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.

IN MEMORIAL

On November 13, 2004, 39 year-old RCMP Auxiliary Constable Glen Evely was killed when his patrol car was struck by a stolen pickup truck following a police pursuit in Vernon, British Columbia. Other officers had initiated the pursuit at approximately 0215 hours after receiving reports of a drunk driver. When they located the vehicle they determined that it had been stolen the night before. When the officers attempted to stop the truck the driver sped away. The pursuing officers broke off the chase shortly after it began as a result of the suspect's reckless driving.

Even though the chase had been terminated the driver continued to flee. At the intersection of 29th Street and 30th Avenue, in Vernon, the driver ran a red light and struck the patrol car Auxiliary Constable Evely was riding in. Auxiliary Constable Evely was pronounced dead at the scene. His partner was transported to a local hospital in serious condition. Both suspects in the stolen vehicle were also taken into custody.

Auxiliary Constable Evely and his partner were aware of the earlier pursuit but had not been involved with it and were not attempting to locate the vehicle at the time the incident occurred.

Auxiliary Constable Evely had served with the RCMP for 2 years. He is survived by his wife and two children.

On November 26, 2004, 49 year-old Ontario Provincial Police Constable Michael John Siydock suffered a fatal heart attack while investigating a motor vehicle accident on Highway 401, near Milton, Ontario. Other officers and medical personnel at the scene immediately began CPR. He was then transported to a local hospital where he was pronounced dead.

Constable Siydock had served with the Ontario Provincial Police for 7 years and had previously served as a conservation officer

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

SEASON'S GREETINGS

The staff at the Police Academy would like to wish our **"In-Service:10-8"** readers and their families all the best for this holiday season. Once again, it has been a pleasure serving British Columbia's police officers, and our other readers across Canada, by bringing them up-to-date on many of the issues facing them daily as they go about protecting and serving the citizens of their communities. May you have a safe and blessed Christmas and all the best in 2005. Remember, In God we trust…all others we run on CPIC!

Note-able Quote

Only a fool would risk their life without a reason—the Lone Ranger

Volume 4 Issue 6
November/December 2004

HIGHLIGHTS IN THIS ISSUE

National Library of Canada Cataloguing in Publication Data

Main entry under title:

In service:10-8. -- Vol. 1, no. 1 (June 2001)-

Monthly.

Title from caption.

"A newsletter devoted to operational police officers across British Columbia."

ISSN 1705-5717 = In service, 10-8

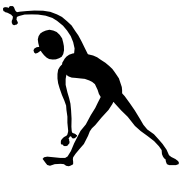
1. Police - British Columbia - Periodicals. 2. Police – Legal status, laws, etc. – Canada – Cases – Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten - eight.

FINDING FUN IN FITNESS

Sgt. Kelly Keith, JIBC

There is always controversy on stretching and its benefits—when it is most appropriate and how long to hold stretches for.

Here's a re-cap of the most recent studies:



1. Stretching should be individualized according to the individual athlete and their needs;
2. For most benefit hold the stretch for a minimum 15 seconds;
3. Stretching is most beneficial at the end of your work-out;
4. There are no studies to indicate that stretching will reduce injuries;
5. Active warm-ups reduce injuries; and
6. Stretching and range of motion for an athlete can and usually will increase performance.

Stretching routines should be designed to achieve one of four things:

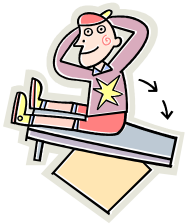
1. maintain or improve range of motion;
2. be free of pain;
3. recover from injuries that restrict flexibility; and
4. achieve sport-specific goals.

A good stretch is defined as "when you can perform a stretch but it doesn't hurt."

Don't forget—if you are lifting weights—the negative portion of the exercise is often more vital than the positive part. Try to spend twice as much time lowering the weight as you did lifting it!

ABS: If you are bracing your feet IN or UNDER anything at the same time you are working your

abdominal muscles, you are losing a large portion of the benefit and working other muscles. If you like the AB rollers, think about how you are moving your upper body to the curl. Most people use their LATS to do this movement on AB rollers and thus are not working their ABS



ORIGINAL CARE & CONTROL BROKEN, BUT NEVER REASSERTED

R. v. Pike,
(2004) Docket: C40852 (OntCA)

The police located the accused's car parked at a liquor store after a carwash attendant reported its driver appeared impaired. The officer saw the accused approach the car—with keys in hand—open the passenger side door and place a bag of liquor inside the car. The officer then approached the accused and asked him whether he had been drinking. He denied drinking that day, but said he had been drinking the evening before. A roadside screening test was administered and the accused failed. He was then arrested and provided samples over the legal limit.

At trial in the Ontario Court of Justice, the judge found that when the accused parked his vehicle and left it to go into the liquor store, care and control had been broken. However, in the judge's view, care and control had been reasserted when he returned, keys in hand, opened the door, and placed the bag inside. The accused was convicted with care and control over 80mg%.

The accused appealed to the Ontario Court of Appeal, arguing the trial judge erred in holding that the accused had care and control. Short of actual driving, the relevant test for care and control is whether the accused engaged in "acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous." The unanimous Ontario Court of Appeal allowed the appeal, set aside the conviction, and ordered a new trial.

In the justices' view, there was no risk of danger by opening the passenger door and placing a package inside the car just before his arrest. The judge failed to analyze or address what may have happened, based on the accused's earlier course of conduct, if he was not arrested. Since the trial judge had earlier found a break in care and control, there was no indication that the accused intended to resume driving by simply opening the door and placing the package inside.

Complete case available at www.ontariocourts.on.ca

SEARCH WARRANT PROVISION ADEQUATE SAFEGUARD FOR PHYSIO RECORDS

R. v. Serendip Physiotherapy Clinic et al,
(2004) Docket:C40275 (OntCA)

The police, investigating fraudulent and exaggerated claims and payments on motor vehicle accident victims, executed a search warrant for patient information at a physiotherapy clinic. The warrant, issued by a justice of the peace, was quashed by the Ontario Superior Court of Justice because no special post-seizure conditions were imposed to protect the medical records. In Justice Ferguson's view, since there was a concern about the privacy of health records, the patient records must be immediately sealed, notice must be given to all affected parties, and a hearing should be held to determine if the seized records should be disclosed to the police. Since these rigid

conditions were not followed, the issuing judge did not have jurisdiction to issue the warrant.

On appeal by Crown, the Ontario Court Appeal ruled that the Ontario Superior Court of Justice erred. Unlike search warrants of law offices, media outlets, or psychiatric treatment records, no special requirements are necessary for physiotherapy records. Section 487 of the *Criminal Code* appropriately balances the state's interest in law enforcement with the privacy interest and confidentiality of patient health records. As Justice Rosenberg of the Ontario Court of Appeal noted:

> The question…is whether the statutory conditions in s.487 of the *Criminal Code* strike the proper balance between the state interest in law enforcement and the public and individual interest in protecting the confidentiality of health records. In my view, with the possible exception of psychiatric records, the section does strike the proper balance. In the absence of a direct attack on the constitutionality of s.487, that section must be taken as meeting the requirements of the Constitution, including the privacy protections contained in ss. 7 and 8 of the *Charter*. The section is designed to mediate between the state interest in the investigation and the public and individual interest in documents and other materials in which there is a reasonable expectation of privacy. As a result of s.487, Parliament has permitted a judicial officer to authorize all manner of serious intrusions into the privacy of individuals. If the requirements of s.487 are met, the police can enter a private home and seize the most intimate of records such as diaries and personal papers. The *Criminal Code* does not mandate a further post-seizure process other than the procedures in s.489.1 dealing with the return of seized property. Using s.487, the police can obtain financial and other records from third parties, material about the individual's lifestyle, intimate relationships and even personal opinions. They can gain access to a core of biographical and other information that is protected by s.8 of the *Charter*. But, it has never been suggested that a properly issued search warrant, meaning a search warrant that was obtained in accordance with the requirements set out in s.487, authorizes an unreasonable search and seizure.
>
> It follows that the requirements of s.487(1)(b), in particular the requirement that the officer provide information under oath of reasonable grounds to believe that the records sought "will" afford evidence with respect to the commission of an offence, strikes the proper balance even where the target of the search is the seizure of health records. By its terms, s.487 precludes granting of a search warrant for the purposes of a fishing expedition or on the basis of mere suspicion. Thus, where, as here, it is conceded that the medical records are not protected by privilege, the only mandatory pre-requisites to the granting of the search warrant are those set out in that section. In the absence of a Constitutional challenge to the validity of s.487, I can see no principled basis for drawing a line around the types of records seized in this case and exempting them from the s.487 regime and I can find no legal basis for engrafting common law requirements on to a comprehensive statutory scheme.[paras. 34-35]

However, an issuing justice retains the discretion to refuse issuing a warrant even where the minimum requirements of s.487 are met. Moreover, they may impose conditions on the search and seizure of records containing private medical information, such as mental health information, but the failure to include post seizure conditions in every medical record warrant does not affect the jurisdiction of the issuing justice of the peace. The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

When we judge or criticize another person, it says nothing about that person; it merely says something about our own need to be critical— Anonymous

FAMILY-VISIT UNIT A 'CELL' FOR PRISONER SEARCH

R. v. Major & McBride,
(2004) Docket:C39019 & C39286 (OntCA)

The wife of a federal inmate attended an institution with her 6 year-old daughter for a weekend visit in a family-visit trailer. The institution's preventative security officer had earlier received information that the inmate's wife would be bringing some marihuana and heroin into the penitentiary during this visit. Both the inmate and his wife were arrested and the trailer was searched, without a warrant, by correctional staff and police officers. The inmate's wife led the officers to a rear bedroom where marihuana and heroin were found and she admitted to bringing the drugs into the institution. Both the inmate and his wife were convicted in the Ontario Superior Court of Justice for possession of heroin and marihuana for the purpose of trafficking, but appealed to the Ontario Court of Appeal arguing, in part, that the warrantless search was unreasonable under s.8 of the *Charter* and that the evidence should be excluded under s.24(2).

Section 8 of the *Charter* is only engaged if a person can demonstrate they have a reasonable expectation of privacy. In this case, both accused had standing to argue s.8 violations because they had a reasonable expectation of privacy in the trailer—a place the Correctional Service promised a reasonable amount of privacy—although the expectation is much diminished. Section 58 of the *Corrections and Conditional Release Act* allows a staff member to "conduct searches of cells and their contents…for security purposes," while s.52 of the *Corrections and Conditional Release Regulations* authorizes the search of individual cells with prior authorization of a supervisor if there are reasonable grounds it contains contraband or evidence.

In rejecting the accused's submission that the family visiting unit requires a warrant to search it, Justice Rosenberg, for the unanimous appeal court stated:

> In my view, when these provisions are looked at as a whole, Parliament's intention is relatively clear. In view of the reduced expectation of privacy in the prison setting, Parliament intended to give the Correctional Service power to conduct warrantless searches throughout the penitentiary. That power extends to all persons within the penitentiary including inmates, visitors and staff, and even reaches out into the community to a room in a community-based residential facility that is occupied by an offender on parole or other temporary release. If the accused are correct, the one search that must be conducted in a penitentiary with a warrant is the search of the family-visiting unit. It seems unlikely that Parliament intended such a result, given the broad warrantless-search provisions in respect of both other parts of the penitentiary and all persons within the penitentiary, which provisions authorize quite intrusive types of searches. [para. 35]

Furthermore, although the word "cell" is not defined in the legislation, a living unit on penitentiary grounds still falls within the meaning of that term. Justice Rosenberg noted:

> I am, of course, somewhat uncomfortable with the idea that in this case [the inmate's] wife and six-year old daughter were sharing his "cell". However, the family-visiting unit retains some of the attributes of a traditional cell. The unit is surrounded by wire fences and steps are taken to limit communication between people in the various trailers. The family is escorted to the trailer and locked behind a 10-15 foot gate. The units are monitored on a regular basis and the occupants must present themselves to correctional authorities on request. The unit becomes the inmate's living quarters where he is confined for the length of the visit. There are extensive rules about items that may not be taken into the trailer, including such routine

items as alarm clocks and radios. Even children's toys may not be brought in except with the authorization of the institutional staff. [para. 37

Admissibility of Evidence

Even if there was a s.8 *Charter* breach, the evidence would not be excluded, ruled the Ontario Court of Appeal. Although there was an intrusion into the living space of the accused and their daughter without exigent circumstances, the admission of the evidence would not affect the fairness of the trial and the officers acted in good faith. They sought out legal advice prior to the search, complied with the provisions of the *Act* and *Regulations*, and had reasonable grounds for the search. Furthermore there was a greatly reduced expectation of privacy making the violation not serious. As for the effect of admission on the administration of justice, the offence was serious and the drugs were essential to the prosecution. The exclusion of evidence, rather than its admission, would have a more serious impact on the repute of the administration of justice. The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

IMPAIRED REASONABLE GROUNDS MUST BE VIEWED IN TOTAL

R. v. Andrea, 2004 NSCA 130

After following a speeding vehicle which ran two flashing red lights, a police officer activated his emergency lights, but it took five blocks for the accused to react and stop. The accused had a light smell of alcohol on his breath, glassy eyes with enlarged pupils, thick tongued speech, and fumbled with his papers. The officer formed the opinion the accused was impaired by alcohol and arrested him. A breath demand was made and two breath samples over the legal limit were obtained.

At trial in provincial court, the judge concluded that the indicia reported by the officer—taken together—provided reasonable and probable grounds and the breathalyzer tests were admitted. The accused was convicted of over 80mg%. On appeal, the accused's conviction was set aside and an acquittal was entered. The summary conviction appeal court found the indicia—neither individually nor collectively—was equivocal and did not provide reasonable and probable grounds. The Crown appealed to the Nova Scotia Court of Appeal contending the appeal court judge erred in law in reversing the trial judge' finding.

Justice Chipman, authoring the unanimous judgment, held the trial judge's finding on the existence of reasonable and probable grounds appropriate and supported by the evidence. He stated:

> As to the subjective component of reasonable and probable grounds, [the constable] testified as to his honest belief, saying that he arrested the [accused] for "impaired driving and over 80" and that the [accused] was, in his opinion, impaired by alcohol. This was not challenged.
>
> As to the objective components, I am satisfied that the appeal court judge erred in assessing the various indicia on which the constable formed his belief in isolation, rejecting each on the grounds of consistency with other explanations. The indicia must be evaluated in total… Specifically the appeal court judge reviewed the [accused's] submissions that each of these indicia were equivocal or consistent with the behaviour of a driver who was not impaired. Although acknowledging that the circumstances must be taken together, in effect he weighed them separately, and concluded that the totality of the evidence did not overcome the equivocal nature of the parts. In doing so he also omitted reference to the [accused's] failure to respond to the flashing lights of the following police car while driving five city blocks.

> The trial judge's conclusion that the officer had reasonable and probable grounds was reached on the basis of the [accused] speeding on a major artery in Halifax at about 2:00 a.m. in the morning; (when traffic was light), failing to stop as required at two flashing red lights, being oblivious to the flashing lights of the following police car for five blocks; upon being approached by the police officer, finishing his french fries before speaking to the officer, exhibiting a light odour of alcohol on his breath, fumbling for his papers, having "glossy" eyes, large pupils and thick tongued speech. The trial judge's conclusion was not unreasonable. [references omitted, paras. 18-20]

The conviction was restored.

Complete case available at www.canlii.org

INTENT TO DRIVE RELEVANT, BUT NOT SOLE FACTOR IN CARE & CONTROL

R. v. Mercer, 2004 NLCA 65

After driving to a lounge, the accused parked his pickup truck and entered to play pool and consume alcohol over several hours. After midnight, he and a friend went outside to the pickup to smoke a marihuana cigarette. The accused occupied the driver's seat and started the vehicle, apparently to generate some heat while they smoked the marihuana. A police officer arrived, found the accused in the driver's seat with his back partially against the driver's side window, motor running, and window partly lowered. The officer observed indicia of impairment and read a demand for breath samples. Two samples of 150mg% were subsequently provided and the accused was convicted in the Provincial Court of Newfoundland and Labrador of care and control with a blood alcohol level over 80mg%, despite testifying he had no intention to drive.

The accused's appeal to the Newfoundland and Labrador Supreme Court Trial Division was dismissed and his conviction was affirmed. He further appealed to the Newfoundland and Labrador Court of Appeal arguing he did not have care and control of his vehicle because he had no intent to drive, but rather intended to take a taxi home and retrieve his truck the next morning. Justice Welsh, for the unanimous court, dismissed the appeal. While intention to drive is a relevant factor in assessing care and control, it is not the sole determining factor. Instead, the circumstances as a whole must be considered. In this case, it was not sufficient merely for the accused to say that he did not intend to drive his vehicle. The court stated:

> [T]he vehicle was running and all that was necessary to set it in motion was to depress the brake and put it in gear. Further, [the accused] was not attempting to sleep in the vehicle. Rather, accompanied by a friend in the vehicle, he was sitting in the driver's seat smoking marihuana, an activity that would only increase his impairment. [para. 9]

The conviction was affirmed.

Complete case available at www.canlii.org

IMPAIRED INDICIA MUST BE ASSESSED COLECTIVELY

R. v. Kuss, 2004 BCSC 1529

Responding to a report of a possible impairer in a pick-up truck dragging a dog, a police officer located the vehicle and spoke to the accused seated behind the wheel with the engine running. Beside him was a dog with bloodied paws. The officer noted a very strong smell of liquor, bloodshot eyes, slurred speech, and fumbling with his wallet. As well, the accused admitted to having a "couple" or "a few" drinks. The officer made a breath demand and the accused was convicted in British Columbia Provincial Court of over 80mg%. However, the accused appealed to the Supreme Court of British Columbia arguing the trial judge erred in holding that the officer had the requisite objective grounds for the demand.

In dismissing the appeal, Justice Bernard ruled that the trial judge had a sufficient evidentiary foundation for concluding that the officer had reasonable and probable grounds to demand the breath samples. He stated:

> It is well established that the indicia of impairment need only give rise to a credibly-based likelihood of impairment, and that the indicia must be assessed collectively. Whether there is a credibly-based likelihood of impairment is a finding of fact, and deference for such a finding ought to be given to the trial judge. [para. 5]

In this case, the finding of the trial judge was well supported.

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

PSYCHOLOGIST NOT AGENT WHILE SPEAKING TO PAEDOPHILE

R. v. Gallup, 2004 ABCA 322

The naked body of a missing 5 year old girl was found in a brush pile. She had died from asphyxia, but there was no evidence to identify a killer. About a week later the accused, who knew the victim and had been seen talking to her the day she went missing, was arrested for car prowling. He had a suicide note in his pocket—expressing self loathing for paedophilic urges—and an extension cord around his neck. He was detained in a psychiatric unit under Alberta's *Health Act*.

One of the police investigators asked a psychologist for general advice about interviewing paedophiles and told her the accused was on suicide watch in the hospital. The psychologist knew the accused and worked with a colleague who had previously counselled him. The psychologist went to the hospital and advised the accused that his therapist had been in an accident and that he could contact her instead.

While in detention the accused asked for the psychologist and told her he had difficulty controlling his intense paedophilia feelings. The psychologist, in turn, advised police. Later, the psychologist told the accused she had spoken to the police however, he again repeated what he had told her earlier. He also made some incriminating remarks to the psychologist. These statements and other evidence were sufficient to convict the accused of first degree murder in the Alberta Court of Queen's Bench.

The accused appealed to the Alberta Court of Appeal arguing, in part, that the trial judge erred in admitting the statements made to the psychologist. He contended that the statements were obtained contrary to s.7 of the *Charter*. In his view, the psychologist was acting as an agent of the state and therefore his right to silence had been breached.

Justice Fruman, authoring the court's judgement, concluded the psychologist would have visited the accused in the hospital had the police not intervened. She, upon hearing the accused was in hospital, expressed an interest in seeing him to inform him that his primary counsellor had been in an accident and was unavailable. She alone made the decision to visit the accused and no police officer attempted to contact her after she left the police station. She then contacted the police because she felt she had a professional ethical obligation to do so. She was then asked by police to tell the accused, and did convey the information at her next visit, that she may be compellable as a witness and that he did not have to talk to her.

The psychologist visited the accused on her own and was neither instructed to nor manipulated into doing so by the police. The psychologist was acting independently and the police did not trick, coerce, or force the psychologist to cooperate. The appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

NO-KNOCK ENTRY VIOLATES *CHARTER*

R. v. Ngo & Ngo, 2004 BCSC 1414

The police obtained a search warrant to search the accused's residence for marihuana. When they executed the warrant, they did not knock and announce their presence. Rather, they checked the door to see if it was locked and used a battering ram to break it down, entering with their guns drawn and yelling "police". During a *voire dire* to determine the admissibility of evidence, the accused argued that the search was unreasonably carried out because of the absence of an announcement, thus violating s. 8 of the *Charter*. As a result, they submitted the evidence should be excluded under s.24(2).

The police stated they used the no knock procedure because it offered surprise and addressed safety concerns. However, British Columbia Supreme Court Justice Stromberg-Stein found this method unnecessary based on the circumstances. In her view, entering simultaneously with announcement or waiting a split second before forcing entry is not knock and announce, but rather knock and crash in.

In this case she held that there were no safety issues, since the main investigator indicated that prior to the search a briefing was held to discuss officer safety concerns, but there were none. There was no evidence the police made any inquiries about the premises that would have led them to believe there was a danger if they did not announce there presence. Neither police policy nor police practice is sufficient, by itself, to waive the knock and announce rule. The evidence was excluded and the charges of marihuana production and possession for the purpose of trafficking were dismissed.

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

REQUEST FOR ID NOT A DETENTION

R. v. Nguyen, 2004 BCCA 546

While arriving at a home to execute a search warrant for electricity theft, the police saw a van parked directly in front of the house. This vehicle was registered to a person wanted on an outstanding warrant for possession of marihuana for the purpose of trafficking. The residence was entered and police found a marihuana grow operation in the basement that could be accessed through a locked door. A key for the door was found inside, but no one was home.

One of the officers exited the house to get something from his vehicle when he saw a Vietnamese male coming from the back yard between the residence and a neighbouring house. The officer said "police" and the man responded he was there to visit a friend. After being asked to produce identification, the man provided a driver's licence in the name of the van's registered owner.

The accused was arrested on the outstanding warrant and Chartered. He was then searched and police found a keys that opened the van and the unlocked door to the residence. At trial in British Columbia Provincial Court, the keys were admitted as evidence and the accused was convicted of unlawfully producing marihuana and theft of electricity. He appealed to the British Columbia Court of Appeal arguing, in part, that the evidence was obtained through an arbitrary detention contrary to s.9 and an unreasonable search and seizure contrary to s.8 of the *Charter* and that it should be ruled inadmissible under s.24(2).

Citing the recent Supreme Court of Canada decision *R. v. Mann*, 2004 SCC 52, Justice Saunders for the unanimous court noted that "the police cannot be said to 'detain', within the meaning of ss.9 and 10 of the Charter, every

suspect they stop for the purposes of identification, or even interview" and the rights recognized by those sections are not engaged if there is "no significant physical or psychological restraint". Justice Saunders stated:

> The exchange which led to the identification being provided was brief. It occurred at a crime scene. [The accused] was on the property, having come from the rear. Whether the [accused] was a suspect or a witness, or neither, a reasonable person in possession of the information [the officer] had would expect a police officer to ask him whom he was and what he was doing on the premises. [para. 16]

Thus, there was no detention at the time of the identification request and therefore an enquiry into whether s.9 or s.10 had been violated at that moment did not arise.

With respect to whether the identification request was a breach of s.8, Justice Saunders held:

> Counsel for [the accused] also complained that the request for identification, and [the accused's] provision of it by way of a driver's licence, was a breach of s. 8 of the Charter. That is, he contends that there was some improper constraint upon [the accused] which resulted in him identifying himself by name and birthdate, by producing a driver's licence. I do not agree. For the reasons expressed above, in the circumstances [the detective's] request of [the accused] that he identify himself, and his review of the driver's license produced, was not a Charter violation. That information, in my view, was not obtained through a Charter breach. [para. 18]

As for the search following arrest, it was proper as an incident thereto. The accused had been lawfully arrested once he was identified as the person wanted on the warrant. The keys were discovered during that lawful search and it was not unreasonable. The appeal was dismissed.

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

GLOBAL SIX YEAR SENTENCE FIT FOR TWO OVER 80mg% CHARGES

R. v. Newhouse, 2004 BCCA 569

The accused, a 61 year old man, pled guilty to two charges of driving with a blood alcohol content over 80mg% that occurred approximately three months apart. In neither of these incidents was anyone injured nor was there property damage. As well, he pled guilty to one count of prohibited driving under British Columbia's *Motor Vehicle Act* and one count of driving while disqualified under the *Criminal Code*. He was sentenced to three years on each over 80mg% charge, to be served consecutively, and given a $300 fine and 7 days in jail on the *Motor Vehicle Act* prohibition and a lifetime driving prohibition and one year concurrent sentence on the *Criminal Code* disqualification charge.

At sentencing, the judge inferred the accused was an alcoholic because he admitted it to police and had 17 prior convictions for either impaired driving or driving with a blood alcohol content over 80mg%. However, the judge said he was not punishing him for being an alcoholic, but rather for his arrogance and "the selfishness of constantly getting drunk and driving and exposing the public to risk." Furthermore, the accused's refusal to follow court orders and the fact he was on bail during the second impaired charge, provided aggravating circumstances warranting public protection.

The accused appealed his sentence arguing that a six year sentence was too long and that a three year sentence could adequately address the sentencing objectives. As the accused pointed out, he had been conviction free from 1986 to 1995, with his last conviction in 1998. However, the British Columbia Court of Appeal disagreed, stating:

> No error in principle was suggested that could give rise to a reconsideration of the appropriate sentence for the [accused]. The individual sentence for each of the offences was within the appropriate range for like offences for offenders, even offenders with less serious records. Moreover, the totality of the sentence was fit, including as it did a lifetime prohibition on driving. The trial judge was right in this case to consider the primary need to protect the public. The protection of the public from this [accused's] driving demanded the sentence the trial judge gave. [para. 10]

The appeal against the length of sentence was dismissed.

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

24 HOUR PROHIBITION CONSIDERED IN IMPAIRED SENTENCING

R. v. Longul, 2004 BCCA 562

The accused pled guilty to impaired driving after driving his vehicle into a chain link fence at a ball park where a game was in progress. Two breathalyzer tests subsequently obtained showed readings of 200mg%. The accused had 38 separate convictions on his criminal record between 1986 and 2000, three of which were for impaired driving, one for driving over 80mg%, eight for driving while prohibited or disqualified and five for failure to attend court. As well, his driving record showed six *Motor Vehicle Act* offences for driving while prohibited or suspended and one for no insurance. His most recent driving record entry was a 24-hour driving prohibition under s.215 of the *Motor Vehicle Act*. The sentencing judge rejected the accused's call for a suspended or conditional sentence, instead sentencing him to nine months in jail and a two year driving prohibition.

The accused appealed, arguing that his sentence should be reduced because the sentencing judge placed to much emphasis on the length of his criminal record that contained only three dated impaired driving convictions, the most recent of which was 10 years old. Moreover, he submitted that his voluntary payment of $2,700 to repair the property damage was enough of a penalty to satisfy sentencing principles, including general and specific deterrence as well as denunciation.

In rejecting the accused appeal for leniency, the British Columbia Court of Appeal held that the sentencing judge did not err in imposing the nine month sentence. The judge neither erred in principle nor overlooked nor overemphasized any relevant sentencing factor. In dismissing the appeal on behalf of the unanimous court, Justice Rowles stated:

> In March 2002, he received a 24-hour driving prohibition under s. 215 of the Motor Vehicle Act. That section does not create an offence; rather, it provides that a peace officer may, if the peace officer has reasonable and probable grounds to believe that a driver's ability to drive a motor vehicle is affected by alcohol or a drug, serve the driver with a notice of a 24-hour driving prohibition. While the s. 215 prohibition cannot be treated as having the same force as a conviction for impaired driving, it seems to me that such a prohibition, particularly when taken together with [the accused's] record for related offences and the circumstances of the offence for which he was being sentenced, undermines any suggestion that the offence for which he was being sentenced ought to be treated as an unfortunate lapse or an isolated event. Given his prior record for drinking-driving offences, it would be reasonable for the trial judge to have inferred that [the accused] had failed to recognize the serious dangers and consequences that can result from drinking and driving and that both specific and general deterrence, as well as denunciation, had to be given considerable weight in sentencing in this case. [para. 14]

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

ROBBERY TEST PARTLY SUBJECTIVE & OBJECTIVE

R. v. Bourassa, 2004 NSCA 127

The accused was charged with robbery under s.344 of the *Criminal Code* after he approached a bank teller's wicket wearing a hooded jacket, put on sunglasses, and pulled out a note. He told her that he wanted large bills while keeping one hand in his pocket at all times. The teller, who had been robbed before, froze and did not hand over the money. The accused then crossed the wicket, reached into the till, and grabbed the bills before leaving the bank. Although she did not actually see a weapon, the teller assumed the accused was holding one in his pocket. The accused was convicted in Nova Scotia Supreme Court, but appealed to the Nova Scotia Court of Appeal arguing, in part, that the trial judge erred in determining whether a robbery or simply a theft had occurred.

Section 343 of the *Criminal Code* defines robbery in several ways, including when a person "uses violence or threats of violence to a person or property" while they steal (s.343(a)). Steal is defined in s.2 of the *Criminal Code* as committing "theft". In examining the difference between theft and robbery, Justice Saunders, for the unanimous appeal court, stated:

> "Theft" is defined generally in s. 322. Also relevant in this case is s. 588 which concerns the ownership of property, here the financial institution's money. From these definitions and the jurisprudence which has considered them, one sees that in simplistic terms the difference between "robbery" and "theft" is that robbery is committed by confronting and intimidating the person whose property is taken, whereas theft is committed without violence or threats of violence, and often occurs secretly, such that the victim is left unaware of being relieved of their property. [para. 7]

The "uses violence or threats of violence" characterization of robbery under s.343(a) is usually applied to robberies not involving weapons or imitations, or personal violence. In deciding whether a robber's conduct amounted to using threats of violence, a partly subjective and partly objective test may be used. In holding that the trial judge correctly concluded that a robbery occurred in this case, Justice Saunders wrote:

> [The teller] said she was frightened and angry to find herself again the victim of a bank robbery. Such evidence was clearly subjective, but was certainly relevant to the determination of whether she felt threatened by the conduct and whether such fear was reasonable under the circumstances. To simply isolate one or two actions of the thief as the appellant suggests, presents a distorted view. The better approach is to examine the entire sequence of events through the eyes of a reasonable observer who happened upon the scene. When assessing, objectively, whether such fear was reasonable, many features of the incident would be especially persuasive, for example: the individual had the hood of his jacket up over his head as he approached the wicket; then after putting his sunglasses on, and keeping his right hand in his pocket, passed the teller a note, and by some gesture and grunting sounds made it clear that he wanted the large bills. When the teller froze and was unable to react, he reached across the till, grabbed the money and fled. [para 15]

The appeal was dismissed.

Complete case available at www.canlii.org

11 HOUR DETENTION OF IMPAIRED DRIVER ARBITRARY

R. v. Iseler,
2004 Docket: C41473 (OntCA)

A police officer came upon the accused sleeping in his vehicle parked on the roadside. The vehicle was running and its high

beams were on. The accused fumbled for his driver's licence and the officer detected a smell of alcohol on his breath. A roadside screening device was administered and the accused failed. He was arrested, allowed to speak with a lawyer, and provided two breath samples with readings registering 177mg% and 175mg%. He was placed in a cell at 5 am and about three or four hours later attempted to get the attention of police because—feeling ill—he needed toilet paper to use the toilet. He gestured to the security camera, rattled the bars, and shouted—but received no response. An hour later he again tried to get the guard's attention, but was unsuccessful. At about 3 pm he was thrown a submarine sandwich and was released an hour later.

During his eleven hour detention, he had no contact with anyone other than the five second encounter with the officer throwing him the sandwich. The accused had money to take a taxi home or his wife could have picked him up. At his trial in the Ontario Court of Justice, the accused sought a stay of proceedings arguing he was arbitrarily detained and imprisoned under s.9 of the *Charter*. The judge concluded he was not arbitrarily detained and his application was rejected. Instead, he was convicted as charged. He again launched an appeal to the Ontario Superior Court of Justice, but it was dismissed. He appealed once more, this time to the Ontario Court of Appeal.

Justice Armstrong, authoring the unanimous appeal judgment, found that there had been an arbitrary detention. There was no evidence of an assessment of the accused's level of sobriety that may have warranted continued detention. Furthermore, "the police either paid no attention to the gesturing, or they were unaware of it because they simply failed to monitor the security camera. In either case, those responsible for his incarceration and well-being would appear to have failed in their duty". This was an 11 hour detention in which the accused was ignored but for a five second encounter at the tenth hour. The accused had presented a prima facie case of arbitrary detention and the Crown left it unanswered.

Despite the arbitrary detention however, Ontario's highest court found a stay of proceedings would be inappropriate in this case:

> While the police conduct in failing to monitor the accused was inexcusable, it is important to note that the breach of the [accused's] s. 9 Charter rights occurred post-offence. The breach had nothing to do with the investigation and the gathering of evidence against him. It did not impact on trial fairness. As Morden A.C.J.O. said in Sapusak [[1998] O.J. No. 4148], "[t]here was no temporal or causal connection between the breach and the obtaining of the evidence". I am accordingly satisfied that this is not "the clearest of cases" warranting the grant of a stay of proceedings. [para 31]

The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

WHOLE PICTURE MUST BE CONSIDERED FOR SEARCH WARRANT

R. v. Saunders, 2004 SCC 70

Three confidential police informants provided information that the accused was receiving hash oil and keeping it at his house. One source told police he had bought some at the accused's house while the two other sources said drugs were there. On the basis of this information the police obtained a *Controlled Drugs and Substances Act* search warrant, executed it, and found drugs and money. The accused was charged with possession of a controlled substance for the purpose of trafficking.

At his trial in the Provincial Court of Newfoundland and Labrador, the trial judge ruled the police had violated the accused's s.8

Charter right to be secure against unreasonable search or seizure. In his view, the warrant was improperly issued by the justice of the peace. As a result, the evidence was excluded under s.24(2) and the accused was acquitted.

The Crown successfully appealed to the Newfoundland and Labrador Court of Appeal (2003 NLCA 63) arguing that the trial judge failed to examine the "totality of the circumstances" when assessing the sufficiency of the information used to support the warrant. In the 2:1 judgment, the appeal was allowed and a new trial was ordered. In the majority's opinion, "the trial judge 'deconstructed' every paragraph (and many phrases within paragraphs) in the information to obtain, concluding they suffered from some inadequacy." As Chief Justice Wells noted:

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

And further:

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

As a result, the majority viewed the whole picture as capable of supporting the search warrant. Justice Welsh, on the other hand, disagreed with the majority. In his opinion, a careful paragraph by paragraph review was necessary to assess the reliability of various pieces of information to identify any deficiencies in order to determine whether the totality of the circumstances lacked a valid or substantial foundation. He found that there was insufficient information to establish the reliability of any of the informants, even if their information was consistent with each other. Further independent police corroboration could have buttressed the warrant, but was not undertaken. Welsh found the search warrant invalid, the resultant search a s.8 *Charter* violation, and would have dismissed the Crown's appeal.

The accused appealed to the Supreme Court of Canada. In a short oral judgment dismissing the appeal, Chief Justice McLachlin, for a five member Supreme Court, affirmed the order of the Newfoundland and Labrador Court of Appeal. In her view, there was sufficient information before the issuing justice to support the granting of the search warrant.

Complete cases available online at www.canlii.org

BC POLICE HONOURED

Many of British Columbia's finest police officers were honoured on November 18, 2004 at Government House in Victoria. They were selected by a committee comprised of representatives from the British Columbia Association of Chiefs of Police and Police Services Division, Ministry of Public Safety and Solicitor General. Awards were presented for

either valour or meritorious service. The criteria for the awards are as follows:

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

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

Awards of Valour

Sergeant Rhen Hallett, Delta Police Department, for apprehending a violent male who, armed with a rifle, threatened the lives of several citizens.

Constable Dan McLean, Constable Derek Gallamore, and Constable Phillip DiBattista, Delta Police Department for apprehending armed and violent suspects, one of who was armed with a handgun, who were threatening the lives of several citizens.

Constable Chad Gargus, Delta Police Department, for rescuing a suicidal male from the outside railing of the Alex Fraser Bridge.

Constable Dave Walker and Constable Richard Vanstone, Vancouver Police Department, for apprehending a violent male who, armed with knives, threatened to cause harm to family members.

Constable Dina Tzetzos, Vancouver Police Department, for saving the life of a suicidal male who was stabbing himself with a knife.

Constable Tony Blouin and Constable Silvana Burtini, Vancouver Police Department, for saving the life of a suicidal male attempting to jump from a viaduct.

Constable Pamela Falconer (currently serving with West Shore RCMP) and Constable Kelly Falconer (currently serving with West Shore RCMP) for apprehending a violent male who, while armed with a knife, threatened fellow officers.

Constable Dave Piket, Prince Rupert RCMP, for rescuing two occupants from a submerged vehicle.

Constable Sandi Swanson and Constable Paul Bouwman, Salmon Arm RCMP, for apprehending a distraught male armed with a shotgun.

Constable Rico Wong (currently serving with RCMP "E" Division, Integrated National Safety Enforcement Team), for his drug investigation in Fiji leading to successful convictions.

Corporal Willie Hornseth, Kelowna RCMP Detachment, for apprehending a violent suspect who, armed with a handgun, threatened a fellow officer.

Constable Wahnese Antonioni-Stevens (currently serving with Alexis Creek RCMP) and Constable Steven Croft, Mission RCMP Detachment, for saving a suicidal male who attempted to jump from an overpass railing.

Constable Cameron Joseph (currently serving with Penticton RCMP), for apprehending a violent male who had caused him personal injury.

Awards for Valour During Forest Fire Season 2003

Staff Sergeant Allen Olsen, (currently serving with Boundary Regional RCMP) and Constable Todd Vande Pol, Barriere RCMP (currently serving with Lytton RCMP), for evacuating several communities threatened by the 2003 Lewis Creek forest fires.

Staff Sergeant John Folk, (currently serving with Central Interior RCMP Highway Patrol), Sergeant Rick Bigland, (currently serving with

Summerland RCMP) and Constable Larry Boak, (currently serving with Central Interior RCMP Highway Patrol), for evacuating the village of Pritchard during the 2003 forest fire season.

Corporal Don Longpre, (currently serving with RCMP "E" Division, Security Engineering Section), Constable Denise Bendfeld, Chase RCMP and Constable Mark Skotnicki, Chase RCMP, for evacuating the McGillvery Lake shore and the Kamloops Shuswap Road area during the 2003 Forest Fires.

Sergeant Garry Kerr, (currently serving with Southeast District RCMP HQ, Kamloops) for performing several roles related to the 2003 Forest Fires.

Meritorious Service

Sergeant Ross Poulton, Saanich Police Department, for pursuing an investigation involving a series of fires that resulted in the conviction of a serial arsonist.

Detective Constable Les Yeo, Vancouver Police Department, for his investigation of a jewellery store robbery led to several charges being laid.

Constable Kevin Lastiwka, Constable Paul Spencelayh and Constable Rae Robirtis , Victoria Police Department, for rescuing residents from a burning apartment building.

Constable Paul Brookes, Victoria Police Department, for his contributions and dedication leading to the development and delivery of the "Youth Combating Intolerance Conference" held on Thetis Island.

Constable Jana Hardy and Constable Dale Sleightholme, Victoria Police Department, for saving the life of a drowning male.

Constable Marc Searle, Surrey RCMP, for volunteering numerous hours of community service.

Corporal Michael Pacholuk, RCMP "E" Division Major Crimes Section, Staff Sergeant Glenn Magark, RCMP "E" Division Major Crimes Section, Corporal Stephen Thatcher, RCMP "E" Division, Vancouver Commercial Crime, and Sergeant Gerry Peters (currently serving with RCMP "E" Division, Criminal Operations Policy), for their eight-year investigation of child abuse at Native Indian residential schools in B.C. resulting in several Criminal Code charges.

Awards for Meritorious Service During Forest Fire Season 2003

- Superintendent William McKinnon (currently serving with SE District RCMP HQ, Kelowna)
- Staff Sergeant Kerry Solinsky, Kelowna RCMP
- Staff Sergeant Shawn Wylie (currently serving with Westbank RCMP)
- Sergeant John Jordan, Kelowna RCMP
- Staff Sergeant Peter McLaren (currently serving with SE District RCMP HQ, Kelowna)
- Staff Sergeant Henk Wamsteeker (currently serving with SE District RCMP HQ, Kelowna)
- Sergeant Darryl R. Little (currently serving with Nelson RCMP)
- Corporal Kevin Keane (currently serving with Boundary Regional RCMP)
- Corporal Rick McIsaac, Nakusp RCMP
- Staff Sergeant Terry Miles (currently serving with Island District RCMP HQ, Victoria)
- Staff Sergeant Norm McPhail (currently serving with Whistler RCMP)
- Corporal Brian Hunter, Salmon Arm RCMP
- Constable Kevin Christensen (currently serving with Creston RCMP)
- Staff Sergeant Dave Williams (currently serving with Salmon Arm RCMP)
- Constable Darren Bonang (currently serving with Central Interior RCMP Highway Patrol)
- Staff Sergeant Len Carlson (currently serving with North Okanagan RCMP)
- Sergeant Kirk Nevison, Kamloops RCMP
- Corporal Steve Nordstrum (currently serving with RCMP HQ, Emergency Response Team, Ottawa)
- Constable Glenn Beattie, Kamloops RCMP

- Sergeant Dennis Bauhuis (currently serving with Kamloops Rural RCMP)
- Corporal Mark Jorgenson, Cranbrook RCMP
- Constable Derren Perpelitz, Cranbrook RCMP
- Sergeant Brian Richard Roy Edmondson, Cranbrook RCMP
- Constable John Ferguson (currently serving with West Kootenay RCMP Highway Patrol)

Source: http://www.pssg.gov.bc.ca/police_services/honours/recipients/2004.htm

FIVE YEAR SENTENCE FOR PURSUIT CAUSE INJURY FIT

R. v. Breton, 2004 ABCA 391

Just days after completing a seven year and two month sentence for dangerous driving, theft, and obstructing a police officer, the accused was stopped at a random check-stop driving a vehicle with the wrong licence plate. He could not produce the vehicle registration , insurance, or his driver's licence and was asked to turn off the vehicle. He did not and appeared to be about to drive off. The officer reached in to turn off the vehicle, became entangled in the seatbelt and a struggle ensued, with both exchanging blows. The accused drove off at a high rate of speed and dragged the officer for four blocks before the officer fell onto the roadway, suffering only minor physical injuries but heavily damaging his boots, clothing, holster and firearm. A police pursuit followed and the accused was stopped by a spike belt and collision with a parked vehicle. In the vehicle police found a stolen licence plate, jewelry, a screwdriver, pliers and binoculars.

The accused entered an early guilty plea to flight causing bodily harm, leaving the scene of the accident, and possession of break-in instruments. While Crown sought a four to six year sentence and the accused only four years, the Alberta Provincial Court judge sentenced him to five years on the flight charge and one year concurrent on the other two charges. The accused appealed to the Alberta Court of Appeal arguing the sentence overemphasized denunciation and deterrence, was not proportionate to the offence since the officer was not seriously injured and gave too little weight to the early guilty pleas.

In dismissing the appeal, Alberta's top court noted:

> Section 249.1 of the Criminal Code, involving flight or evasion from a peace officer, is intended to protect the public and the police when a person operating a motor vehicle being pursued by the police fails to stop as soon as is reasonable. The maximum penalty where bodily harm occurs is 14 years. This is significant because the maximum penalty for impaired driving causing bodily harm or negligence causing bodily harm is 10 years. [para. 8]

In finding no error in the sentencing judge's decision, the court stated:

> In the case before us, the sentencing judge specifically identified the mitigating factors of the guilty plea, the apology showing remorse, and the one month spent in custody. He took them into account in sentencing the [accused] to 5 years. There is no basis for finding that he gave too little weight to the guilty plea.
>
> He also considered the very aggravating factor that the [accused] tried to shake the police officer off in order to escape. He said that it was evident that the [accused] did not care whether the police officer would be injured or killed by his actions. While the injuries turned out to be minor, there was an actual risk and it was very great. The [accused's] actions showed a disregard for the lives and safety of others. An accused who evades police is morally blameworthy for the risk created. The accused's reckless behaviour was a serious aggravating factor in this case. [para. 18-19]

The global five year sentence was a fit and proper sentence, even though there were only minor physical injuries to the officer.

Complete case available at www.albertacourts.ab.ca

BAR ID CHECK FOR WARRANTS UNCONSTITUTIONAL

R. v. Skeet, 2004 MBPC 10141

Eight police officers attended a bar to do a spot check project whereby they would spread out through the bar, randomly walk up to individuals and request identification to determine if they were wanted on warrants. No one had called the police nor was there any criminal conduct requiring police intervention. Officers approached the accused's table where he was drinking from a bottle of beer and asked him for identification. He produced a picture driver's licence. He was checked on CPIC and was found to be bound by a probation order requiring him to abstain from the consumption or possession of alcohol. As a result, the accused was charged with breaching his probation.

At his trial in Manitoba Provincial Court, the accused admitted he had been drinking but testified officers were blocking the exits to the bar, did not tell him he could refuse to identify himself, and felt he did not have any option but to do what he was told. He argued his s.8, s.9, and s.10 *Charter* rights were violated, while the Crown submitted there were no *Charter* breaches because there had been no detention until the CPIC checked revealed the probation order.

Justice Garfinkel concluded the accused had been both physically and psychologically detained when they asked for identification—he felt he could not or should not refuse. The police action was "compulsive"—the officers wore police attire, their weapons and equipment were visible, they prevented people from leaving, and they did not tell people they did not have to produce identification nor answer questions. In Justice Garfinkel's view, "people have the right to drink or eat in a public bar or restaurant without police approaching and asking, without any cause articulated, to produce identification". There was no observable illegal activity, no disturbance, or no assault upon which to take police action. Thus, the accused's *Charter* rights were violated by this deliberate police action to check for warrants.

Since the identification provided by the accused was conscriptive—he was detained and compelled to produce it—the trial would be rendered unfair. Furthermore, the *Charter* violation was serious. The accused was not suspected of doing anything illegal and the degree of intrusiveness was more than minimal in the circumstances. The admission of the evidence would therefore bring the administration of justice into disrepute.

Complete case available at www.canlii.org

9-1-1 ENTRY LOGICAL & LAWFUL

R. v. Havelock, 2004 MBQB 189

The police received a 9-1-1 hang up call from an apartment suite. On call back a female answered, said it was a joke, and lied about her name. A male voice then came on the phone and told the call taker off. About 15 minutes later, two officers arrived at the suite and could hear yelling from inside. They heard the accused yell, "Shut the fuck up. You fucking bitch" and a female take blame for calling 9-1-1. The accused said he didn't "care if the fucking cops came."

The police knocked on the door and the accused opened it, yelling and asking what they wanted. The officer asked if the police could come in and talk, but the accused became angry, said "no", and blocked the doorway by standing in the middle of it. The officer explained the police would have to come in and ensure everything was okay because of the yelling and the 9-1-1 hang up call. The officer took a step to pass by, but the accused lunged and pushed the officer backwards, both losing their balance and falling to the floor. A struggle ensued—one officer

trying to handcuff while a second tried to restrain his legs while being kicked at. The accused was subsequently restrained and convicted in Manitoba Provincial Court of assaulting a peace officer in the execution of his duty.

The accused appealed his conviction to the Manitoba Court of Queen's Bench arguing the trial judge erred in finding the officer acting in the lawful execution of his duty. In his opinion, the officer was exercising an unjustifiable use of police powers when he attempted to enter the suite. He submitted that the police could have determined the health and safety of the female without going inside the suite—such as asking the accused to have her come to the door or calling out to her to come to the door herself. The Crown, on the other hand, contended the officer was engaged in the execution of his duty when he attempted to enter the suite, which was justified in the circumstances.

Justice Hanssen of the Manitoba Court of Queen's Bench agreed with the Crown and dismissed the accused's appeal. In his view, there was no doubt "the police officers had a duty at common law to ascertain the reason for the 911 call and to ensure that [the female] was safe." Furthermore, the officer's attempt to enter the suite did not involve an unjustifiable use of police powers associated with that duty. Justice Hanssen stated:

> [The officer's] attempt to enter the suite in the manner he did was justifiable considering the totality of the circumstances. The police officers were responding to a disconnected 911 call. They had a duty to act to protect life and safety. They had a duty to respond to the call. Once they arrived at [the accused's] suite, they had a duty to ascertain the reason for the call. They had no indication as to the nature of the problem. They did not know whether the call related to a criminal offence. When they arrived they heard a heated argument taking place in the suite. They heard [the accused] yelling loudly. When he answered the door he was hostile and uncooperative. The officers could not see [the female] inside the suite. They did not know whether she had been injured and might be in need of assistance. The fact that [the accused] tried to block the doorway contributes to the appropriateness of [the officer's] response.
>
> Given [the accused's] belligerent and uncooperative mood, it would have been pointless for the officers to have asked him to have [the female] come to the door. It is obvious he would not have complied. It was also reasonable for them not to call out to [the female] to come to the door. This might have resulted in unnecessary delay in rendering assistance to her. In fact, given [the accused's] hostile frame of mind it is possible she would have been exposed to some danger if she had come to the door to speak with the officers. Moreover, it would have been more appropriate for them to deal with her in the privacy of the suite instead of a public hallway.
>
> Under the circumstances, it was logical and lawful for [the accused] to attempt to enter the suite without [his] permission. … [The officer] hoped to gain entry without having to use any force. This is why he tried to step around [the accused]. Had he been successful in gaining entry in this manner the interference with [the accused's] privacy would have been minimal and brief. [The officer's] intention was merely to ascertain the health and safety of [the female] and to provide whatever assistance she might require. He did not intend to intrude any further on [the accused's] privacy than was necessary in order to achieve these goals. [paras. 16-18]

The officer's attempted entry into the suite was reasonable.

Complete case available at www.canlii.org

DID YOU KNOW…

…that a new federal law makes it an offence to make a terrorist hoax. Real acts of terrorism are already criminal offences, but s.82.231 of the *Criminal Code* fills a gap in the existing law by creating an offence, punishable by a maximum life in prison—if death results—for terrorist hoaxes.

NEW (PROPOSED) LAWS UPDATE

There are several new Bills before Parliament that may impact police officers and how they do their job. These Bills include C-16 and C-17.

Bill C-16 (first reading only: November 1, 2004)

New amendments to the *Criminal Code* provisions respecting impairment by alcohol or drug have been proposed, including authorizing specially trained peace officers—known as evaluating officers—to conduct physical coordination tests (prescribed by regulation) to determine whether a person is impaired by a drug or a combination of drugs and alcohol. Furthermore, the new section will allow police to take bodily fluid samples to test for the presence of drugs or a combination of drugs and alcohol in a person's body.

A person who fails or refuses, without reasonable excuse to comply with a demand to perform the physical coordination tests or provide urine tests commits an offence.

Bill C-17 (first reading only: November 1, 2004)

Several amendments to the *Controlled Drugs and Substances Act* (CDSA) have been re-introduced following the recent federal election. These proposed changes include reducing the maximum punishment, by fine only, and the possibility of "ticketing" processes for minor marihuana possession offences. Penalties for growing marihuana would be increased.

Production Offences

In its bid to toughen penalties against marihuana growers, Parliament is proposing to double the current maximum sentence (proposed s.7(3) *CDSA*). Under the present law of producing marihuana (which includes cultivating, propagating, or harvesting the substance), a convicted grower can only receive a maximum of 7 years in prison. Under the new proposal, maximum sentences are based on the number of marihuana plants grown. The following sentencing grid shows the corresponding penalty attached to the number of plants:

# of plants	Offence type	Punishment
1-3	Summary only	≤$500 adult ≤$250 young person
4-25	Dual	by indictment • <5 yrs. prison by summary • ≤$25,000 and/or • <18 mos. prison
26-50	Indictable	≤10 yrs. prison
51+	Indictable	≤14 yrs. prison

Possession Offences

This new legislation will "de-criminalize", but not "de-legalize", possession of small amounts of marihuana. Therefore, enforcement action can still be taken. Marihuana possession of amounts less than 30 grms. or hashish possession less than 1 gram remain summary conviction only offences. However, maximum penalties for these offences have been reduced in some cases.

Offence	Drug Amount	Max. Penalty
s.4(5) CDSA summary	hashish ≤ 1 grm.	Adult = $300 YO = $200
s.4(5.1) CDSA summary	marihuana ≤ 15 grms.	Adult = $150 YO = $100
s.4(5.2) CDSA summary	If person in possession of ≤1 grm. of hashish or ≤15 grms. of marihuana: • is operating or in care & control of a motor vehicle, railway equip. aircraft, or vessel • while committing an indictable offence • in or near a school or school grounds	Adult = $400 YO = $250
s.4(5.4) CDSA summary	marihuana more than 15 grms., but not more than 30 grms.	Option ≤ $1000 fine and/ or 6 months in prison *Contraventions Act* process: Adult = $300 YO = $200

Marihuana amounts in excess of 30 grams or hashish amounts in excess of 1 gram will continue to be a dual offence. If possession of these amounts proceeds by indictment, the maximum punishment available is imprisonment for a term not exceeding 5 years less a day. If the offence is proceeded summarily, a first offence can draw up to 6 months in prison and/or a $1000 fine while a second or subsequent offences can bring up to one year in prison and/or a $2000 fine.

Sentencing Reasons

A new section will place an affirmative duty on judges in some cases to justify why a person is not sent to jail (proposed s.10(2.1) *CDSA*). If an accused is convicted of a production offence where 4 or more plants are involved, but is not sentenced to imprisonment, the Court must give reasons why if:

- the accused used real property belonging to a 3rd party to commit the offence;
- the production was a potential security, health, or safety hazard to children at the location or in the immediate area;
- the production was a potential public safety hazard in a residential area; or
- the location was set with a trap or other device likely to cause death or bodily harm.

Complete copies of these and other proposed Bills are available at www.parl.gc.ca

HUNCH INSUFFICIENT FOR INVESTIGATIVE DETENTION

R. v. Calderon & Stalas,
(2004) Dockets: C38499 & C38500
(OntCA)

Ontario police officers stopped a rented Lincoln Town car with BC licence plates travelling 10 km/h over the speed limit at night on a highway. Inside the vehicle an officer saw several indicators suggesting the two occupants—who identified themselves and cooperated with police—were drug couriers. These items included cell phones, a pager, a road map, fast food wrappers, and two duffel bags. As well, the officer thought the vehicle appeared too expensive for the occupants to be driving. The driver exited the car on request and would not allow the police to search it. The officer then asked the passenger—who rented the car—if he could search the car and he said yes. As the passenger exited the car, the officer detected a fresh odour of marihuana, but his partner did not. The passenger withdrew his consent, but the officers searched the car anyways without informing the occupants of their right to counsel or considering a warrant. In the trunk of the car police found two duffel bags containing 22 lbs. of marihuana. The occupants were both arrested and advised of their right to counsel.

At trial in the Ontario Superior Court of Justice, the accused were convicted after Justice Kurisko concluded there were no *Charter* violations. In his view, the stop was legitimately connected to highway traffic concerns and the officers also had articulable cause for suspecting there may be drugs in the car. Even if their were breaches of the *Charter*, the trial judge would have admitted the evidence under s.24(2). The accused were convicted of possession for the purpose of trafficking.

The accused appealed to the Ontario Court of Appeal arguing their rights were violated under s.8 (unreasonable search or seizure), s.9 (arbitrary detention) and s.10(b) (right to counsel) of the *Charter*. Crown conceded the accused's rights under s.8 and 10(b) were infringed, but argued the trial judge was correct in finding no arbitrary detention and with his s.24(2) analysis.

Search and Seizure

Justices Laskin (with Feldman concurring) concluded that the Crown was correct in conceding the s.8 violation. The search was warrantless and presumed to be unreasonable. A warrantless search can be justified under the common law as either a search incidental to an investigative detention or incidental to arrest. Searches "incidental to an investigative detention can only be justified for protective purposes: officers must believe on reasonable and probable grounds, that their safety or the safety of others is at risk." However, neither officer testified they searched for safety. Their search was to discover evidence of a crime—drugs—which could not be justified as an incident to investigative detention.

A search incident to arrest may precede an arrest provided the officer had reasonable grounds to make an arrest prior to the search and the arrest follows on the heels of the search. However, the majority held that the police did not have the subjective or objective grounds to make the arrest before searching the trunk. Nor could the search be based on consent. Before the search of the trunk, one occupant refused to consent and the second occupant quickly withdrew his. Furthermore, both accused were detained prior to the search and had not been advised of their s.10(b) rights. Where a person is detained and the search depends upon their consent, the failure to advise them of their right to counsel renders the resultant search unreasonable.

Arbitrary Detention

When the officers stopped the accused's vehicle for speeding-10 km/h over the limit—it was a legitimate highway safety concern and the officer's "suspicion about drugs did not taint the lawfulness of the initial stop." However, the investigative detention related to drugs that followed would not be arbitrary only if the officer had an articulable cause, or reasonable grounds to detain the accused. As Justice Laskin noted:

> On an objective assessment of all of the circumstances, the officers had to have reasonable grounds to suspect that the [accused] were implicated in the transportation of drugs. The objectivity of the assessment is critical. An officer cannot exercise the power to detain on a hunch, even a hunch born of intuition gained by experience. [para. 69]

In this case the officer testified to taking a one week drug interdiction course where he was trained on the indicators of drug couriers. He said the items he saw, along with his view that the occupants did not fit the expensive car they were driving led him to reasonably suspect they were drug couriers. But on cross examination he testified the indicators were neutral and might be found in any car. Furthermore, he said he had previously stopped between 10 and 20 cars with these indicators and made no arrests while his partner stopped between 50 and 100 cars without an arrest.

Justice Laskin concluded the neutrality and apparent unreliability of these indicators did not

amount to reasonable grounds for detention and therefore the investigative detention was not justified and was arbitrary under s.9.

Right to Counsel

Justice Laskin ruled that when the police were looking for drugs the accused were at least physically restrained and therefore detained under the *Charter* which triggered their rights under s.10(b)—which had not been provided.

Admissibility

The majority held that the evidence should be excluded under s.24(2). Although the non-conscriptive evidence would not affect trial fairness, the police committed three violations. There was no urgency or necessity and the violations were not inadvertent or technical. The police searched the trunk—an area with a reasonably high expectation of privacy—without a warrant or consent and did not have reasonable grounds to do so. Moreover, the police could have obtained a telewarrant and lawfully searched the car

Another View

Justice Weiler, on the other hand, found the initial stop lawful. The stop was legal under s.216 of Ontario's *Highway Traffic Act* and the officer's motive of investigating possible drug smuggling, in addition to the highway safety concerns, did not taint the lawfulness of the stop. Furthermore, the police did have articulable cause to conduct an investigative detention. Although the individual factors by themselves were susceptible to innocent explanation, their totality was suspicious.

However, the police unjustifiably used their power to detain since they did not advise the accused of their right to counsel before asking for their consent to search. Thus, although articulable cause existed, the detention was still arbitrary under s.9. But, unlike the majority, Justice Weiler would have found the evidence admissible under s.24(2). The accused had a reduced expectation of privacy in the vehicle, there was no oppressive police behaviour, no ongoing pattern of disregard for their rights, no deliberate breach of the *Charter* and the search was unobtrusive. Furthermore, the detention was brief before the police smelled the marihuana and thereby acquired reasonable grounds to effect the arrest and search incidental thereto. As well, the evidence was non-conscriptive real evidence discoverable in any event.

Complete case available at www.ontariocourts.on.ca

ACTUAL ARREST NOT A PREREQUISITE TO SEARCH PROVIDED GROUNDS EXIST

R. v. Dubois, 2004 BCCA 589

Two police bicycle members on patrol detected a smell of burning marihuana as a car passed by them. The car turned into a parking lot and the officers rode up to it. An officer saw the driver raise a beer and take a drink. A strong odour of burning marihuana was detected coming from the car and an open beer was seen on the console area. The driver and his female passenger were asked to exit the car. At this time the female brushed what the police suspected was marihuana leaves or remnants from her pants and police saw residual marihuana leaf throughout the interior of the car.

Both occupants were advised they were being detained for investigation of possession of a controlled substance and that the vehicle would be searched. A police dog was called to the scene, searched the car, and located a baggie of marihuana between the passenger seat and the passenger door, roaches in the ashtray, and a sum of money. The accused driver was told he was being detained and read the *Charter* and police warning. He was taken to the police detachment where a jail guard found a deck of cocaine in his pants.

At his trial in British Columbia Provincial Court the accused was acquitted of the marihuana found in the vehicle—since the judge was not satisfied he had control over it—but was convicted of possessing the cocaine. Although he argued that his rights under s.9 (arbitrary detention) and s.8 (unreasonable search and seizure) of the *Charter* had been violated, the trial judge ruled the police had reasonable grounds upon which to arrest the accused prior to the dog search. In his view, "a reasonable person would readily conclude that given the aroma emanating from the vehicle it was reasonable to conclude that one or both of the occupants had recently used marihuana within it and might do so again."

The accused appealed to the British Columbia Court of Appeal arguing that the police did not arrest him prior to the dog search, and therefore the search incidental thereto was unreasonable. He contended that the odour of marihuana and the leafy substance on the female's pants were insufficient grounds in any event upon which to base an arrest.

Justice Huddart, authoring the unanimous British Columbia Court of Appeal, upheld the trial judge's decision. In her view, an actual arrest is not a prerequisite to a search incidental to arrest provided there are reasonable grounds—both objective and subjective—upon which to arrest prior to the search. In this case, the police had reasonable and probable cause to arrest the accused before the dog search began. Evidence of marihuana odour alone in every circumstance is not necessarily insufficient to found an objective belief that a crime has been or is about to be committed. The trial judge's finding that the officer had a subjective belief to arrest was supported by the evidence and her inference there was probably marihuana in the car was reasonable. The trial judge did not err and the appeal was dismissed.

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

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