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

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

SCHOOL SEARCH WITHOUT REASONABLE GROUNDS IMPROPER

R. v. A.M., 2004 ONCJ 98

A high school principal had a standing invitation with the local police to use drug detector dogs at the school. The school had a zero tolerance policy for drugs and the students were aware of both the policy and the use of drug dogs. The police attended the school and asked for and were granted permission to search for drugs. An announcement was made over the school P.A. system advising of the search and that students were to remain in their classrooms. During a search of the gymnasium, a drug dog indicated on a back pack. It was searched and police found 10 bags of marihuana, ten magic mushrooms (psilocybin), and other drug paraphernalia. The accused, a youth, was charged with possession of marihuana for the purpose of trafficking and possession of psilocybin.

Although a search without a warrant is prima facie unreasonable, "the absence of a Warrant for a search conducted by school authorities in a school setting does not render the search unreasonable." However, Justice Hornblower of the Ontario Court of Justice found that a search—even in a school setting—must be based on reasonable grounds. Without it, the search will not be reasonable. In this case, there were no reasonable grounds. Although the principal may have had a reasonable belief drugs would be at the school based on what he was told by neighbours and parents of students school, this information was all disclosed to him prior to the day the police arrived. In other words, a reasonably well educated guess that on any given day drugs would be found in the school is not enough.

The court also found the search in this case to be a police search, rather than a school search—even though there was a general invitation from the school. Justice Hornblower stated:

> The fact that school authorities on an earlier occasion requested a search by police does not convert the search to one by school authorities. While the search of the gymnasium was done at [the principal's] request, that was the extent of the involvement of any school official in that search. The search of the school was a warrantless search. It was a search for which no judicial officer could issue a Warrant, there being no reasonable grounds to believe drugs would be found. The fact that drugs were found after the fact cannot be relied upon to support a finding of reasonable grounds before the fact. And, although the principal's belief that drugs would be found in the school might not be seen to be unreasonable, it seems equally likely that in any gathering of several hundred or more people, drugs are likely to be found. Such a likelihood, however, does not constitute reasonable grounds. [para. 19]

Having found a s.8 *Charter* violation, the evidence was excluded. Although the evidence would not effect trial fairness and was on the less serious end of the scale, admitting it would bring the administration of justice into disrepute by suggesting that "persons in the same situation as [the accused] have no rights." The charges were dismissed.

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HIGHLIGHTS IN THIS ISSUE

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FINDING FUN IN FITNESS

Sgt. Kelly Keith

Mental Toughness

During recruit training I do a Lecture on Fear and Anger Management. Part of the lecture is about Mental Toughness. I was reviewing a fitness article on Mental Toughness and the more I think about it, the more I see how important Mental Toughness is to exercise. Mental Toughness is what often separates the people who exercise and the people that don't. Some Mental Toughness suggestions:

1) Get an unshakeable belief in achieving your goals;
2) Be prepared for setbacks and have the determination to get past them and succeed;
3) Have an unshakable belief that you possess the qualities and ability to be better than your opponents;
4) Always stay focused on the task at hand;
5) Push back the boundaries of emotional and physical pain while still maintaining technique and effort;
6) Do not allow yourself to be adversely affected by your bad or your opponents good performance;
7) Thrive on the pressure of competition;
8) Don't focus on the uncontrollable;
9) Don't be afraid to talk to people who have been there and done that;
10) Think about the solutions to your problems rather than dwelling on them; and
11) Get comfortable with the unfamiliar

In the Anger part of the lecture I go into the positives of Anger (after I've gone over the negatives). The two positives that I outline are:

1) Appropriately channelled Anger can enable you to keep fighting and/or trying during a crisis situation.; and
2) Appropriate Anger allows us to be assertive; to stand up for ourselves and

even plays a small role in command presence.

Anger can also play a role in fitness if it is channelled correctly. Go ahead "Get Angry at Yourself!!!!!"

The Movie "CHOKE" is about Rickson Gracie and his fights in the Vale Tudo competitions. During an interview with Gracie's wife, she states that there are only two ways that Rickson Gracie will lose; 1) he gets knocked out or choked unconscious or 2) he gets killed. This may seem a tad mellow dramatic, however the mental toughness this guy has is second to no one. He's got a six-pack and can fight round after round without getting tired!

While I'm talking about this side of fitness – if your having a weight work-out don't forget to squeeze the muscle your working at the top portion of the rep. This enhances the mind muscle connection, enhances the pump and muscle definition. Flex the muscle between reps to get the same results.

Biking into the Wind

The best way to cut through the wind on your bike is to align your back with your head and keep your side-to-side motion of your head at a minimum. Some other quick tip reminders:

1) Don't sacrifice form for poundage;
2) Don't lean on cardio equipment;
3) Always warm up – get the blood flowing;
4) If you Run – Don't skimp on running shoes – buy at a running store;
5) Don't walk into the gym without a plan;
6) Whether weight training or cardio – remember the importance of proper breathing; and
7) Drink lots of water before, during and after.

Position v. Submission

At work I sometimes find myself having to convince people that it is always POSITION before SUBMISSION. In any altercation (police, street fight, competition fight) the one factor that is a constant is the winning shot or submission most likely came from the person who had the POSITION of advantage. The Gracie's sell one of the top martial arts video series in the world. Their number one selling video is the submission video. The one thing most purchasers fail to recognize is that in order to get the SUBMISSION they've just learned they need to be in the POSITION to enable them to get the SUBMISSION. One without the other is of no use!

While the factors are in your control – don't allow suspects to be in the position of advantage. Remember – Action is faster than Re-action – this is a basic fact of officer survival - so don't allow the subject to get within your re-actionary gap. When you're approaching or handcuffing a suspect – when possible - always approach from a position of advantage.

If you believe there is a possibility of a weapon and you have the time, always remember cover, cover, cover. If time/situation does not allow you the availability of cover ensure you use angles/concealment to your advantage – make the suspect visually and physically change his body position to locate you. Those valuable time frames used to locate you may be what you need to visualize his intent and re-act. This may be the difference between who wins and who loses! (for some very convincing articles read the Police Marksman May/June 2002 study by Joe Weeg and/or Police Marksman November/December 2000 article by Bill Lewinski.)

DETENTION ARBITRARY, BREATH SAMPLES EXCLUDED

R. v. Bell, 2004 ABPC 136

Shortly before midnight, two police officers observed a known prostitute enter an out of province vehicle in an area

frequented by prostitutes. The vehicle was stopped and the accused driver subsequently provided breath samples and was charged with impaired care and control and over 80mg%.

At trial in Alberta Provincial Court, the accused argued his s.9 *Charter* right to be free from arbitrary detention was violated and that the police officer's observations, the signs of impairment, and the results of the breath tests should be excluded as evidence under s.24(2). The Crown submitted, on the other hand, that stopping the accused was a lawful exercise of police authority and that the interference was not serious enough to warrant exclusion of the evidence in any event.

Justice Brown ruled that the detention in this case was not a traffic stop. Although the police may justifiably conduct random stops of motorists to check sobriety, vehicle registration and insurance, driver's licensing, and vehicle roadworthiness, that is not what happened in this case. The police detention was not connected to vehicle-related enquiries—"no traffic violations or other suspect driving conduct had been observed by the police". Rather, the police wanted to identify the accused out of concern for the safety of the prostitute.

In holding that the police breached the accused's s.9 *Charter* right, Justice Brown stated:

> [The constable] detained [the accused] because he was in a vehicle with out-of-province licence plates, stopped at night in an area known for prostitution. [The constable] was not investigating any particular crime; nor was he looking for any particular suspect. His general state of alertness to suspicious occurrences, while a commendable quality in an on-duty police officer, did not rise even to the level of a "hunch" and…a hunch does not constitute reasonable grounds for detention.
>
> [The constable] is trained to complete "check-up slips" to track activity in areas of the city known for prostitution and to pass information gleaned from this type of checking to the Vice Unit. There is no legal obligation on individuals questioned by police officers filling out check-up slips to provide information about themselves. [The constable] was not entitled to detain [the accused] in order to complete a check-up slip…
>
> Had [the constable] chosen merely to pull in behind [the accused's] vehicle and observe, he might have developed reasonable grounds to detain him but, at the time of the detention, [the constable] did not have those grounds. [paras. 16-18, references omitted]

The evidence was excluded.

Complete case available at www.albertacourts.ab.ca

CHARTER WARNING NECESSARY IF ROADSIDE SAMPLE NOT FORTHWITH

R. v. George,
(2004) Docket:C41000 (OntCA)

After stopping the accused in the early morning hours and making a roadside screening demand, a police officer made a request for a device to arrive at his location from a different police division because he did not have one with him. He was told the device would take 15-20 minutes to arrive, which he informed the accused. The device arrived in 16 minutes and a breath sample was taken two minutes later. At no time during the wait did the officer advise the accused of his right to a lawyer. As well, the officer was unaware the accused had a cellular telephone—the officer did not ask nor did the accused tell him. The accused registered a failure. He was arrested, given his right to counsel, and subsequently provided samples of 146mg% and 137mg%—well in excess of the 80mg% legal limit.

At trial in the Ontario Court of Justice, the accused testified on the *voire dire* that if the

officer had provided him with an opportunity to call a lawyer he would have done so. The charge was dismissed because the trial judge held the accused's *Charter* right under s.10(b) had been violated and the evidence of the breath samples was excluded. An appeal to the Ontario Superior Court of Justice was dismissed. The Crown further appealed to the Ontario Court of Appeal.

When a roadside demand is made under s.254(2) of the *Criminal Code* the driver is detained and their *Charter* rights under s.10 are *prima facie* triggered. However, if the demand is made forthwith, the detainee's right to counsel can be suspended as a reasonable limit justified under s.1 of the *Charter*, thereby allowing the police to administer the screening test without advising the detainee of their s.10(b) rights. As the Court of Appeal noted, "it is understood that to be 'forthwith', the demand must be that the detainee provide a sample after 'a brief period of detention', if not 'immediately'".

If however, the police are not in a position to require a sample before there is any realistic opportunity to speak with a lawyer, the demand is not valid under the *Criminal Code* and the suspension of s.10(b) rights are not permitted. In other words, if the period of time between the demand and the time the test could actually be carried out would provide a reasonable opportunity to contact counsel, the suspension of the right to counsel arising from the detention is no longer justified under s.1 and the detainee must be advised of their right to speak with a lawyer.

In this case, Justice Gillese, authoring the unanimous judgment, ruled that the demand did not comply with s.254(2) of the *Criminal Code*. In her view, "the demand…was not to provide a breath sample "forthwith" but to provide a sample when the required apparatus arrived, which was some time later". Justice Gillese stated:

> [The constable] was not in a position to require the [accused] to provide a breath sample before there was a realistic opportunity for the [accused] to consult counsel. There was a delay of eighteen minutes between the issuance of the demand and the taking of the sample. On the record, contact with counsel could have been accommodated either through the [accused's] cellular telephone or, given that there were no safety concerns associated with the [accused], by means of the telephone at the nearby police station [located around the corner from the stop]… [para. 33]

And further:

> In the instant case, the officer was aware that there would likely be a delay of fifteen to twenty minutes before the screening device arrived. In the face of that information, it was incumbent upon the officer to take reasonable steps to facilitate the [accused] detainee's right to consult counsel. Such steps would involve asking the detainee whether he had a cellular telephone. In this case, the evidence is that the [accused] would have used his cellular telephone and called his lawyer. I consider the proximity of the cellular telephone more fully below. [para. 42]
>
> ……
>
> Where an officer is in a position to require that a breath sample be provided by the detainee before the detainee has any realistic opportunity to consult counsel, the detainee does not have the right to delay the production of the breath sample in order to consult counsel by virtue of the ready availability of a telephone. However, where an officer is not in a position to require that a breath sample be provided immediately after a demand for such a sample, the court, in determining whether the detainee had a realistic opportunity to consult counsel during the period of delay, must consider the ready availability of a telephone as a relevant factor in making that determination. [para. 56]

The Court of Appeal concluded that the lower courts did not err in ruling that the accused's right to counsel under s.10(b) of the *Charter* had been breached and the appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

PASS-ON INFORMATION OK FOR ARTICULABLE CAUSE

R. v. Wheeler, 2004 NLCA 53

A police officer received information at about 2am from an unidentified motorist (during a very brief exchange) that there was a suspected impaired driver in an orange or red pick-up in front of a convenience store. Twenty seconds later the officer attended the convenience store located about half a kilometer away and saw the only vehicle, matching the description, pulling away from the parking lot. The officer turned to follow the vehicle, but a second police officer by coincidence was traveling in the same direction and fell in behind the suspect vehicle. The first officer receiving the information about the suspected impaired driver radioed ahead to the second officer with the information he had received. The second officer stopped the accused and he was subsequently charged with impaired driving and over 80mg%.

At his trial in the Provincial Court of Newfoundland and Labrador the accused was acquitted because he had been arbitrarily detained contrary to s.9 of the *Charter* since the officer did not have articulable cause on which to justify the stop. In the trial judge's view, the officer made no objective observations of the accused or his vehicle and simply stopping him on the basis of information provided by another officer was insufficient. As a result, the breathalyzer readings were excluded.

The Crown successfully appealed to the Newfoundland and Labrador Court of Appeal. Chief Justice Wells ruled that there were, in the circumstances, "a demonstrable rationale…sufficiently reasonable to have justified the detention of the [accused]". Furthermore, "information obtained by one officer and passed on to another can be relied upon to establish articulable cause." The Chief Justice wrote:

> The first police officer passed the information by radio to the second police officer and it was the second police officer that actually stopped the [accused]. He did so solely on the basis of the information passed to him by the first police officer and did not observe any erratic driving by the [accused].
>
> Neither the fact that the original information was provided by a person who was not a police officer nor the fact that the person's identity was not checked by the first police officer, would, by itself, diminish, as was argued by the [accused], the right (perhaps even responsibility) of the police officers to stop the [accused's] motor vehicle. Considering all of the circumstances…the explanation of the police officers must be accepted as articulable cause for detaining the respondent. [para. 6-7, references omitted]

The appeal was allowed and the matter was referred back to Provincial Court for trial.

Complete case available at www.canlii.org

ID SEARCH DURING INVESTIGATIVE STOP UNREASONABLE

R. v. Greaves, 2004 BCCA 484

A police officer responded to a report of an in progress assault, occurring at a nearby liquor store, perpetrated by a black male and several white males who fled the scene eastbound. The officer arrived at the liquor store in five minutes, did not see anyone, so proceeded east. Traveling for only two blocks, the officer saw the accused, a black male, and two white males walk out from a park in a north-west direction. Although the black male did not closely match the suspect description, the officer considered the grouping of a black male with two white males unique for that part of the city.

Brown, beer-bottle-like, long necked bottles from which the males were drinking were discarded by the men when they saw the officer. The officer maneuvered his car to approach the men and made eye contact, but they jay walked in an apparent effort to avoid him. The officer parked his car, walked after the men, and called to them to stop. The officer believed, beyond mere suspicion, the men were involved in the assault.

The officer told the men he was investigating an assault and that they matched the general description of the suspects. He asked the men for identification in an effort to determine who they were in the event a photo-lineup was warranted. His intention was to allow them to go once their identities were established. Both white males were identified satisfactorily and after a computer check were allowed to proceed. However, the accused produced a piece of identification without a photo or date of birth in the name of Bradley Vrekko from a silver cigarette case held open in his hand. The accused said he was born in August, then changed it to January 1973. Computer queries for Vrekko were negative and the officer was suspicious that the name was fictitious. The accused denied ever having a driver's licence in Canada or ever owning a vehicle.

The officer then took the cigarette case from the accused's hand to further ascertain his identity. Other pieces of identification, including a service station credit card and motorcycle safety certificate, were found in Vrekko's name, however none had a photo or date of birth. A computer query revealed a driver's licence in Vrekko's name—a white male. When asked why he had a service station card and a motorcycle safety certificate if he never had a driver's licence, the accused turned and took a couple of steps as if to run away. The officer grabbed him from behind and handcuffed him. The officer conducted a cursory search for safety as well as for evidence. A pocketknife and two prescription pills were found, but a pellet gun in the his waistband was missed.

The accused was given the obstruction warning for lying about his name. He then provided the name of Michael Loyd, but again computer checks were negative. A second obstruction warning was given and the officer attempted to verify his identification by calling a phone number provided by the accused. Noting a cellular phone in the accused's shirt pocket, the officer took the telephone and called the number provided—but it was out of service. The officer then scrolled through the numbers on the telephone and called a listing tilted "Dad". Calling this listing, the officer learned that the telephone had been stolen during a robbery. The accused was arrested for possession of the stolen phone and he was given his *Charter* warning. He was searched and the pellet gun was found. Forty minutes had passed since the initial stop. As a result of the stop, the victims in the robberies were able to identify the accused in a photo lineup and fingerprints found at the scene were subsequently matched to him.

The accused was convicted in the Supreme Court of British Columbia for various offences relating to two separate confinement, threatening, and robbery incidents. The trial judge ruled that neither the accused's detention nor the search of his property breached the *Charter*. She found the police had an articulable cause the accused was involved in the assault and was justified in detaining him to further the investigation. Furthermore, the inspection of the contents of the cigarette case and the address book of the cellular telephone were reasonably necessary to establish his identity. Moreover, even if there were *Charter* violations, the judge held that the admission of the evidence would not bring the administration of justice into disrepute. The accused appealed to the British Columbia Court of Appeal arguing his rights under s.9 (arbitrary detention), s.8 (search and seizure), and s.10(b) (right to counsel) were violated.

Detention

Relying on the recent Supreme Court of Canada decision in *R. v. Mann*, 2004 SCC 52, Justice Lowry, authoring the court's unanimous judgment, concluded that an investigative detention will not be arbitrary and offend s.9 of the *Charter* provided two conditions are satisfied:

> First, the police must have "reasonable grounds to detain" in the sense that they reasonably suspect that the individual detained was involved in a crime under investigation. There must be both a subjective and objective basis for that belief. Second, the detention must be "reasonably necessary" in all the circumstances, including the nature of the liberty interfered with and the public purpose the interference serves. [para. 33]

In this case the accused argued that the officer lacked an articulable cause because there were insufficient objectively discernible facts giving rise to a reasonable suspicion that he was involved in the liquor store assault. He submitted factors militating against reasonable grounds to detain included the fact the men were walking towards the liquor store (not away from it), they differed in number from the broadcast description, and their height, weight, age, and clothing description differed. In rejecting this argument, Justice Lowry wrote:

> In my view, the [accused] has established no sound basis for interfering with the trial judge's conclusion that [the officer] had reasonable grounds to detain for the initial investigative detention. The precise and detailed facts which the appellant suggests the police must possess in order to form reasonable grounds to detain would elevate that standard much closer to the higher standard of reasonable grounds to arrest. It is clear that the standard of reasonable grounds to detain is less demanding than that of reasonable grounds to arrest….Articulable cause has been said to exist, even where the person detained does not match the description of a suspect with the type of precision the [accused] here suggests is required, but the circumstances as a whole still give rise to a reasonable suspicion…
>
> The primary purpose of the requirement that police have reasonable grounds to detain is to ensure that they do not have *carte blanche* to interfere with individual liberty and do not detain persons based on mere "hunches". It prevents the discriminatory or capricious exercise of police power…It is clear that [the officer] was acting on more than an intuitive hunch. His suspicion that the persons detained may have been involved in the assault was supported by objective facts and was reasonable in the circumstances. Although there may not be objective data to support his belief that the combination of one black and two white males was "unique" in this area, the testimony of [two officers] was consistent with the fact that this was the only group of males -- whether black, white, or some combination of the two -- observed in the area at the time. After hearing the testimony of [the officers], the trial judge was satisfied that his conduct was not racially motivated. [paras. 41-42, references omitted]

Although the initial detention was justified, the court also examined whether the prolonged detention—some forty minutes—ceased to be reasonable and became arbitrary. The court noted that there was no legal obligation for the accused to identify himself. However, rather than simply refusing to provide his name, he chose to give two false identities. Recognizing the distinction between the absence of a legal obligation to respond to police questions and the existence of a legal obligation to refrain from providing false information, the further reasonable suspicion that the officer was being obstructed provided justification for a more protracted and intrusive detention, including continued questioning and physical restraint. As Justice Lowry noted, "It was reasonably necessary in the circumstances, both with respect to the assault and a possible obstruction charge, to prolong the questioning

of the [accused] for a further 30 minutes in an attempt to discover his true identity".

Search

In light of the *Mann* ruling, the power to search incidental to investigative detention is restricted to searches that are reasonably necessary to permit the detention to be safely conducted. Thus, searches are limited to officer safety, generally through a pat-down frisk and do not include searches to determine identity.

The initial pat-down search was largely consistent with a safety search, even though the officer testified in part he was searching for further evidence and removed two pills from his pocket. Despite this reservation, the search was reasonably necessary since the officer reasonably suspected the accused was involved in a violent assault.

However, the court concluded that the inspection of the cigarette case containing the identification and the telephone address book were unreasonable and breached s.8 of the *Charter*. Neither searches were reasonably necessary to ensure officer safety and therefore fell outside the police power to search incidental to investigative detention.

Right to Counsel

Although the court was reluctant to pinpoint the precise time the detention in this case triggered s.10(b) rights and that some delay in informing a briefly detained person of their s.10(b) rights may be justified, it did rule that there was little doubt a detention occurred under s.10(b) at the time the officer handcuffed the accused, which subjected him to significant physical restraint. In failing to advise him of his right to counsel at this point, the officer violated his s.10(b) *Charter* rights.

Admissibility of Evidence

Assuming that the identification evidence was obtained in a manner that violated the accused's rights, the evidence was nonetheless admissible under s.24(2) of the *Charter* despite the s.8 and s.10(b) violations. The evidence did not affect the fairness of the trial. The s.8 breaches, although serious, were mitigated somewhat by the presence of reasonable grounds to arrest for obstruction. The s.10(b) violation was minor and the officer did not act in bad faith. Moreover, the offences charged were serious and the evidence obtained essential to a conviction. As a result, the admission of the evidence would not impair the reputation of the administration of justice. The appeal was dismissed.

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

TWO NEW SUPREME COURT JUDGES APPOINTED

The Supreme Court of Canada recently saw the appointment of two new justices. Madam Justice Rosalie Abella, from the Ontario Court of Appeal, and Madam Justice Louise Charron, also from the Ontario Court of Appeal, became the newest judges added to the nine member court. They join Chief Justice Beverley McLachlin (B.C.), Mr. Justice John Major (Alta.), Mr. Justice Michel Bastarache (N.B.), Mr. Justice William Binnie (Que.), Mr. Justice Louis Lebel (Que.), Madam Justice Marie Deschamps (Que.), and Mr. Justice Morris Fish (Que.).

Did you know that you do not have to be a lower court judge to be a member of the Supreme Court of Canada? Section 5 of the *Supreme Court Act* allows the appointment of a "barrister or advocate of at least ten years standing at the bar of a province". Furthermore, at least three judges have to be from Quebec and judges may stay with the court until they are 75 years old.

VEHICLE SEARCH INCIDENT TO DETENTION UNREASONABLE

R. v. Fuller, 2004 BCPC 326

After stopping the accused for a vehicle equipment violation, a police officer noted a large cardboard box on the back seat. The officer also observed he appeared nervous, shaking as he handed over his driver's licence. When asked about the contents of the box, the accused stated it contained a television. At this point, the officer noted a strong smell of fresh marihuana. A probationary constable, accompanying the officer, noted the smell was moderate.

The officer ordered the accused from the vehicle and told him he was being detained—not arrested—for investigation under the *Controlled Drugs and Substances Act*. The officer also stated that the accused would be charged "if" any amount supporting a charge was found. The vehicle was searched and the taped cardboard box opened. In the box, police found 19 ziplock bags of marihuana containing ½ kg. each. The accused was then handcuffed and read his s.10 warning and caution from a card. The accused, and his wife—the registered owner of the vehicle—were charged with unlawful production of marihuana and possession for the purpose of trafficking.

At their trial in British Columbia Provincial Court, they argued, among other grounds, that their *Charter* rights under s.8 (search and seizure) had been violated. The Crown, on the other hand, submitted that initial detention was based on articulable cause and the search was incident to arrest.

The Search

A search conduced without a warrant is *prima facie* unreasonable unless the Crown can rebut the presumption. Warrantless searches incidental to arrest under the common law will rebut the presumption provided the arrest is lawful. However, searches incident to arrest (for safety and contraband) are different in scope than searches incident to detention (safety only).

In concluding that the search of the vehicle was done solely for the purpose of finding contraband and could not be justified as incident to detention, Justice Chen stated:

> Without any basis for a belief that [the accused] was armed and dangerous, [the police] did not have a right to search [the accused]. Once [the accused] was detained and handcuffed in the back of the police vehicle, there was no threat to officer safety and no basis for searching either [the accused] or the vehicle. In fact, [the accused] was not searched at all until after [the officer] had removed the cardboard box from the back of [the accused's] vehicle and opened it to find the marihuana In my view, officers with a genuine concern for their safety would have conducted the search of [the accused] prior to any search of the vehicle. [para. 25]

If the officer had reasonable and probable grounds, the search could be justified as an incident to arrest. However, in this case the court found that the officer did not have the grounds required to support an arrest. Drawing on what the officer said and did, Justice Chen ruled that the observations made by the officer were sufficient grounds for only suspicion—not belief. Using the word "if"—relating to the possible discovery of evidence—was somewhat ambiguous about whether the officer believed there was marihuana in the vehicle. Furthermore, the officer "detained" the accused for investigation, which was consistent with a suspicion there were drugs in the vehicle. As a result, the search was unreasonable and the evidence excluded under s.24(2) of the *Charter*.

Complete case available at www.provincialcourt.bc.ca

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

The "In Service: 10-8" newsletter would like to share some of our readers' comments about the publication.

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"Your newsletter continues to be an essential read for officers who want to keep abreast of current legal issues." **Police Constable, British Columbia**

****

"I find reading the newsletter to provide a valuable resource to learning the legal issues in policing." **Police Constable, British Columbia**

****

"I find what you put together extremely helpful and educational." **Police Constable, RCMP Major Crime Section British Columbia**

****

"Your publication is the most useful one I read by far and I am forwarding it to my members." **Police Sergeant, RCMP British Columbia**

NO NEED TO *CHARTER* BEFORE ROADSIDE SUSPICION FORMED

R. v. Halliwell, 2004 BCPC 359

At about 10:45 pm on New Year's Eve a police officer saw three persons exit a vehicle that arrived at a parking lot and enter a bar. Half an hour later, the officer saw the vehicle back up and then drive forward, stopping very close to the bar doors. The officer decided to check on the driver and found the accused in the driver's seat. The officer asked where the occupants had come from and how much they had to drink. The accused was also asked for her driver's licence and registration. During this time, the officer noted a smell of alcohol from inside the vehicle, a faint smell of alcohol on the accused's breath, and her watery eyes. The accused also said she had a drink back at her residence more than an hour before.

Based on these observations, and his belief the vehicle occupants had likely been inside the bar for 30 minutes, the officer formed a reasonable suspicion the accused had alcohol in her body. The officer read the roadside screening device demand and the accused was charged with failing to provide a sample. At her trial in British Columbia Provincial Court, the accused argued that the officer's suspicion was not reasonable because he relied, in part, on her statement that she had been drinking without advising her of her *Charter* rights under s.10(b).

Justice Gordon rejected this argument. In his view, "when the police stop a motorist for the purpose of ensuring compliance with the Motor Vehicle Act, or the driving sections of the Criminal Code, they have the right, as part of a 'preliminary investigation,' to ask questions of the driver that are relevant to that investigation and without advising the citizen of his or her Section 10 rights." However, the statements of the driver are only limited for the purpose of determining whether the officer had the requisite belief—in this case a reasonable suspicion—on which to base the roadside screening device demand.

Even without the drivers statement, Justice Gordon would have nonetheless concluded the officer had a reasonable suspicion the accused had alcohol in her body. She was operating a vehicle in close proximity to a drinking establishment at 11:15pm on New Year's Eve and had a faint smell of alcohol on her breath. Although not enough to satisfy reasonable grounds for a breathalyser demand, the factors were sufficient to constitute a reasonable suspicion for a roadside screening device demand.

Complete case available at www.provincialcourt.bc.ca

CHARTER WARNING SUSPENDED DURING IMPAIRED INVESTIGATION

R. v. Pineau, 2004 BCPC 183

A police officer stopped the accused driving and noted symptoms of impairment. In response to being asked if he had anything to drink, the accused said he had "five". This admission, together with other factors, contributed to the officer's opinion that there were reasonable grounds to demand a breath sample.

At trial in British Columbia Provincial Court, the accused submitted that once the officer decided to investigate for impaired driving, his rights under s.10 of the *Charter* arose. Absent this proper warning, he argued the certificate of analysis should be inadmissible. The Crown, on the other hand, contended that once the accused admitted to drinking, the officer's reasonable grounds crystallized and it was at that point the obligation to provide *Charter* rights arose.

Justice Skilnick agreed with the Crown. In his view, even though the accused was detained when stopped by police, the officer asked the question during the 'investigatory stage' and was entitled to briefly suspend—as a reasonable limit under s.1 of the *Charter*—the accused's s.10(b) rights until the reasonable grounds to make the demand under the *Criminal Code* were formed. This brief suspension of s.10(b) rights also includes preliminary investigation using an approved screening device or a field sobriety test. However, the evidence "can only be used in assessing whether or not the police officer had the requisite grounds for making a breath demand. It cannot be used for determining the guilt or innocence on the impaired driving charge." The certificate of analysis was admissible.

Complete case available at www.provincialcourt.bc.ca

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