POLICE ACADEMY
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IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

CANADA's TOP COURT SANCTIONS POLICE SAFETY SEARCH

R. v. Mann, 2004 SCC 52

The police, responding to information of a break and enter in progress, found the accused, who matched the suspect description, walking on a sidewalk close to the scene. The attending officers stopped the accused to question him and conducted a "security search" by patting him down, looking for items that may be used as weapons. In the front pouch of his pullover sweater, the officer detected, by touch, something soft. The officer then went inside the pouch and found a baggie of marihuana. The officer testified that the soft item might be concealing something hard like a weapon behind it, and he was not about to stop his protective search for this reason[1].

At trial the accused was acquitted because the judge concluded that the officer had no reason other than perhaps curiosity to go beyond the external pat down search when he felt something soft. Thus, the search was unreasonable and the evidence was excluded under s.24(2) of the *Charter*. On appeal by the Crown, the Manitoba Court of Appeal set aside the acquittal and ordered a new trial. Using the two-prong analysis of the *Waterfield* test (a legal analysis for determining the common law powers of the police), the Court concluded the police were justified in both detaining as well as searching the accused.

The accused appealed to the Supreme Court of Canada, which allowed the appeal and reinstated the acquittal by holding the evidence inadmissible. Despite agreeing with the trial court on the issue of admissibility, Canada's highest Court outlined some important general principles regarding investigative detention and the accompanying authority to search detainees. In this case, the court examined under what circumstances and to what extent the police can interfere with an individual's freedom to be left alone by the state.

Investigative Detention

Justice Iacobucci, writing the majority judgment, examined a number of cases that recognized the limited power of police officers to detain persons for investigative purposes. At minimum, the police must have reasonable grounds to detain (also known as articulable cause). This standard (reasonable grounds to detain) is "somewhat lower than the reasonable and probable grounds for lawful arrest" and imports both an objective and subjective standard. Justice Iacobucci wrote:

> The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the

[1] See R. v. Mann, 2002 MBCA 121

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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> front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.
>
> Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest. [paras. 34-35]

Thus, the police must possess a reasonable suspicion (more than a hunch) the detainee is involved in ongoing criminal activity and that such a detention is necessary in the circumstances.

Protective Searching

The court recognized the need to balance the competing interests of police safety and individual privacy interests in assessing whether the search of a detainee is justified. Justice Iacobucci concluded that the common law does provide the power to search incidental to an investigative detention as long as the search is reasonably necessary in the circumstances for safety reasons—not to find evidence of a crime. And once again, the police must have more than a hunch that their safety is at risk. However, the level of risk (low to high) required to engage a safety search is unclear. The majority held:

> The general duty of officers to protect life may, in some circumstances, give rise to the

> power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances...The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition. [para. 40]

Conclusion

In conclusion, the majority ruled:

> To summarize…police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case. [emphasis added, para. 45]

In this case, the police did have reasonable grounds to suspect the accused was involved in criminal activity. He closely matched the break and enter suspect description and was only two to three blocks from the crime scene. A protective search of the accused was also reasonable. As the majority noted:

> There was a logical possibility that the [accused], suspected on reasonable grounds of having recently committed a break-and-enter, was in possession of break-and enter-tools, which could be used as weapons. The encounter also occurred just after midnight and there was no other people in the area. On balance, the officer was justified in conducting a pat-down search for protective purposes. [para. 48]

However, the officer's decision to reach into the accused's pocket after feeling a soft object went beyond a protective pat-down. The accused had a reasonable expectation of privacy in his pocket and the police unreasonably violated this privacy expectation—a s.8 *Charter* violation. Once the officer reached into the accused's pocket the search shifted from safety concerns to the detection and collection of evidence. The Manitoba Court of Appeal should have given due deference to this finding by the trial judge.

Admissibility of the Evidence

Although all seven of the Supreme Court justices agreed that the search was a s.8 *Charter* (unreasonable search or seizure) violation, they were divided on the admissibility of the evidence. The majority (five justices) concluded the evidence was inadmissible under s.24(2). Although the evidence was non conscriptive, the breach was "unacceptably serious". Moreover, "the nature of the fundamental rights at issue, and the lack of a reasonable foundation for the search suggest that the inclusion of the evidence would adversely affect the administration of justice". The majority allowed the appeal and restored the accused's acquittal.

The minority, on the other hand, would have ruled the evidence admissible. In their view, the admission of the evidence would not bring the administration of justice into disrepute.

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

Note-able Quote

There can be no justice until those who are unaffected by crime become as indignant as those who are…—Solon 635-588 B.C.

ESSENTIAL COP COURSE JUSTIFIES COURT ADJOURNMENT

R. v. Tkachuk, 2004 ABQB 266

The Crown made an application, opposed by defence counsel, to adjourn the accused's two day cocaine trafficking trial because the undercover constable was attending a specialized drug course during the trial dates. It was submitted by Crown that it was important for the officer to take the course because he was only one of two experts in the Edmonton region who could testify locally. Defence counsel, on the other hand, argued the Crown should be forced to choose between the officer taking the course (if it was more important) and the prosecution of the accused.

Justice Lee of the Alberta Court of Queen's bench sided with the Crown. In his view, there was no inordinate delay in this case—it was about one year old, this was the first adjournment application, and the officer was available for the new proposed trial dates. He stated:

> It is unfortunate that the undercover police officer has to attend a course, but I am satisfied that this course is essential for his work. Normally police officers would not be excused from testifying because they have to attend courses, but given that the constable in this case is only one of two expert drug trafficking witnesses available to the Crown, his attendance on the course is reasonable and justified. [para.9]

And further:

> While it is unfortunate that the constable is on a course at the same time as the trial is scheduled, the course is important relative to the constable's duties as he is one of only two experts available presently with respect to the local drug trade. Therefore his attendance at the course is reasonable, even if it does not relate to his role in the present trial, and even is it causes a slight delay in the trial. [para. 15]

The adjournment application was granted.

Complete case available at www.albertacourts.ab.ca

CRIMINAL HARASSMENT: 'REPEATEDLY' MEANS MORE THAN SINGLE INCIDENT

R. v. Zeilstra, 2004 BCSC 648

The accused was convicted in British Columbia Provincial Court of criminal harassment under s.264 of the *Criminal Code* after his ex-common law wife reported that he followed her in his vehicle for 30-35 minutes, during which both vehicles exceeded the speed limit. The two had earlier lived together for six to eight months and had joint custody of their 13 month old child. The accused appealed to the British Columbia Supreme Court arguing, in part, that Crown failed to prove that he harassed the complainant.

Section 264(2) outlines four types of prohibited conduct that must be proven in order to sustain a conviction, including "repeatedly following from place to place the other person or anyone known to them." The only evidence was the single occasion when the accused followed the complainant. Repeatedly, on the other hand, means conduct which goes beyond one occasion. Thus, the accused's conviction could not be supported in law. The appeal was allowed and an acquittal was entered.

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

IT'S WHAT THE OFFICER KNOWS THAT COUNTS

R. v. Decker, 2004 NLCA 36

A police officer received information by telephone from another officer that he had seen a person drinking liquor in a dark coloured pickup located at a

ferry terminal. The officer receiving the information went to the ferry terminal and stopped a pickup with two occupants. There was only one road into and out of the terminal area and traffic was light. A roadside test was administered and the accused failed. He subsequently provided two breath samples in excess of the legal limit and was charged.

At his trial in Newfoundland Provincial Court, the accused was convicted of care and control with a blood alcohol level over 80mg%. The trial judge concluded the accused's rights under s.9 of the *Charter* protecting him from arbitrary detention had not been breached and there was no reason to exclude the certificate of analysis. The accused appealed to the Newfoundland Supreme Court.

In overturning the conviction, Justice Dymond found the accused had been arbitrarily detained because the police lacked an articulable cause for the stop. In his view, the detaining officer had no objective observation of an offence or erratic driving. Rather, he only had minimal information provided by another officer—the vehicle's licence number, make, model, colour, occupant description, or whether it was parked or moving were not known. As a result of the unlawful detention—described as random and arbitrary by Justice Dymond—the evidence of the breathalyzer readings was excluded under s.24(2) of the *Charter*.

The Crown appealed to the Newfoundland Court of Appeal arguing the description of the vehicle was sufficiently detained to provide articulable cause—the yardstick used to measure an arbitrary detention under s.9. Articulable cause has been previously described by the Newfoundland Court of Appeal as "a demonstrable rationale…which is sufficiently reasonable to have justified the detention"[2].

Justice Welsh, authoring the unanimous judgment, noted there were two important considerations in assessing articulable cause. First, the particular context of the situation must be considered. And second, "the focus must be on the evidence that is before the court, not the factors that, had they been present, may have facilitated proving articulable cause". In this case, the lower appeal court judge erred when he focused on what factors the officer did not have. In holding there was sufficient cause to justify the stop, Justice Burke of Newfoundland's top court stated:

> In this case, the vehicle matched the description of the vehicle [the officer] was looking for, a dark pickup with two occupants. There was just one road on which the vehicle could be traveling, and only one possible direction since the driver was leaving the ferry terminal, Further, [the officer] stopped the [the accused's] vehicle at a time there was very little traffic….
>
> The testimony as to the volume of traffic is important in light of the limited description of the vehicle provided…. In the particular circumstances of this case, it cannot be said that [the officer] stopped the [accused's] vehicle randomly or arbitrarily. He used objective criteria to identify the vehicle. He had reasonable grounds, which he could articulate, for stopping the particular vehicle. While the amount of information was minimal, it was sufficient to satisfy the requirements of section 9 of the Charter. [paras. 12 and 13]

In other words, in assessing articulable cause, the appropriate focus is on the known—rather that the unknown. The appeal was allowed and the conviction was restored.

Complete case available at www.canlii.org.

[2] R. v. Burke, 1997, 153 Nfld. & P.E.I.R. 91 (NCA).

HOUSE SEARCH WARRANT DOES NOT INCLUDE VEHICLE PARKED ON PROPERTY

R. v. Vu, 2004 BCCA 230

Police received a tip of a possible marihuana grow operation at a residence. Follow-up investigation was conducted and a search warrant was obtained and executed. In the home, police found 127 plants, an elaborate ventilation system, lights, a tampered hydro meter and other evidence. Also found in the search were keys, one set fitting the locks securing the door to the grow operation as well as a vehicle parked in the backyard. Police opened the car and found documents in the accused's name, including vehicle registration papers, and two passport photographs bearing his likeness.

At trial, the accused was convicted of marihuana production and possession for the purpose of trafficking. An officer testified he usually examines search warrants, but in this case did not and went ahead and searched the vehicle anyways. Police also admitted they had searched vehicles found at grow operations for offence related material in similar circumstances before, even though the vehicles were not mentioned in the warrants. The trial judge found there had been no breach of the accused's s.8 *Charter* right. Furthermore, even if there was a breach, the trial judge would have admitted the evidence under s.24(2). In her view, the officers acted in good faith, having had reasonable grounds to search the vehicle. The accused appealed to the British Columbia Court of Appeal arguing, among other grounds, that the search of the vehicle was unreasonable under s.8 of the *Charter* and that the evidence should have been excluded.

The Search

All three appeal court justices agreed that the search of the vehicle under the warrant authorizing the search of the dwelling house did not include the authority to search vehicles on the property. Thus, the accused's right to be secure against unreasonable search and seizure was violated. Justice Donald held:

> On the face of the warrant I do not, with respect, see how it is possible to find that it authorized the search of a motor vehicle. The warrant recites that there are reasonable grounds to believe that evidence of an offence under the *Controlled Drugs and Substances Act* are "in a place, namely the dwelling house...". The authority is "to enter the said place...". The antecedent of place is clearly the dwelling house. That language cannot be stretched to include a vehicle.
>
> Neither can it be said that the Information to Obtain provides a context for giving an expansive reading to the warrants such that it can include the Honda….
>
> Thus the search was not authorized by law: either by the warrant or by reason of exigent circumstances or a search incidental to an arrest. The [accused] was not arrested at the time of the searches. It must follow in my judgment that the search of the vehicle violated s. 8. [paras. 20-22]

Good Faith

Section 24(2) of the *Charter* allows a court to consider evidence obtained as a result of a *Charter* violation provided its admission in the trial would not bring the administration of justice into disrepute. One factor the courts examine during the s.24(2) analysis is whether the police were acting in good faith when they obtained the evidence in question. In this case, the trial judge felt the police had reasonable grounds to believe vehicles should be searched at a grow operations because evidence might be found in them. Justice Donald (with Justice Rowles concurring) however, disagreed. In the majority's opinion, reasonable grounds to believe a vehicle may provide evidence would only offer a basis to obtain another warrant, not allow for a warrantless search of the vehicle without

exigent circumstances or some other power. Justice Donald, critical of the police conduct in this case, stated:

> I have said that reasonable grounds to search do not provide a basis for a finding of good faith. A warrant is required and every police officer should know that. The thinking that reasonable grounds constitutes good faith must be discouraged, otherwise police will shortcut the warrant process in the expectation that the evidence obtained in a warrantless search will be admitted notwithstanding a s. 8 breach.
>
> Not only is the trial judge's finding of good faith based on an erroneous ground, but the behaviour of the police manifested the opposite of good faith. The officer who searched the vehicle did not read the warrant to see whether it authorized the search. This shows a casual indifference to the privacy interests protected by s. 8. Both that officer and the detective in charge indicated a practice of searching vehicles on property covered by a warrant despite the absence of any specific authority relating to vehicles. An occasional lapse is one thing, a practice is quite another and engages the good faith criterion in the [s.24(2)] analysis.
>
> In my view, the reputation of justice will suffer much more from tolerating a practice of unauthorized searches than setting aside the convictions. The exclusion of the evidence taken in the vehicle search would not end the matter. On a new trial the Crown may have other means of proving the [accused's] identity as a person with knowledge and control of the grow operation. [paras. 40-42]

Justice Braidwood took a different position than the majority on the good faith issue. He concluded that the admission of the evidence would not bring the administration of justice into disrepute. In his view the evidence was non-conscriptive, the violation not serious, and the accused's privacy expectation in the vehicle was lower than a residence. The fact the officer who searched the vehicle usually examines the search warrant, but failed in this case, was evidence of carelessness rather than bad faith. Justice Braidwood wrote:

> This is not a case of the police running roughshod over an accused's rights. The police found a large scale marihuana grow operation in the house. While the cultivation of a narcotic is a very serious offence, the breach of the [accused's] rights was not serious. Admitting the evidence would not lessen the esteem in which the public holds the administration of justice. There is no need in this case to acquit the guilty in order to ensure that in the future the public's right to privacy is protected; to do so in this case would bring the administration of justice into disrepute. [para. 74]

The accused's convictions were set aside and a new trial was ordered.

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

FLIGHT FROM POLICE ADDS TO REASONABLE SUSPICION

R. v. Jackson,
(2004) Docket: C40604 (Ont.C.A.)

Two plainclothes police officers were patrolling an area known for drug trafficking and gun related incidents shortly after midnight when they saw two black males walking along the street. They were the only pedestrians in the area and were doing nothing suspicious. About 25 minutes later another officer broadcast over the police radio he heard a gunshot in the area. The plainclothes officers drove back into the area, verbally identified themselves as police, and told the two men seen earlier that they wanted to talk. The two men fled on foot and the police took up chase. One man got away, but the accused was apprehended as he attempted to scale a fence. As police pulled the accused from the fence, an object fell from his jacket and a silver handgun was found near his feet on the ground. After a struggle, he was pepper sprayed and handcuffed. A search of the accused netted

police $330 in cash, a baggie of crack cocaine, and a baggie of marihuana. He was subsequently charged with several offences.

The accused made a motion in the Ontario Superior Court of Justice ([2002] O.J. No. 4005) to exclude the evidence submitting it was obtained as a result of an arbitrary detention (s.9 of the *Charter*) and an unreasonable search (s.8 of the *Charter*). Superior Court Justice Nordheimer concluded the police were justified in approaching the two men to question them in light of the circumstances that evening. This, along with the men fleeing, provided sufficient cause for the police to pursue and detain them. Thus, everything that flowed from the efforts to detain the accused—finding the gun, the arrest and the search—was admissible. Justice Nordheimer stated:

> …the officers were patrolling in an area of their division which was known for problems, including gun related incidents; it was early in the morning; they had received a report of a gun shot; and the defendant and the other male were the only two individuals who the officers had seen in the area. In those circumstances, it was entirely reasonable for the officers to wish to question the two men in relation to the gun report. In this regard, it is important to remember that police officers do have the right to question people in furtherance of an investigation…
>
> The officers were therefore acting within their rights to question the defendant and the other male. Had the defendant simply refused to answer the officers' questions, then any attempt by the officers to detain or arrest the defendant would have been problematic… However, that is not what happened. Rather than refusing to answer the officers' questions, the defendant and the other male fled. In doing so, in my view, the defendant provided the reasonable suspicion to the officers necessary for the officers to pursue and detain the defendant. The defence strongly asserted that the questions raised by these evidentiary issues had to primarily be determined through the use of common sense. The defence then asserted that if the defendant had the right to simply refuse to answer questions and walk away, then he had the right to run. I would say that common sense does not allow for the conclusion that individuals in this situation who attempt to flee from police officers are to be treated as equivalent to individuals who simply refuse to answer questions…. [references omitted, paras. 12, 13]

And further:

> The result of the defence position in these circumstances is that the officers would have had no alternative in the face of these two men fleeing but to simply return to their police car and continue on patrol. That is a result that does not accord either with common sense or with the requirements of the Charter. Instead, I believe that the "constellation of objectively discernible facts" gave the officers articulable cause to detain the defendant. That, in turn, gave the officers the right to pursue the defendant to effect the detention. In the course of detaining the defendant, the firearm was revealed, and that, in turn, gave the officers the right to arrest the defendant. The arrest being valid, then the warrantless search which gave rise to the finding of the drugs is also justified. [para. 16]

The accused was convicted by a jury of possession of a firearm, assault with intent to resist arrest, and failing to comply with a recognizance, but appealed to the Ontario Court of Appeal contending, among other grounds, that the trial judge erred in concluding the detention was justified. In dismissing his appeal, the unanimous Ontario Court of Appeal agreed "with the trial judge that the "constellation of objectively discernible facts" including the [accused's] attempt to flee from the police provided reasonable grounds for the officers to pursue and detain him."

Complete case available at ww.ontariocourts.on.ca

Editor's note: It must be remembered that it was not the flight from police, by itself, which provided the reasonable suspicion (sometimes

referred to as an articulable cause) for the accused's pursuit and detention. Rather, there were other circumstances including the reputation of the area, a gunshot, and the fact the accused was in the area at the time. As well, the officers had identified themselves and told the accused and his companion they wished to speak to them, at which time they ran away. It was the totality of the circumstances—not taking any one in isolation—that provided sufficient cause for the police in this case to pursue.

DID YOU KNOW…

…that the Police Services, Ministry of Public Safety and Solicitor General, Province of British Columbia recently published 2003 statistics reporting the *Criminal Code* case burdens per officer for all 11 of BC's independent municipal police departments?

Department	Criminal Code Case Burden per Officer
Abbotsford	97
Nelson	92
Victoria	89
New Westminster	87
Vancouver	65
Oak Bay	61
Port Moody	53
Delta	51
Saanich	44
West Vancouver	44
Central Saanich	35

In the Data Qualifiers to the report, Police Services notes, "Case Burden is defined as the number of Criminal Code offences (excluding Traffic) per authorized police strength. Because it represents the workload per officer in each policing jurisdiction, case burden is a better indicator of the demand for police services than either population or crime rates." A copy of the report is available at www.pssg.gov.bc.ca/police_services.

'MENACING' POLICE CONDUCT DOES NOT WARRANT STAY

R. v. McCrea, 2004 BCCA 229

The accused was arrested for robbery, taken to the police station, and searched. He was provided access to a telephone to call a lawyer, but the lawyer was not in. However, a member of the lawyer's staff connected the accused to his own residence where he had a 45-minute conversation with someone at his home. Following the telephone call, the two officers interviewed the accused for three and a half hours. The interview was captured on video tape.

Despite the accused maintaining he wished to remain silent throughout the interview, the officers continued to tell him what they knew and urged him to tell his side of the story. At one point during the interview the accused was seated on a chair. A police officer responded aggressively, moved his chair closer to the accused so their faces were less than two feet apart. The officer then suddenly stood up, thrust his hand in the direction of the accused, struck the wall behind his head, and leveled an insulting, profane, and vulgar verbal barrage at him. The officer then left the interview room and slammed the door behind him. The accused was not touched during the event and appeared quite collected afterwards. The second officer did not intervene during the incident.

At his trial for break and enter x 17, armed robbery x 4, and committing an indictable offence while masked x 4, the accused applied for a judicial stay of proceedings arguing, in part, that he was verbally abused during the interview. Even though no evidence derived from the interview was tendered at trial, the trial judge concluded the police transgression affected the judicial process and ordered a judicial stay of proceedings. The trial judge stated:

> These actions of the police officers are completely unacceptable. Persons in Canada are entitled to be treated with respect and dignity by law enforcement individuals, even those persons who are charged with serious criminal offences. The actions of the police went way beyond what the community expects from professional law enforcement persons. To be treated by these officers as the accused was is an affront to the community's sense of fair play and responsibility by those who are charged with a duty to serve and protect.
>
> ……
>
> In the case at bar there was no physical injury, there nevertheless were serious and flagrant violations perpetrated against the accused. Taken all together, and most significantly the actions of the police officers, lead me to the conclusion that this is one of those cases that is the clearest of cases where the only way to ensure the integrity of the judicial system and to remind the police that their behaviour at all times when dealing with members of the public, including those persons charged or suspected with serious crime, must be civilized and professional, is to grant a stay of proceedings.

The Crown appealed to the British Columbia Court of Appeal. Justice Saunders, authoring the unanimous appeal court judgment, found a stay of proceedings was not appropriate in the circumstances. As she noted, "A judicial stay of proceedings is the ultimate remedy available to an accused, preventing as it does prosecution of the charges laid in the public interest. It is for that reason that a stay will be ordered in only the "clearest of cases"." In considering whether a stay is appropriate, a court must examine

(1) The impact upon the trial process—whether the prejudice caused by the police behaviour manifested, perpetuated, or aggravated the conduct or outcome of a trial,

(2) Whether a stay the only remedy or if there was any other remedy reasonably capable of removing the prejudice, and

(3) Balance the interests served by a stay weighed against society's interest in a final decision of the charges.

Although Justice Saunders found the officer's behaviour "below standard" and "menacing", she concluded the trial judge "gave inordinate consideration to the disciplinary influence of a stay upon the comportment of police officers and insufficient consideration" to the above three criteria. In reviewing the impact of the police behaviour on the trial process, Justice Saunders stated:

> In the case at bar the incident was separate both in time and substance from the prosecution of the charges, the misconduct occurred prior to involvement of Crown counsel or the trial process and the interview provided no evidence for use at trial. This compels the conclusion, in my view, that any prejudice to the accused caused by the incident is unlikely to be manifested, perpetuated or aggravated through the continuation of the trial or by a verdict.
>
> To put the matter another way, the issue here is one of the behaviour of a police officer that had no material effect upon the conduct of the trial or its outcome. In that sense the stay was directed at least in part, as the trial judge appeared to recognize, to the discipline of the police service. However, discipline of police, while perhaps a secondary outcome to a stay of proceedings, should not be the purpose of such an order. [paras. 19-20]

As for other remedies, the accused's sentence (if convicted) could reflect the inappropriate police conduct, the accused could seek a civil remedy, or the RCMP public police complaint process could be pursued. Finally, "the administration of justice would be brought into disrepute by a stay of proceedings." The prejudice was "fleeting", there was no substantive effect on the trial, and the charges were serious and many. The stay was set aside and the matter remitted for trial.

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

VOLUNTARINESS: HOW FAR CAN A POLICE INTERROGATION GO?

Henry Waldock, Crown Counsel

Current police interrogation techniques use psychological devices to persuade suspects to confess. To win sympathy for the accused at trial, defence counsel will emphasize the imbalance of power between the detained suspect and the sophisticated cop.[3] But the Supreme Court of Canada in *R. v. Oickle*[4] clearly established that not every improper inducement renders a statement involuntary. When a suspect has been well treated, it takes considerable pressure to overwhelm a person's freedom to choose whether to confess.

It is trite law that if the suspect spoke to a "person in authority"[5] about the crime, courts will accept evidence of those remarks only if the accused made them *voluntarily*.

A suspect makes a statement *voluntarily* when:

- the suspect had an *operating mind*;
- the person in authority did not use *threats or promises* nor *oppression* to persuade; the suspect to speak;
- the suspect is not *compelled* to speak; and
- the police did not use improper *trickery*

"If an investigator's conduct passes the scrutiny of the common law rule as to voluntariness, it necessarily satisfies the *Charter* right to silence."[6]

What Caused the Confession?

When describing the principles of voluntariness, Iaccobucci J. did not discuss causation. But when applying the principles to facts, he dismissed many inducements as being insufficient to *cause* Oickle to confess involuntarily.[7] Other cases put this in more express terms.[8] Therefore, even where the police have offered inducements, or oppressed or tricked the suspect, Crown counsel should ask the court to determine whether these things overwhelmed the suspect's will.[9]

Operating Mind

The operating mind standard is a low one – schizophrenia,[10] drunkenness[11] and other mental problems[12] do not necessarily render a statement involuntary. But a low mental capacity renders a suspect more vulnerable to oppression, and so the court may give greater scrutiny to the treatment of the suspect.[13]

Threats or Promises

Proper	Improper
Minimize *Moral* Gravity of Offence[14]	Minimize *Legal* Gravity of Offence[15]
Appeal to spirituality – how do you face your God?[16]	Discuss how confession will impress the judge[17]
Social appeal – others will respect you	Discuss sentencing options[18]

[3] For example: Baidwan #2 March 11, 2002 BCSC Vancouver Registry #CC001678A at para 51.

[4] R. v. Oickle 2000 SCC 38, [2000] 2 S.C.R. 3, (2000) 147 C.C.C. (3d) 321

[5] *A person in authority* is someone who investigates, detains, arrests or prosecutes the accused.. See: R. v. Hodgson [1998] 2 S.C.R. 449, 127 C.C.C. (3d) 449 and R. v. Wells [1998] 2 S.C.R. 517, 127 C.C.C. (3d) 500.

[6] HMTQ v. Baidwan No. 1, 2001 BCSC 1412 at para 56; aff'd 2003 BCCA 351

[7] R. v. Oickle para 84, 87, 99

[8] R. v. Spencer 2003 BCSC 508 at para 30; R. v. Bakker 2003 BCSC 599 at para 95; R. v. Crockett 2002 BCCA 658 (2002) 170 C.C.C. (3d) 569, (2002) 7 C.R. (6th) 300 at para 29; *R. v. Paternak* (1995), 101 C.C.C. (3d) 452 (Alta. C.A.); Kerans J.A. of the Alberta Court of Appeal in at p. 461 (reversed on other grounds, 110 C.C.C. (3d) 382 (S.C.C.)) wrote:

"For an otherwise healthy and mature human to be deprived of an effective choice, I am inclined of the view that the influence must be so overbearing that it can be said that the detainee has lost any meaningful independent ability to choose to remain silent, and has become a mere tool in the hands of the police."

[9] R. v. Carpenter 2001 BCCA 31, (2001) 151 C.C.C. (3d) 205 at para 69; R. v. Malik, Bagri & Reyat 2003 BCSC 20 at para 69; R. v. Labbe 2002 BCSC 996 (appeal allowed on other grounds: (2001) 159 C.C.C. (3d) 529 (BCCA)) at para 37

[10] Whittle [1994] 2 SCR 914, 92 CCC (3d) 11

[11] R. v. Oldham (1970) 1 C.C.C. (2d) 141 (B.C.C.A.); R. v. McKenna [1961] 1 S.C.R. 660; R. v. Richard (1980) 56 C.C.C. (2d) 129 (BCCA), R. v. Labbe 2002 BCSC 996 (appeal allowed on other grounds: (2001) 159 C.C.C. (3d) 529 (BCCA))

[12] R. v. Santinon 11 C.C.C. (2d) 121 (B.C.C.A.); R. v. Nagotcha [1980] 1 S.C.R. 714 51 CCC (2d) 353.

[13] Oickle paragraph 42.

[14] R. v. Speidel 2003 BCSC 1532; R. v. Bakker 2003 BCSC 599;

[15] In some interrogations, the investigating officer referred to less serious legal consequences in circumstances in which the suspect may have made the link. Eg Oickle; Baidwan unreported March 11, 2002 BCSC Vancouver Registry #CC001678A;

[16] R. v. MacNeil (1995), 138 N.S.R. (2d) 117 (N.S.C.A.), leave to appeal to the Supreme Court of Canada refused September 14, 1995

[17] Oblique references to legal process while minimizing moral gravity do not necessarily constitute improper inducements. HMTQ v. Baidwan No. 1, 2001 BCSC 1412 at para 53; aff'd 2003 BCCA 351

[18] R. v. Warren (1997) 117 C.C.C. (3d) 418 (N.W.T.C.A.) Leave to appeal refused [1997] S.C.C.A. No. 483. When trying to persuade Warren to confess, the officer said: If he confessed, apologized and explained that the blast was not

Emotional appeal – you will feel better	Phrases like "It would be better if you told" or "better tell us everything"[19]
Develop suspect's trust[20]	Intimidate
Comfort the suspect when crying or upset	Offer *quid pro quo* – "if you confess for me then I/prosecutor/judge will do X for you"
Polygraph[21]	Link confession to liberty

The worst inducement in this category is the offer of lenient legal treatment in exchange for a confession or the threat of worse treatment for failure to confess. But other improper inducements include promises of benefits for people close to the suspect[22], or psychological treatment for the suspect in exchange for a confession[23]. However, when a suspect infers an advantage from a remark made by a police officer some trial courts[24] diverge from the Supreme Court of Canada's distinction between inducements by the state and self-inducement.[25]

Oppression

Because a suspect might falsely confess made in order to put an end to harsh circumstances,[26] Oickle considers oppression. Again, none of these are necessarily fatal, depending upon what persuades the offender to confess.

Proper	**Dangerous**
Attend the offender's wellbeing	Deprive suspect of sleep[27]
Persist in the face of assertions of the right to silence[28]	Withhold medical attention
Let the suspect take bathroom breaks	Threaten or inflict injury to suspect[29]
Cigarette breaks	Confront suspect with false evidence[30]
Feed the hungry, clothe the naked	Starve or freeze the suspect[31]
Limit repeated access to counsel[32]	Deny access to counsel[33]
Confront with evidence or exaggerate evidence[34]	False evidence[35]
	Failure to give the right to silence warning[36]

intended to kill the miners, he would be looking at a manslaughter charge and might only serve a few years; but if he did not confess and apologize, he would be viewed as a cold, uncaring person and would be treated more harshly by the police and the prosecutors' office. The trial judge was satisfied by the evidence that these inducements did not move Warren to give the confession.

[19] R. v. Hogben [1993] B.C.J. No. 458 (BCCA)

[20] R. v. Malik, Bagri & Reyat 2003 BCSC 20

[21] R v. McIntosh (1999) 141 C.C.C. (3d) 97 (Ont CA) leave to appeal dismissed [2000] S.C.C.A. No. 81.

[22] *R.* v. *Jackson* (1977), 34 C.C.C. (2d) 35 (B.C.C.A.) ; But not all such promises will render a confession involuntary: R. v. Billings 2004 BCSC 456.

[23] A promise to get the guy help *may* cause him to confess. If so, the statement is inadmissible. But *R. v. Ewert* (1991), 68 C.C.C. (3d) 207 (B.C.C.A.) decided to confess for other reasons, and so the offer didn't render the statement involuntary.

[24] eg R. v. N.T.A. 2002 BCCA 103.

[25] Oickle at para 57; see also *R.* v. *Henri*, [2001] A.J. No. 462 (Q.B.); R. v. Carpenter 2001 BCCA 31, (2001) 151 C.C.C. (3d) 205;

[26] Hoilett (1999 Ont CA) Sex offender was drunk and high. Arrested at 11:25pm. Clothing taken for forensic purposes. Naked for 1.5 hours. Given a bunny suit. Woken at 3:00am for an interview. Fell asleep 5 times during the interview. Confession not voluntary

[27] Baidwan #1 & #2: Unreported ?? March 11, 2002 BCSC Vancouver Registry #CC001678A.

[28] Wood (1994) 94 CCC (3d)193 (NSCA) leave to appeal to SCC dismissed; R. v. Bohnet 2003 ABCA 207. R. v. Timm (1998) 131 CCC (3d) 306 (Que CA); R. v. Van Haarlem (1991), 64 C.C.C. (3d) 543 (BCCA) (affirmed 71 C.C.C. (3d) 448 (S.C.C.)) reviewed the Supreme Court of Canada's decision in Hebert, and summarized the conclusions of that court on the parameters of the right to silence, at page 11:
…I extract the following principles which are applicable to an accused person's fundamental right to silence.
(1) The right is intended to protect an accused from unfair pre-trial interrogation.
(2) The right is to be determined objectively, based on the conduct of the police.
(3) Unlike the right to counsel, the right to silence is not an absolute right subject only to be discharged by waiver, as was decided in R. v. Clarkson (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383.
(4) If an accused chooses to volunteer information to policemen, there is no violation of his s. 7 right to silence.
(5) An accused's right to silence will be violated where police conduct subverts his constitutional right to choose not to make a statement.
(6) An accused's right to silence will be violated when undercover police, or their agents, actively elicit information after an accused has exercised his right to silence. However, in this latter situation, in the absence of eliciting behaviour, if an accused chooses to speak by his own choice there is no violation.

[29] R. v. Sabri [2002] O.J. No 2202, 166 C.C.C. (3d) 179 (Ont CA)

[30] R. v. McMillan [2003] O.J. No. 3489 (Ont CA)– officer produces a forged "confession" of McMillan's partner in crime. McMillan spills the beans. Crown prohibited from cross-examining McMillan on the statement to police.

[31] R. v. Hoilett (1999) 136 C.C.C. (3d) 449 (Ont C.A.) Consider also that Oickle was interrogated late into the night, and again early in the morning.

[32] Uppal Mann & Soomel 2002 BCSC 1379; R. v. Taylor, [1994] B.C.J. No 2112 (S.C.) (Vol. 2, Tab 12), R. v. Robinson, [1997] B.C.J. No. 1845 (S.C.) (Vol. 3, Tab 23), and R. v. Ertmoed, [2002] B.C.S.C. 806, R. v. Ekman 2000 BCCA 414 146 CCC (3d) 346 para 25; R. v. Roper (1997), 32 O.R. (3d) 204 (Ont. C.A.); R. v. Gormley (1999), 140 C.C.C. (3d) 110 (P.E.I.S.C. App. Div.); R. v. Mayo (1999) 133 CCC 3d 168 (Ont CA)

[33] R. v. Freisen 2003 BCSC 1760; *R. v. P.L.R* (1988) 44 C.C.C. (3d) 174 (N.S.C.A.)

[34] R. v. Watts 2003 BCSC 1403; R. v. Riley & Henry 2001 BCSC 1169 (Romilly J.) aff'd (2003) 179 C.C.C. (3d) 307 (BCCA); Baidwan #1 2001 BCSC 1412 aff'd 2003 BCCA 351

[35] R. v. Riley & Henry 2001 BCSC 1169 (Romilly J.) aff'd (2003) 179 C.C.C. (3d) 307 (BCCA)

[36] R. v. Boudreau [1949] S.C.R. 262; See also R. v. Dupuis [1952] 2 S.C.R. 516.

Trickery

"[T]he investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. [Emphasis added.]"[37]

The sorts of "trickery" that the Supreme Court of Canada disapproved of included injecting a diabetic with truth serum instead of insulin, or pretending to be a priest in order to get a confession. Trickery which brought the justice system into disrepute is to be avoided.

The Crown's Burden

Voluntariness is a question of fact; appellate courts must defer to the trial judge's findings.[38] Voluntariness must be proved beyond a reasonable doubt; a court may still point at a minor inducement and declare a statement to be involuntary.[39]

Severance – removing offending portions

If the court does find that police conduct at some point did render the suspect's remarks involuntary, ask the court to admit as voluntary all conversation which preceded that point. However, the whole of the admissible statement must go before the trier of fact, not just the inculpatory portions.[40]

[37] Oickle at paragraph 66
[38] Oickle para 22; R. v. Tessier 2002 SCC 6 reversing R. v.. Tessier (2001), 153 C.C.C. (3d) 361 (NBCA)
[39] R. v. Bunn 2001 MBCA 12: "Obviously, having regard to the first sentence of the passage I have just quoted, the final sentence must be qualified by the need for the Crown to prove, beyond reasonable doubt, that the accused's belief in the advantage to be gained by a confession was not induced or confirmed by persons in authority. There is thus no onus on the accused to prove that his or her confession was induced by a promise or that he or she was misled. It is sufficient to exclude the statement that the accused believed it would be to his or her advantage to make the statement and there is a reasonable doubt as to whether this belief was the result of an inducement held out by the police."
[40] *R. v. Allison* (1991) 68 C.C.C. (3d) 375 (B.C.C.A.)

Conclusion

A confession following interrogation may be found admissible, no matter how many errors the police make *if* the police errors individually and collectively did not overwhelm the suspect's ability to choose whether to confess. It is a question of fact, where advocacy matters.

Further Reading

Like Oickle, lengthy and intense interrogations were conducted in the following cases, yet the confessions obtained were admitted:

- HMTQ v. Baidwan #1 - 2001 BCSC 1412 aff'd 2003 BCCA 351; #2 11 March 2002, Vancouver CC001678A.
- R. v. Ekman (2000), 146 C.C.C. (3d) 346 (B.C.C.A.), 2000 BCCA 414, 2003 BCCA 485
- R. v. Ertmoed , 2002 BCSC 806.
- Wood (1994) 94 CCC (3d)193 (NSCA) leave to appeal to SCC dismissed

POLICE ENTRY JUSTIFIED FOLLOWING 911 CALL FROM PAYPHONE

R. v. Huang & Zeng, 2004 BCPC 172

Police received a 911 call at 1:57 am from a payphone located outside a convenience store. The caller stated he had been robbed at gunpoint in his home where he had a marihuana grow operation. The caller provided his address and hung up, but the police were unable to renew telephone contact with the caller. Several police officers attended the home and grouped at the front door. The area was quiet and there was no external evidence of criminal activity or a marihuana grow operation.

Police knocked loudly at the door, but received no answer despite hearing a male voice inside. Further knocking and ringing of the doorbell resulted in a male voice stating, "Who is it?" An officer said it was the police and asked the

occupant to open the door. The male said, "What do you want?" The officer again knocked, told the occupant it was the police, and asked him to open the door. The officer could see a male standing in the hall as he looked through the mail slot. Again the officer told the occupant to open the door. After about 30 seconds, the door opened and the odour of growing marihuana was immediately evident. The occupant was handcuffed and police entered the house. Two other adults and one child were found in the home, but there were no guns or evidence of a robbery. However, the police did note that the house had been converted into a marihuana grow operations with some space reserved for living quarters. Police applied for and were granted a search warrant to search the house.

During a trial *voire dire* in British Columbia Provincial Court, the accused challenged the validity of the warrant, among other things, arguing the information contained in it was obtained through a warrantless search that violated their *Charter* rights to be secure against unreasonable search and seizure. The accused submitted that the police should have considered that the 911 call was a hoax, perpetrated on the occupants of the home. If the police would have considered the 911 a hoax, the accused contended the police would have taken other action.

In ruling that the police action in entering the house to search for injured persons was reasonable and did not violate the accused's rights under s.8 of the *Charter*, Justice Schmidt stated:

> The court is not satisfied that the police acted inappropriately in this circumstance. The police responded to a high priority call of a robbery at gunpoint in a private residence by a person who said he was the occupant of the residence. The person revealed that he was growing marihuana in his home and gave the address for the police to attend. When the occupants refused to answer the door after the police announced their presence, the person in the residence created a sense of urgency and appeared to verify the information received by the police in the 911 call. The best information the police had was that the owner / occupier of the house was not in the house, but that a robbery was in progress. The failure of the person inside to open the door or to hesitate to open the door added credibility to the 911 call.
>
> At that point, the options for the police were severely limited. There may be a number of scenarios which would account for the facts as they presented themselves, but it was a sensible conclusion that the report was accurate. Perhaps the caller occupant had escaped, run to the nearby payphone, made the call and in his panic had forgotten to leave his name and ran off after other assistance, leaving his family alone with the armed intruders. The refusal of the male person inside the house to open the door tended to confirm some such scenario and required the police to perform their duty as peace officers and determine the facts without further delay and in a manner that reflected the report they received.
>
> There was no fact or circumstance observable by the officers that would move them to believe that they were dealing with any situation other than the one that had been reported to them. In fact, they have a growing familiarity with armed robberies of private residences used for growing marihuana that unfold much as this one appeared to be unfolding.
>
> The fact that the house did not appear to be a grow operation is not persuasive and is not something that should cause the police to treat a 911 call less urgently. Criminals with sophisticated methods appear to have increasingly occupied the field, and grow operations are no longer clumsy attempts to produce for personal use or minor profit. They are often businesses that have adapted to the adverse business climate of illegality and their operations are difficult or impossible to detect. No one is more aware of this than the police and the lack of condensation on windows and other historical indicia of marihuana grow

> operations inside a residence are not factors that should have caused the police to doubt the veracity of the call.
>
> The police were not required in these circumstances to attempt to locate the caller at the payphone beyond the efforts made by their dispatchers to call back to the payphone and re-establish the connection…. [paras. 23-27]

And further:

> Where, as in the case at bar, the police are unable to verify whether the person behind the door is the occupant and are unable to verify the circumstances of the persons inside the house after receiving a call involving the possible use of firearms, they have a duty to act in a manner most consistent with a response to an emergency. [para. 31]

Complete case available at www.provincialcourt.bc.ca

TASER TOUCH DID NOT BREACH *CHARTER* RIGHTS

R. v. Eriksson, 2004 BCPC 34

In the early morning hours a citizen saw a car off the road in a snow bank. He noted the accused smelled of liquor, seemed under the influence of alcohol, and became angry and yelled at him and the tow truck operator before police arrived. A police officer attended and began an impaired driving investigation after noting the smell of alcohol on the accused's breath and other indicia of impairment. She was arrested, given the breath demand, and advised of her *Charter* rights. The accused declined to give a breath sample at the time, asked for a 24 hour driving suspension, and declined to speak with a lawyer.

The accused was transported back to the police station and the booking-in process began. She was very loud, "almost confrontational", and again refused to speak with a lawyer. The police learned the accused was on an undertaking to abstain from alcohol; she was arrested for breach and again refused to talk with counsel. The accused became vocal, yelling and screaming, using profanity, and calling police derogatory names when she was about to placed in a cell.

A female member was called to assist in removing her personal possessions and searching her, but the accused refused to cooperate. What occurred next was described by the trial judge as follows:

> Cst. Millar asked the Accused to remove her jewellery. At first the Accused refused and swore at Cst. Millar at which point Cst. Millar advised the Accused that if she did not remove the jewellery force would be used to remove those items. The Accused took off one earring and punched it into Cst. Millar's hand striking the constable's hand with her hand and causing the earring to fall to the floor. The Accused then refused to remove any more jewellery and continued verbally assailing Cst. Millar.
>
> Cst. Clark stepped forward at that point and without any warning touched the Accused with a TASER on her left side. The Accused "jolted back" and said "that fucking hurt" but then became compliant and removed the rest of her jewellery and provided it to Cst. Millar. [para. 12-13]

The accused was searched and placed in cells. No medical treatment was provided by the police nor did the accused seek any medical treatment after being released. She said she hurt for a month and she suffered bruising and breaking of the skin.

In the midst of her trial in British Columbia Provincial Court on charges of impaired driving and breach of undertaking, the accused sought a judicial stay of proceedings, submitting the actions of the police while she was in custody violated her *Charter* rights, including s.7—the right to life, liberty, and security of the person. The trial judge summarized the accused's arguments as follows:

(a) there was no concern by any of the police officers that the Accused might assault one of them;
(b) there is no evidence of Cst. Clark's motivation for using the TASER as he was not called as a witness;
(c) although the Accused was unquestionably loud and unpleasant the booking-in process was proceeding by the officers who had duties in that regard; and
(d) Cst. Clark had no role in the arrest of or the booking-in procedure concerning the Accused and his use of the TASER was a case of extra-judicial punishment and a completely unneeded and unacceptable use of force in the circumstances.

The Crown contended that the *Criminal Code*—s.25—permits "a peace officer to use whatever force is necessary to do what they are required or authorized to do provided they act on reasonable grounds and the force used is not likely to cause death or grievous bodily harm." Even if the force was excessive and its use breached the accused's s.7 rights, the Crown also suggested there was no link between the breach and trial fairness that would justify a judicial stay of proceedings.

The trial judge also added s.12 of the *Charter*—the right not to be subjected to any cruel and unusual treatment or punishment—to the discussion even though the defence did not refer to it in their stay application. However, Justice Brechnell concluded the police did not breach the accused's *Charter* rights in this case. The judge ruled:

> The Accused claims that the application of the TASER by Cst. Clark without warning and in circumstances where she was not threatening the other police officers in the booking room area amounted to excessive force and extra judicial punishment and thus infringed upon her *Charter* rights.
>
> It is clear that Cst. Clark gave no warning prior to administering the TASER to the Accused. However, one must examine all of the circumstances surrounding the use of the TASER in coming to any conclusions as to whether or not its use amounted to an infringement of the Accused's *Charter* rights.
>
> The Accused was being vocally abusive and belligerent to Constables McSeveney and Millar. The Accused was being uncooperative in response to Cst. Millar's requests to remove her jewellery. The Accused struck Cst. Millar's hand with her hand in an obvious show of defiance and with sufficient force to cause the Accused's earring to fall to the floor. This action followed Cst. Millar's verbal warning to the Accused indicating that if she did not cooperate in the removal of her jewellery additional measures would be taken by the police to ensure the jewellery was removed. She did receive a warning that there would be consequences to follow from further non-compliance with Cst. Millar's requests.
>
> The use of the TASER in the booking room area is third on the continuum of methods of control enunciated by Cst. McSeveney as RCMP policy. The Accused had failed to comply with verbal requests and had acted in a physically aggressive manner towards Cst. Millar. It is not necessary for the police in such circumstances to become involved in a full blown physical altercation with a person in their charge when another acceptable method of ensuring compliance is immediately at hand and can be deployed in a manner that minimizes any physical danger to the attending members and the Accused while at the same time encouraging immediate compliance.
>
> By applying the TASER to the Accused Cst. Clark's actions can be justified as the use of as much force as is necessary for the purpose of controlling the Accused and ensuring her compliance.
>
> Although Cst. Clark's actions in applying the TASER to the Accused were taken without any request from Constables McSeveney and Millar and done without an additional warning to the Accused that the TASER would be used they do not amount any violation of the Accused's Section 7 or indeed Section 12 *Charter* rights in the circumstances of this case and no relief is available to her. [paras. 66-71]

The judge also noted that even if there was a violation of the accused's *Charter* rights, a judicial stay was not an appropriate remedy—her ability to make full answer and defence, the investigation of the charges, nor the conduct of the trial were affected by the police action.

Complete case available at www.provincialcourt.bc.ca

POLICE NOT REQUIRED TO 'COCOON' THEMSELVES ON APPROACH TO HOUSE

R. v. Vu & Vu, 2004 BCCA 381

Two major crime unit police officers went to the accused's home to return some property seized during a previous drug investigation 3 years earlier. They parked at the rear of the house and went to the back door, knocked, but received no response. An officer walked along the house to the front to look for another door, but did not find one. Walking back to the police car, he saw a doorway made of wooden slats, with one slat missing. He detected a very strong odour of marihuana, looked inside, and saw a garden hose and water bottles. He also examined a lower floor level window and saw it had a covering on it. The police obtained a search warrant under the *Controlled Drugs and Substances Act* and found two rooms containing 159 marihuana plants.

At trial the accused argued that the search warrant was based on information unlawfully obtained. They submitted that the police really went to the property to investigate a marihuana operation, rather than to return property. Further, even if the officer did not have a secondary purpose, his walk down the driveway after knocking was unlawful and therefore he smelled the marihuana illegally.

Justice Taylor, describing the detection of the marihuana odour as happenstance, rejected the accused's arguments. In his view, the police had one intention when they attended—to return property—and the officer was not expected "to collapse his antennas and cocoon himself in the reality of that which he observes as he passes through each day." The accused were convicted of production of a controlled substance and possession for the purpose of trafficking.

The accused appealed their convictions to the British Columbia Court of Appeal arguing, in part, that the trial judge erred in concluding that the search of the residence was lawful. Although they conceded the police had an implied licence to knock on the door, they argued it was revoked once the police received no answer. In other words, the officers' right to remain on the property had ended and any further evidence obtained was unlawful, which tainted the warrant. Justice Oppal, authoring the unanimous British Columbia Court of Appeal judgment upheld the trial court's ruling. He stated:

> …There is no doubt that the police conduct in this case was somewhat unusual, to say the least: the police took the extraordinary measure of having officers in a Major Crime Unit personally return an exhibit that had been seized from Mrs. Vu some three years prior to this incident. Notwithstanding this, the trial judge found that the police were acting in a *bona fide* manner when they went to the Vu residence. He found as a fact that they had but one intention: to return an exhibit that had been seized earlier. It is of course not for this Court to interfere with those findings of fact. [para. 24]

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

ANSWER TO QUESTION FOLLOWING DETENTION INADMISSIBLE

R. v. Dolynchuk, 2004 MBCA 45

Two police officers responded to a report of a vehicle being driven erratically by a single male occupant who was slouched to the side with his eyes closed. A licence

number of the vehicle was provided, but the vehicle was not located in the area. The police attended the registered owner's address at an apartment building. As they were backing up in the parking lot, the officers noted a SUV matching the suspect vehicle description and bearing the same licence plate number pulling in the parking lot. They did not see the driver, but saw a male coming from between two parked cars. They asked the accused his name, which he provided. It was the same as the registered owner of the SUV. The accused was staggering, unable to balance himself, smelled of alcohol, had bloodshot eyes, slow responses, and still held the vehicle keys in his hand. An officer then asked the accused if he had just got home after driving his vehicle—to which the accused responded in the affirmative. The accused was then arrested, Chartered, cautioned, and read the breathalyzer demand.

At his trial the accused successfully argued he had been arbitrarily detained under s.9 of the *Charter* and that his s.10(b) *Charter* rights had been violated because the police did not advise him of the right to counsel before questioning him. His admission of driving was excluded and the impaired driving charge was dismissed. The Crown unsuccessfully appealed to the Manitoba Court of Queen's Bench, which upheld the trial judge's ruling. The Crown again appealed to the Manitoba Court of Appeal.

In dismissing the Crown appeal, all three justices agreed there had been a psychological detention when the officer asked the accused if he had been driving and therefore his right to counsel under s.10(b) had been triggered. A psychological detention occurs when an officer makes a demand of a person and the person reasonably believes there is no choice but to comply with the demand. Even if an accused does not testify, as was the case here, the court can nonetheless conclude a reasonable belief to comply with a demand since the test is objective. "All of the words and conduct of the participants, as well as the environment in which questioning took place" must be examined to distinguish a demand from a request or what is compulsory from what is voluntary. In concluding that there was a detention, Justice Steele wrote:

> In the case at bar, the police had knowledge that an offence may have been committed. They knew that a witness had seen the particular motor vehicle in question being driven erratically quite recently. They knew that this man who had emerged from around the motor vehicle in question was the registered owner, that he was staggering, smelled of alcohol and had blood-shot eyes. They had already formed the opinion that the accused was noticeably impaired and that should he refuse to answer their questions, they would not allow him to leave. They were asking questions of him as part of a specific investigation. The positive answer to the police question "Were you driving?" basically gave the police proof of the final element in the offence of impaired driving. The uniformed police officers were not questioning him at random on the street, but in the parking lot of his apartment complex. These factors may support an inference by the trial court that the accused could reasonably have concluded that his freedom had been restrained. In these cases, the courts are not developing a concept of what has been referred to as "constructive detention," but rather are looking to surrounding circumstances to determine whether a reasonable person would consider themselves detained.
>
> I hasten to add that the question itself, "Were you driving?," would not necessarily lead to a conclusion that the accused was detained in every circumstance in which it was asked by a police officer of a driver….
>
> In this case, the police officers had much more than a suspicion that [the accused] had just been driving the motor vehicle in question and that he was impaired. The Crown acknowledges that [the constable's] testimony is clear that he "would have detained for investigative purposes" once he determined that he was speaking to [the accused], the registered owner. While this was never communicated to the accused and therefore

> cannot be determinative of the issue of psychological detention, it is reflective of the environment in which the question was put and one factor among several to be considered when deciding whether the inference can be drawn from the totality of the circumstances.
>
> Police purpose and motive can be taken into account as a factor when determining whether there is sufficient evidence from which a court can infer compulsion. The overall situation must be evaluated having regard to what is said and done, in what manner, in what location and for what purpose. [paras. 24-27]

And further:

> …This was not a random encounter or a general investigation. It was a specific investigation with respect to impaired driving and this particular motor vehicle. Given the description the civilian witness gave of the driver and the opinion the police officers formed of the degree of impairment of the accused when they saw him, they had reasonable grounds to suspect that the accused had committed the crime being investigated, perhaps even to arrest him. By the testimony of the police officers themselves, the investigation had reached the stage where they had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission. In that context, the question as to whether he had just been driving his vehicle was not of a general nature to obtain information, but rather was for the purpose of obtaining incriminating statements from the accused.
>
> One last point. This case was argued on the basis that if a detention existed, the accused should have been provided his s. 10(b) *Charter* rights. In this case, I agree with the trial judge and the summary conviction appeal judge that he should have been given his right to counsel information after the first question and answer and before the second question. There is no reason in this case that could not have been done even though we are speaking of a detention of only a minute or two.
>
> I leave open the question of whether a s. 10(b) right arises in all cases of detention. I can envision a situation where because of safety concerns, a search incidental to detention is required before an individual is given their right to counsel information. There may be other examples. There may be situations where delay of the accused's s. 10(b) rights is justified under s. 1 of the *Charter*. These points were not fully argued in front of us and should be left for a subsequent case. [paras. 32-34]

As for the s.24(2) *Charter* analysis—the admissibility of evidence—the court was divided. Justice Steele, with Justice Hamilton concurring, ruled the evidence inadmissible. Justice Steele wrote:

> In the case at bar, the accused was detained. The *Charter* breach resulted in the accused's participation in the creation of self-incriminating evidence in a situation where the evidence indicates he might very well have taken advantage of his s. 10(b) rights. Even though a statement may not literally have been compelled from the accused by force or trickery, it would still render a trial unfair to admit a statement that incriminates the accused when he has not had the opportunity to be advised of his legal right to remain silent in circumstances where he is entitled to that right. [para. 72]

Justice Huband, on the other hand, would have admitted the evidence even though it might be categorized as conscriptive. Justice Huband stated:

> In the circumstances of this case, it is my view that the admission of the evidence would not result in unfairness of the proceeding.
>
> Turning to other matters that will influence the decision on admissibility, I think it is obvious that the alleged violation of law was serious in nature. The accused's motor vehicle was identified as being driven in a manner which constituted a significant danger to other users of the highway. This was no trifling momentary incident. It is the public interest that offenders be apprehended and suitably punished, and it is equally important that

potential offenders be mindful of the consequences of driving while impaired.

What would a reasonable and informed observer conclude upon learning that the accused's admission was admitted as evidence in his trial, leading ineluctably to his conviction? He or she would consider the circumstances leading to the momentary detention, the good faith of the police officers and the less than serious nature of the *Charter* breach. Given the circumstances, I do not think that the observer would be shocked or appalled. I do not think he or she would conclude that the criminal justice system was in any way corrupted. Without passing too long over the ambiguities inherent in the phrase "bring the administration of justice into disrepute," I do not think that our reasonable and informed observer would conclude that disrepute of the administration of justice would result from the admission of this evidence in these proceedings. [para. 94-96]

Complete case available at www.canlii.org

DID YOU KNOW…

…that Statistics Canada recently released its crime statistics for Canada's 27 Census Metropolitan Areas (CMAs). The top 10 in each category are:

2003 CMA Top Ten Crime Rates (per 100,000 residents)	
Saskatoon	15,164
Regina	15,143
Abbotsford	13,356
Winnipeg	11,864
Vancouver	11,576
Edmonton	10,969
Victoria	10,588
Halifax	9,324
Thunder Bay	8,533
Montreal	7,938

2003 CMA Top Ten Homicide Rates (per 100,000 residents)	
Abbotsford	5.1
Regina	5.1
Kingston	3.3.
Saskatoon	3.3
Windsor	2.7
Winnipeg	2.6
Edmonton	2.2
Vancouver	2.1
Toronto	1.9
London	1.7

2003 CMA Top Ten Motor Vehicle Theft Rates (per 100,000 residents)	
Abbotsford	1,580
Winnipeg	1,493
Regina	1,355
Vancouver	1,261
Edmonton	951
Saskatoon	744
Hamilton	740
Montreal	659
Sherbrooke	648
London	586

2003 CMA Top Ten Break-in Rates (per 100,000 residents)	
Saskatoon	2,083
Regina	2,071
Vancouver	1,350
Abbotsford	1,335
Winnipeg	1,162
Sherbrooke	1,107
Gatineau	1,061
Edmonton	1,020
Thunder Bay	1,000
Sudbury	992

2003 CMA Top Ten Robbery Rates (per 100,000 residents)	
Saskatoon	306
Winnipeg	235
Regina	230
Edmonton	162
Montreal	158
Vancouver	153
Halifax	141
Calgary	116
Abbotsford	114
Toronto	112

For a complete copy of Statistic's Canada report, see The Daily, Wednesday July 28, 2004, available online at www.statcan.ca