was impaired. He was arrested and taken to a breath technician where he advised the police he had his last drink five minutes before the stop.

At his trial in Alberta Provincial Court, the accused maintained that police could not rely on the roadside screening fail because the officer did not satisfy himself that no alcoholic beverage had been consumed within 15 minutes of the breath sample. Since the fail reading was tainted and could not be used as grounds, the accused argued the officer lacked sufficient cause to process the accused for impaired driving. In rejecting the accused's submission, Justice LeReverend stated:

> Unless there are facts which are brought to the attention of the investigating officer that an accused has either consumed alcohol in the preceding 15 minutes an officer is not required by law to either ask the question or wait the 15 minutes," stated the judge. "The investigating officer did not have any evidence before him that this accused had consumed alcohol within 15 minutes of the A.L.E.R.T. test. The mere fact that the accused was exiting a parking lot of a pub is not sufficient to require the officer to ask the question or wait the 15 minutes. It is only where the officer knows that a suspect has just recently

consumed alcohol and that a proper sample can only be obtained by waiting at least 15 minutes that the waiting requirement is necessary.

Pursuant to s. 254(2) the peace officer had grounds to reasonably suspect that the accused had alcohol in his body. Those grounds were an odour of alcohol emanating from the accused and his red eyes. He made a proper demand for a breath sample and was entitled to rely on the results of the analysis of the breath sample.

The police officer's suspicion that the accused might be impaired was raised to a belief that he had reasonable and probable grounds to make a s. 254(3) demand because of the failure of the Alco Sensor sample. [para. 13-15]

Complete case available at www.albertacourts.ab.ca.

MERE CONVERSATION DOES NOT NECESSARILY RENDER A DETENTION

R. v. Macdonald, 2004 SKPC 55

A curious police officer pulled up beside two young men walking on the road early one morning. With his driver's window down, the officer asked the men what they were doing, who they were, and where they were heading. After getting the information and letting them go, the officer learned the accused lied about his name and also had a curfew. He was later arrested and found to be carrying car break-in tools.

In Saskatchewan Provincial Court the accused argued he was psychologically detained by police when the conversation occurred and therefore his s.9, s.10(a) and s.10(b) *Charter* rights were breached. Thus, he submitted the evidence of the conversation and the results of the search following the arrest should be excluded under s.24(2). Justice Singer however, disagreed. In his view there was no detention. He said:

The question [of whether an accused was] psychologically detained, depends upon each set of circumstances. It becomes easier to answer if certain elements are present. For instance, if there was a demand or direction as opposed [to] just ordinary questioning or conversation, if the language used and the tone of voice expressed compulsion and not mere conversation. Even the place where the conversation took place must be taken into account. Though the basis of a psychological restraint is a subjective one based upon the personal circumstances of the accused, that test has an objective criteria as well, as the subjective belief has to be a reasonable belief.

In order then to be detained by the police there must be some direction or words on the part of the police that results in the deprivation of liberty. In other words the police must by either physical or psychological means attempt to control the movements of the citizen. Merely asking questions as took place in this case, does not have this element of direction or compulsion.

In this case there was no direction from the police officer of any kind that could be interpreted objectively as compulsion or direction to talk. While the accused may have believed he must talk to the police in this situation, there was no physical restraint on the accused nor were there any words used by the police officer that would indicate that the accused was restrained in his movements or that he had to answer the questions put to him. He was not even asked to come over to the police car, he was just asked his name.

I find that on the particular circumstances of this case that the accused was not detained and therefore that there was no breach of his charter rights. [para. 22-25]

The accused was convicted of obstructing a police officer, breach of recognizance and possession of break-in instruments.

Complete case available online at www.canlii.org.

REQUESTED TEST AFTER 24-HOUR PROHIBITION MUST BE GIVEN

Green v. McLean, 2004 BCSC 536

A police officer stopped the petitioner after observing him not wearing his seatbelt and his vehicle without tail lights and weaving. The officer noticed the petitioner had an odour of alcohol on his breath and that his eyes were glassy and bloodshot. The petitioner, on the other hand, denied consuming alcohol and said that beer had been spilled on him. An Approved Screening Device (ASD) test was conducted and the accused failed. Although the officer felt he could proceed with a full impaired driving investigation, he decided to only issue the petitioner with a 24-hour driving prohibition under s.215 of the *Motor Vehicle Act* (*MVA*)—a provision that empowers a police officer to automatically suspend a driver's licence for 24 hours where the officer has reasonable and probable grounds to believe the driver's ability is affected by alcohol.

Section 215(6) of the *MVA* states:

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

Section 215(7) also recognizes the right of the driver to have the prohibition terminated if they can produce a medical certificate showing blood alcohol content not in excess of 50mg%.

The petitioner was served with a notice of prohibition which stated, on the reverse, that he had the right to either request a breathalyser test or obtain a certificate from a medical practitioner if he did not accept the prohibition. As a result, the petitioner demanded a test. But the officer refused on the grounds he had already administered a test—he felt a second test would be redundant.

The petitioner sought a judicial review of the officer's decision in the Supreme Court of British Columbia. He submitted that his right to demand a test arose after the notice of prohibition was served and, in any event, the ASD test performed was not a "test" within the meaning of s.215 or the notice he was served. Justice McEwan agreed on both these points.

First, once the notice of prohibition was served, the petitioner had the right to request a test to establish the concentration of alcohol in his body. It is the receipt of the notice that triggers the right to be tested, regardless of whether a test preceded the issuance of the prohibition. Secondly, although the notice uses the term "breathalyser" in a generic sense, the "test" referred to in s.215 requires the use of an approved instrument that measures the concentration of alcohol in a person's blood, not an approved screening device that merely measures the presence of alcohol.

Section 215(6) provides a driver who does not accept a prohibition with the right to request a test, which in Justice McEwan's view left no room for the exercise of police discretion. The officer's refusal to test the petitioner after the prohibition was served on the basis of the ASD results rendered the 24-hour prohibition invalid. The prohibition was set aside.

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

Note-able Quote

The defence also cites a 1951 notion that identification must be based upon a verbal inventory of the perpetrator's face and build, and not on recognition. …It strikes me as dubious psychology. I recognize Clark Gable or Helen Mirren when I see them in movies, but I cannot usefully describe them, even their height or weight.[2]—Alberta Court of Appeal Justice Cote

[2] R. v. Zurowski, 2003 *ABCA* 315