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.

2006 POLICE LEADERSHIP CONFERENCE APRIL 10-12, 2006

Mark your calendar! The British Columbia Association of Chiefs of Police, the Ministry of Public Safety and Solicitor General and the Justice Institute of British Columbia will be hosting the "**Police Leadership 2006 Conference**" April 10 to 12, 2006 at the Westin Bayshore in Vancouver, British Columbia. This is Canada's largest Police Leadership Conference and was sold out in 2004.

This conference will emphasize leadership as an activity, not a position, and provide an opportunity for participants of all ranks from police agencies across Canada, the United States, and beyond to engage with a carefully chosen list of first class speakers, some of the world's outstanding authorities on leadership.

For more updates on this conference as they develop, please bookmark:

www.jibc.bc.ca/police/main/promoforleadership2006.htm

'IN SERVICE: 10-8' NOW IN 5th YEAR

The Police Academy's newsletter has now entered its fifth year of publication. Back issues are now available from 2001, 2002, 2003, 2004 and now 2005 by navigating the Police Academy website at www.jibc.bc.ca.

Volume 5 Issue 1
January/February 2005

FRASER VALLEY LAW ENFORCEMENT CONFERENCE 2005

MARCH 12-15, 2005

"Mass Murder in the Home, the School and the Workplace: Spree Killers and Annihilators"

Location:

Ramada Inn & Conference Centre
Abbotsford, BC

Registration:

$329 regular—Registration fee includes tickets to the opening ceremonies and receptions, on-site continental breakfasts, and tickets for the conference banquet.

Topics:

- Dunblane School Massacre, Scotland, 1996
- Gakhal Family Murders, Vernon, British Columbia, 1996
- Ottawa Transpo Massacre, Ottawa, Ontario, 2001
- Kamloops Murders, British Columbia, 2002
- Port Arthur Massacre, Tasmania, 1996
- Columbine High School Massacre, 1999

Expert presenters include Lt. Col. Dave Grossman, U.S. Army (Retired), Director, Killology Research Group, is one of the world's foremost experts in the field of human aggression, the roots of violence and violent crime.

Visit **www.fvlec.org** for more info!

UCFV UNIVERSITY COLLEGE of the FRASER VALLEY

JUSTICE INSTITUTE of BRITISH COLUMBIA

HIGHLIGHTS IN THIS ISSUE

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

National Library of Canada Cataloguing in Publication Data

Main entry under title:

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

Monthly.

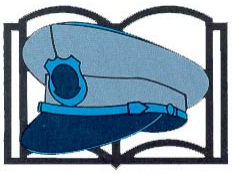
Title from caption.

"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.

'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. We appreciate the kind words we have received and continue to look forward to serving Canada's police officers:

****

"Thanks…for the newsletter, always a very good read & crucial information"—**Police Sergeant, British Columbia**

****

"I have been receiving the In-service 10-8 Newsletter for some time now and it is greatly appreciated. Even though we are provinces apart, it is amazing how we can be dealing with very similar issues day in and day out. I am into my 5th year as an Instructor…and the information provided in your newsletter always comes in handy as we like to refer to incidents / case law to substantiate the topics that we present during in-service training. Keep up the excellent work!"—**Police Officer, Ontario**

****

"I just wanted to say that I think you do an excellent job of encapsulating relevant case[s] using minimal time and space while losing nothing in content. I wish I had known about this publication when I was practising criminal defence law…"—**Reviewer/Analyst, Commission for Public Complaints Against the RCMP**

****

"While researching the internet for photos of prohibited weapons for a course I am putting together, I came across your In Service: 10-8 newsletter dealing with prohibited weapons and am emailing to see if I can get permission to use your newsletter in an upcoming course I am running for our dispatchers and records personal."—**Police Training Officer, Ontario**

"Just a quick note to request that I be added to the distribution list for your newsletter at this address. I wish we had something similar in Ontario..IT's a great read. Thanks"—**Police Officer, Ontario**

****

"I would love to receive the newsletter on a regular basis."—**Police Constable, British Columbia**

****

"Great work on the case law articles. Could you please subscribe me to your 10-8 newsletter? (SIGH) ....the Mounties don't have a letter like this."—**Police Constable, RCMP British Columbia**

****

"I really enjoy reading your articles, they have helped me on the job immensely!"—**Police Constable, British Columbia**

****

"Just read the latest 10-8 and wanted to once again express my appreciation for this "epistle"...the cases and referrals to statistics are invaluable so thanks for that... Take Care and keep up the good work."—**Criminology College Instructor, British Columbia**

****

"I am a member of the Canadian Forces Military Police… I am writing to request that I be added to your electronic distribution list for the 10-8 newsletter. This continues to be an outstanding publication, keep up the good work!"—**Military Police Corporal, British Columbia**

ROADSIDE DEMAND REQUIRES NOTHING MORE THAN A REASONABLE SUSPICION

R. v. Dunfield, 2004 BCPC 0419

After stopping the accused for excessive speeding at 01:42 am, an officer asked her if she had been drinking. She said she had beer and wine at 9:30 pm and had been involved in a fight with her husband. An odour of liquor emanated from the vehicle and the accused was crying, had a pale face with flushed cheeks, running mascara and bloodshot, watery eyes. The accused was asked to exit the vehicle and was somewhat unsteady on her feet while she stood on level ground. The officer formed a suspicion the accused had alcohol in her body and proceeded with a roadside screening demand.

During her trial in British Columbia Provincial Court the accused argued that the smell of liquor from the vehicle and the other observations were not sufficient to justify the roadside screening demand. In her view, something more was required, such as asking when her first and last drink occurred.

In rejecting the accused's submission, Justice Moss concluded the officer proceeded properly. He stated:

> The essential question is whether or not [the officer] had, objectively speaking, reasonable grounds for her suspicion. Looking at it in its entirety, the evidence involves the admission by the driver of the consumption of liquor at an earlier time. The officer had in her mind the concern she may not be getting the truth, which I do not find to be shocking. Thus there is the admission of the consumption of liquor at some time prior to the time of driving. The officer also had the driver with watery, bloodshot eyes, saying she had recently had an argument and had been drinking at an earlier time around 9:30 p.m., and finally, there was the smell of liquor emanating from the driver's side when the window was down.
>
> [The officer] concluded there were reasonable grounds to pursue the matter and therefore, in order to satisfy herself, she made an approved roadside screening device demand. A roadside screening device is one more tool in a police officer's toolbox with regard to the investigation of suspected impaired drivers, and is often used to raise "mere suspicion" to reasonable and probable grounds if there is a fail reading obtained.
>
> I am satisfied [the officer] had the required subjective belief at the time she made the

> breath demand. On an objective analysis, I cannot say that I would be prepared to conclude there was not a constellation of objective factors surrounding the situation that would make it unreasonable for her to have made the demand. [para. 9-11]

Complete case available at www.provincialcourt.bc.ca

NO PRIVACY INTEREST THROUGH OPEN DOOR

R. v. Motevaselan, 2004 BCPC 0453

The police received a report that a hotel staff worker had been assaulted hours earlier. The suspect was last seen entering a rooming house next door to the hotel. The police were shown a photograph of the suspect and told he was seen enter the rooming house about one and a half hours earlier. Officers entered the second floor hallway of the rooming house through a locked door by using a key given to them in the past by the landlord. Along the hallway were several individually numbered doors, which gave entry into each tenant's sleeping room. The tenants shared a communal washroom and a communal kitchen.

As the police approached the suspect—seen at the far end of the hallway—they passed by a room and saw a woman standing in the open doorway talking to people inside. Looking over her shoulder into the room, an officer saw the accused, and a female, seated on a bed mattress with a small quantity of what appeared to be crack cocaine, a set of scales, a crack pipe, and cash. The officer stepped into the room, arrested the accused for possession for the purpose of trafficking, handcuffed him, and took him from the room. He was searched for safety (weapons, needles) and police found more cocaine in the front of his pants along with $85 in his pocket.

At his trial in British Columbia Provincial Court on charges of possession of cocaine and heroin for the purpose of trafficking, the accused argued the police unlawfully entered the second floor of the rooming house when they opened the locked door without a warrant, hot pursuit or exigent circumstances. He submitted he had a reasonable expectation of privacy in his own room as well as the hallway, which he uses to access the communal washroom and kitchen. In his view, his s.8 *Charter* rights securing him against unreasonable search or seizure were violated and the evidence should be excluded.

Justice Weitzel disagreed. In his opinion there was no *Charter* breach. The accused did not have a reasonable expectation of privacy in the hallway or in his room with the door open. Since the drugs were in plain view, the officer had the right to enter the room and seize the drugs before they could be destroyed. The detention that followed was also lawful , including the pat-own search that lead to the discovery of more drugs. Justice Weitzel wrote:

> [I]t is my view that there was no reasonable expectation of privacy in this common hallway in the circumstances of this case. Other tenants of the rooming house, their visitors, repair people, the landlord, and so on, could be reasonably expected to be in the hallway quite independent of the consent or invitation of the accused, and any of them could easily have looked through the open door into the accused's room. In my view, if the accused had an expectation of privacy in the common room, it was lesser than the expectation in his room proper, and any expectation, in my view, of privacy was waived by sitting in the room with the door open.
>
> The police were in the hallway for a proper unrelated investigative purpose with the consent, express or implied, of the landlord, who had given them a key at some point in the past. The landlord was clearly a person who had the right to use the hallway and to regulate other non-residents from doing so as well. Accordingly, I find that the presence of the police in the hallway did not amount to in essence an unlawful attendance, and their view into the room was not, in my view, an unreasonable search.

> The door to the accused's room, as I say, was open, or partially open, and afforded anyone in the hallway the opportunity to look inside. The room was small, approximately eight feet by eight feet, and I am satisfied on the evidence that the accused himself knew that the door was open. The drugs were in plain view, along with the other items. In those circumstances, in my view, provisions of the *Criminal Code* and the *Controlled Drug and Substances Act* authorized [the officer] to enter without warrant, to seize the cocaine, and prevent it from being destroyed. In my view, his detention of the accused was also lawful, as was the attendant pat-down search of him aimed at finding any weapons or sharp objects which may affect officer safety. [references omitted, paras. 20-22]

The evidence resulting from the seizure in the room and the search of the accused was admissible.

Complete case available at www.provincialcourt.bc.ca

SEARCH WARRANT ONLY REQUIRES CREDIBLY BASED PROBABILITY

R. v. Schneider, 2004 NSCA 99

Police obtained a search warrant to search the accused's home. The complainant and his family were neighbours of the accused and alleged they were harassed over a six month period in several ways, including spitting, shaking fists, running at their car, throwing rocks at their house, shining a flashlight into the windows at night, verbal harassment, blocking entry, cutting branches, banging pipes, scattering glass on their property, cutting pieces of their porch and photographing them against their will. Some of these incidents were supported by video tape recordings made by the complainant.

The accused were convicted in Nova Scotia Provincial Court of criminal harassment and mischief under the *Criminal Code* and a conviction appeal was dismissed by the Nova Scotia Supreme Court. The accused launched a further appeal to the Nova Scotia Court of Appeal arguing, in part, that the search of their home was unlawful because there was no evidence upon which to justify the warrant. In their submission there were no reasonable grounds they committed the offences they were charged with because the complainant was lying.

Justice Cromwell, authoring the court's judgment, concluded the police did have reasonable grounds for believing the accused had committed offences and that the search of their home would provide evidence of these offences. The information to obtain the warrant contained detailed information from a journal kept by the complainant and some incidents were captured on videotape. In examining the sufficiency of the information to obtain in this case, the court noted:

> A justice of the peace who issues a search warrant must be satisfied by information on oath that there are reasonable and probable grounds to believe that an offence has been committed and that evidence of it is to be found in the place of search… The standard is one of credibly based probability… The affiant's reasonable belief does not have to be based on personal knowledge, but the Information to obtain the warrant must, in the totality of circumstances, disclose a substantial basis for the existence of the affiant's belief… On review of the issuance of a search warrant, as in this case by the trial judge, the question is whether the record before the justice of the peace who issued the warrant, as properly amplified on review, provides a proper basis upon which the search warrant could be issued...[para. 75]

And further:

> A police officer investigating an alleged crime and a justice of the peace asked to issue a search warrant are not trial judges deciding guilt or innocence. The police officer may proceed on the basis of belief that reasonable

> and probable grounds exist which have a credible basis and the justice of the peace may issue a search warrant if satisfied that this is so. [The officer in this case] was examined at length at trial and, at the end of it all, it could not have been clearer that he believed the [accused] had committed offences. It was also clear that he thought that [the complainant's] detailed records and video tape provided a reasonable and credible basis for that belief. The justice of the peace was evidently satisfied that the requirements had been met as were the trial judge and the [summary conviction appeal court]. [para. 78]

On its face, the material before the issuing justice of the peace provided a proper basis for authorizing the warrant. The warrant was valid and the search was therefore authorized by law. The appeal was dismissed.

Complete case available at www.canlii.org

HEARSAY OK FOR SEARCH WARRANT GROUNDS

R. v. Agensys International Inc. et al, (2004) Docket: C38981 & M30925 (OntCA)

Revenue Canada investigated the accused for offences under the *Income Tax Act* and the *Criminal Code*. A special Investigations Unit officer swore an information to obtain a warrant, which included hearsay information from several sources. As a result, a search warrant was granted to search business and residential premises. Six months after the warrant was executed, the accused filed an application seeking an order of certiorari quashing the warrants and declaring their *Charter* rights under s.8 had been violated.

LEGAL LANGUAGE
Certiorari—a writ issued from a superior court inquiring into the validity of proceedings in an inferior court and commonly used for the purpose of quashing orders.

The application was dismissed and the accused appealed to the Ontario Court of Appeal arguing, in part, that the investigator improperly relied on multiple layers of hearsay evidence without making inquiries to verify the accuracy of it. This, in the accused's view, caused a fatal flaw in the warrant because the information did not offer full, frank and fair disclosure.

Justice Gillese, on behalf of the court, dismissed the appeal. As long as the information relied upon is properly sourced, hearsay can support the issuance of a search warrant. She stated:

> [A]lthough the deponent of an Information to Obtain should consider obtaining information directly from those with first-hand knowledge of the facts, it is not a legal requirement that the deponent do so. Like search warrant applicants, such deponents are entitled to rely upon hearsay. Again like search warrant applicants, where hearsay is relied upon, it must be presented in a way that allows the issuing judge to make his or her own determination about the reliability and trustworthiness of the sources of information. The Information to Obtain should never attempt to trick its readers. It should set out the facts truthfully, fully and plainly…[references omitted, para. 43]

But "it is important that an affiant properly source all the information relied upon,", which in some cases may require providing sufficient information on an expert's credentials so the justice can satisfy themselves the expert is qualified to give their opinion. Furthermore, information provided to the investigator by other Revenue Canada employees does not require independent verification of its accuracy, unlike a tip from unproven or unknown sources that require confirmation.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

If you lead through fear you will have little to respect; but if you lead through respect, you will have little to fear—Unknown

CERTIFICATE OF ANALYSIS CONSIDERED IN ASSESSING EVIDENCE TO THE CONTRARY

R. v. Suttie,
(2004) Docket:C40183 (OntCA)

After stopping the accused for a seatbelt violation, a police officer formed a reasonable suspicion he had alcohol in his body and administered a roadside screening test. The accused failed and subsequently provided breath samples of 212mg% and 218mg%. He was charged with care and control with a blood alcohol content over 80mg% and the certificate of qualified technician was tendered as evidence, but the technician was not called to testify.

At trial in the Ontario Court of Justice, the accused testified to the amount of alcohol he consumed, which according to an expert toxicologist would have provided a blood alcohol level well below 80mg%. The trial judge considered the contents of analysis—absent the presumption of accuracy under s.258(1)(g) of the *Criminal Code*—when determining whether the accused had raised a reasonable doubt about his blood alcohol level as stated in the certificate of analysis. He rejected the evidence to the contrary and convicted the accused.

The accused's appeal to the Ontario Superior Court of Justice was successful. The appeal judge found the trial judge had erred in considering the breathalyzer readings in assessing the accused's evidence to the contrary. He set aside the conviction and ordered a new trial. The Crown then appealed to the Ontario Court of Appeal.

Proving an Over 80mg% Charge

If the Crown seeks to prove an over 80mg% charge by relying on the certificate of qualified technician it must show that the results reported in the certificate accurately reflects the results of the breathalyzer and also that the driver's blood alcohol level at the time of driving was over 80mg%. In overcoming these two evidentiary hurdles, the Crown may rely on two statutory presumptions—the presumption of accuracy and the presumption of identity. Since each presumption is different, they will require different "evidence to the contrary" to raise a reasonable doubt about the fact to be presumed.

Presumption of Accuracy

Section 258(1)(g) of the *Criminal Code* allows the Crown to introduce the certificate of analysis as proof of blood alcohol level without calling the breathalyzer technician taking the samples. Justice Goudge described the presumption in this way:

> The presumption of accuracy permits the Crown to prove the accused's blood alcohol level at the time the breathalyzer test was administered without calling a qualified breathalyzer technician. According to this presumption, the lowest result of the analyzed samples reported in the certificate provided by the qualified breathalyzer technician is presumed to accurately reflect the blood alcohol level of the accused at the time the test was administered, absent evidence to the contrary. This presumption is the product of s. 258(1)(g) of the *Code* which makes the certificate admissible and s. 25(1) of the *Interpretation Act* which makes the certificate presumptive proof of those facts absent evidence to the contrary…
>
> The consequence of these sections is twofold. First, the certificate is admissible as evidence of the facts stated in it without the need to call a qualified breathalyser technician. This serves as a statutory exception to the hearsay rule. In effect, it makes the written statement of the qualified breathalyser technician admissible as some evidence of the truth of the assertions in the certificate. These include that two breath samples that were taken at the specified time and place; that the samples were analyzed by an approved instrument as defined in s. 254(1) of the *Code*; that the technician had ascertained the

> instrument to be in proper working order; and what the results were of the two analyses.
>
> The second consequence is that these facts are deemed to be established or conclusively proven in the absence of any evidence to the contrary. [paras. 16-18]

In short, s.258(1)(g) "declares that the breathalyser certificate is evidence of the facts alleged in it…[including] the blood alcohol readings of the accused recorded by the breathalyser." However, the presumption of accuracy can be displaced if a reasonable doubt is raised about whether the driver's blood alcohol content was actually under 80mg% had the breathalyzer test produced accurate results. Simply offering evidence that the blood alcohol level at the time of testing was different from that recorded by the breathalyzer is not sufficient to rebut the presumption.

Presumption of Identity

The presumption of identity under s. 258(1)(c) of the *Criminal Code*, on the other hand, allows the Crown to prove blood alcohol level at the time of driving without having to call an expert by using the lowest reading on the breathalyzer provided it was taken within two hours of the time of driving. Justice Goudge stated:

> Under this provision, it is presumed, in the absence of evidence to the contrary, that the lowest of the blood alcohol readings referred to in the certificate provided by the breathalyzer operator is identical to the accused's blood alcohol level at the time of the offence. This presumption avoids the need for the Crown to call expert evidence in every case as to the accused's blood alcohol level when he or she was driving based on an extrapolation from the results of the breathalyzer test administered up to two hours after the driving occurred. [para. 19]

The presumption of identity can be rebutted "if there is evidence accepted by the court that tends to show that the blood alcohol level of the accused was different at the time of the breathalyzer test than at the time of the driving." It is not necessary to show the blood alcohol level at the time of driving was below 80mg%, but only that it was different. An example that may displace this presumption is evidence of consumption after driving but before testing. If the presumption of identity is successfully rebutted, Crown will have to call other evidence relating the breathalyzer reading back to the time of driving.

Assessing "Evidence to the Contrary"

The Ontario Court of Appeal ruled that the certificate of analysis could be used by a judge in assessing whether to accept or reject the accused's "evidence to the contrary", absent the statutory presumption:

> To treat the certificate as some evidence of the facts contained in it is not to give it the presumptive effect of establishing those facts. The certificate is merely some hearsay evidence that a qualified breathalyser technician conducted two tests of the accused with an approved device which produced the blood alcohol results set out in the certificate. The court simply considers this together with the other evidence before it in deciding whether to accept or reject the tendered evidence to the contrary.
>
> It is true that in doing so the court can treat the certificate as no more than some evidence of the facts set out in it. The court cannot treat the certificate as establishing or conclusively proving those facts, since to do so would be to prematurely apply the presumption in s. 25 of the *Interpretation Act* before the court has determined whether there is evidence to the contrary rebutting the presumption. However even without the presumption, the readings contained in the certificate are deemed by s. 258(1)(g) to constitute some evidence of the accused's blood alcohol level at the time of testing.
>
> There is no doubt that weighing the hearsay evidence contained in the certificate of analysis against the *viva voce* evidence of the defence tending to show a blood alcohol level

below .08 at the time of testing presents a challenge because the evidence in the certificate comes to the court in documentary form which must be weighed against live evidence. Although it is not necessary that they do so, it would not be surprising if triers of fact proceeded as the trial judge did here by focussing first on a careful examination of the *viva voce* defence evidence and its inherent strengths and weaknesses in the context of the balance of the evidence apart from the certificate, and only then turning to consider the contents of the certificate, in reaching a conclusion about whether to accept or reject the tendered evidence to the contrary.

Moreover, in my view, it will be the rarest case in which the certificate alone is a sufficient basis to reject otherwise credible defence evidence in the contrary. If there is nothing in either the balance of the evidence or the defence evidence itself to undermine the latter in any way, to reject it only because of the contents of the certificate risks the court wrongly according premature presumptive effect to the certificate, either in its own reasoning process or in the result. Neither accords with Parliament's intent in s. 258(1)(g) of the *Code* and s. 25 of the *Interpretation Act*, that in the context of conflicting evidence, the certificate should not constitute conclusive proof of its contents. [para. 30-33]

In this case, once the evidence to the contrary was rejected, the certificate's statutory presumptions were used to establish the accused's blood alcohol level at the time of testing under s.258(1)(g) and at the time of driving under s.258(1)(c).

The appeal was allowed and the accused's conviction was restored.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

A leader leads by example, whether he intends to or not—Unknown

NEAR PASSIVE 'TRICK' NOT ELICITATION

R. v. Mishra, 2004 BCCA 598

While executing a search warrant arising from a lengthy drug investigation at the accused's automobile detailing business police found money, scales, bullets, cocaine, heroin, score cards, other drug paraphernalia, and a picture of the accused and his family inside a locked filing cabinet with a bag containing $35,830 in cash—the going price for a kilo of cocaine—on top of the cabinet. In a locked briefcase police also found documents and identification in the accused's name along with more heroin, cocaine and drug paraphernalia.

About half an hour later the accused arrived by car with three associates. Upon arrest, he dropped a key ring with keys to the locked filing cabinet. He was twice advised of his right to counsel under the *Charter* and of his right to remain silent—on his initial arrest and when taken inside the building. He asserted his right to counsel but was not provided an opportunity until over an hour later after he was transported to the police station since there was no place at the business where a call in private could be made.

During the time between his arrest and access to a lawyer, a police officer engaged the accused in "small talk", asking him a few curious questions about his family. The officer said he told the accused he would not use the conversation against him nor was it tendered as evidence. However, a second officer overheard the conversation and was able to identify the accused's voice from an earlier telephone conversation in which that officer was working in an undercover capacity in the drug investigation. In that telephone conversation, the accused threatened to kill the undercover officer. This officer then spoke the same words the accused

threatened and the accused remarked, "Oh, so my phones have been tapped." In his testimony on the *voir dire*, the officer agreed he deliberately made the remark to see what reaction the accused would make.

At his trial in British Columbia Provincial Court the accused was convicted of possession of cocaine and heroin for the purpose of trafficking. The trial judge found that the statement made by the accused following his arrest but before being provided an opportunity to contact counsel was not actively elicited and therefore his ss. 7 (right to silence) and 10(b) (right to counsel) *Charter* rights were not violated and the statement was therefore admissible. In his view, the police simply gave him the opportunity to speak after the police made him aware they knew something about him. The accused appealed to the British Columbia Court of Appeal arguing the police used a thinly disguised attempt to elicit an inculpatory statement from him before he could speak to his lawyer.

Between the time an arrestee expresses a desire to contact counsel and the time a reasonable opportunity is provided to exercise that right, the police have a duty to refrain from attempting to elicit evidence from the arrestee. If the police do not hold off and actively elicit a statement, the arrestee's ss. 7 or s.10(b) rights may be violated. Police conduct beyond the usual form of question and answer which creates an opportunity for an arrestee to speak ranges from being passive—such as leaving a piece of evidence in a prominent location at the police station where it could be seen by the arrestee—to the "functional equivalent of an interrogation"—such as persisting in conduct effectively wearing down an arrestee until they cave in and make a statement despite repeatedly asserting a right to counsel.

In this case the unanimous appeal court dismissed the appeal. The trial judge did not err in concluding that police did not elicit the statement. Justice Prowse wrote:

> While [the "trick" played] was not entirely passive, it is difficult to characterize it as being the functional equivalent of an interrogation. Nor is there any suggestion that [the first officer] intended to "set up" [the accused] by chatting with him about his family. On the contrary, it is apparent from the transcript that officer] had no idea of the significance of what had transpired between [the second officer] and [the accused] until later. It is true that [the second officer] was hoping that [the accused] would say something exculpatory, but the real question is whether he breached [the accused's] rights by his conduct.
>
> The administration of justice is not served if this Court creates fine distinctions between conduct which does and does not amount to elicitation giving rise to a breach of an accused's Charter rights. The guidelines with respect to what constitutes eliciting behaviour have been set out by the Supreme Court of Canada…. It is up to trial judges to apply those general guidelines to the facts before them in determining whether the conduct in issue amounts to elicitation within the contemplation of those cases. This Court will only interfere if the finding cannot be justified on the evidence, or if the trial judge erred in the course of his reasons… In this case, I am not persuaded that the trial judge erred in concluding that the conduct of the police did not constitute elicitation as that word has been interpreted by the relevant authorities and that [the accused's] rights under either s. 7 or 10(b) of the Charter had not been breached. [para. 26-27]

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

Note-able Quote

Leaders who win the respect of others are the ones who deliver more than they promise, not the ones who promise more than they can deliver—Mark Clement

PAT-DOWN NOT FOR SAFETY: EVIDENCE EXCLUDED

R. v. Motevaselan, 2004 BCPC 0362

Officers approached the accused to investigate his presence in an alley while in possession of a high end bicycle. As they got closer, they saw a marihuana bong attached to the bicycle. The accused said the bike was his when asked and the officers inferred the bong belonged to him as well. The police also saw wire mesh, similar to that used for smoking crack cocaine, sticking out from his pocket and heard a cell phone in possession of the accused ringing constantly. The officer placed the accused under investigation for possession of drugs, handcuffed him and searched through his pockets, finding 69 grams of cocaine and 2.5 grams of heroin.

During a *voir dire* in British Columbia Provincial Court, Justice Godfrey concluded the bong, steel wool, and cell phone provided only enough grounds to investigate—as the officers were doing—but not to arrest the accused and search him in the manner they did. She held:

> Incident to the right of detention for investigation is the right of officer safety. They were entitled to pat down the accused to ensure that he didn't have any weapons on him. That is not what they did. They proceeded to search him in the fashion that would follow an arrest, and that was not open to them, given that the accused was simply detained for investigation. [para.5]

The evidence was excluded under s.24(2) of the *Charter* and the accused was found not guilty.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

The leader who exercises power with honour will work from the inside out, starting with himself—Blaine Lee

INVESTIGATION OF NEW OFFENCE DOES NOT REQUIRE PROSPER WARNING

R. v. M.W.F., 2004 BCCA 425

The accused, a 15 year old young offender, was arrested by police for assaulting his foster mother with a weapon and was advised of his right to counsel under s.10(b) of the *Charter*. He was taken to the police detachment, reminded of his right to counsel, and told police he wanted to speak to a lawyer. The accused made a call to legal aid, but was unsuccessful speaking to a lawyer. However, he did leave a message for a lawyer to call him back at the detachment.

About an hour and a half later, while still waiting for a return call from legal aid, the accused was taken to an interview room where a s.56 *Young Offenders Act* (*YOA*) statement waiver form was completed. Over an 18 minute period, the accused was explained his rights including such things as not being required to say anything, that he could speak to a lawyer free of charge, and that he could speak to a lawyer at anytime. The officer talked through each item on the form and the accused said he understood. He was not questioned about the matter relating to his arrest, but subsequently confessed during a videotaped interview to a sexual assault occurring two days earlier that the police were investigating and for which he was a suspect. The accused's inculpatory statement was admitted at trial in the British Columbia Provincial Court and he was convicted of sexual assault causing bodily harm.

The accused appealed to the British Columbia Court of Appeal arguing, in part, that his right to counsel had been denied. Since he had not been able to speak to a lawyer on the matter for which he was originally arrested, the accused submitted he could not be questioned on other matters, despite being explained and

understanding the waiver form. In his view, he told the arresting officer he wanted to speak to a lawyer and the police had a duty not to question him about any matter until he had spoken to one.

In a 2:1 judgment, the accused's appeal was dismissed. Justice Lowry—with Justice Huddart concurring—concluded the accused's right to counsel had not been breached and the statement requirements for a young person contained in s.56 of the *YOA* had been followed. In addition to the right to counsel under s.10(b) of the *Charter*, ss. 11 and 56 of the *YOA* provide additional rights to a young person. Section 11 provides a young person with the right "to retain and instruct counsel without delay", to be advised of their "right to be represented by counsel" and to be "given an opportunity to obtain counsel." Section 56 of the *YOA* creates a number of prerequisites for the admissibility of a young person's statement. These requirements include voluntariness, age appropriate explanations that they are under no obligation to give a statement, any statement may be used as evidence, they can consult counsel, and any statement must be made with counsel present, unless waived. Furthermore, s.56 mandates that the young person must be provided a reasonable opportunity to consult with a lawyer and any waiver must be videotaped or in writing. If the requirements of s.56 are not satisfied, the statement will not be admitted as evidence.

In holding that the officer had no duty not to attempt to further her investigation on the sexual assault or that her efforts did not deny the accused an opportunity to exercise his right to counsel, Justice Lowry stated:

> It is certainly clear that when a person is arrested or detained by police who are investigating the commission of an offence in which the person is thought to be implicated and, upon being told the reason for the arrest or detention as required, the person wishes to consult with counsel, he or she is entitled to a reasonable opportunity to do so free of any attempt to elicit evidence about the matter that is the subject of the arrest…
>
> I am, however, unable to accept the notion that, in the circumstances, [the sex assault investigator] was duty bound not to take the opportunity of the [accused] being in the detachment to attempt to further her investigation of a matter that was entirely unrelated to the matter that was the subject of his arrest, providing of course that she advised him of his rights as required by s. 11 and reflected in s. 56(2) of the Act. A person who has been arrested or detained may wish to consult counsel in respect of one matter but not another. Indeed, that appears to have been exactly what the [accused] wished. What is important is that the person be properly advised of his or her rights so a proper determination in that regard can be made. [references omitted, paras. 72-73]

The accused also argued that once a detained person has asserted their right to counsel but has changed their mind the police must provide them with additional information, commonly referred to as a Prosper[1] warning. This warning requires the person be told that they have a right to a reasonable opportunity to consult with counsel and that the police are required to "hold off" from questioning or otherwise requiring the person to participate in any potentially incriminating process. Justice Lowry, however, ruled that this was not a Prosper case. The accused had not changed his mind. Rather, he wanted to speak with a lawyer in relation to the matter for which he was arrested and the officer merely "raised with him an unrelated matter requiring that he be advised of his right to counsel anew." Justice Lowry held:

BC's PROPSER WARNING

You have the right to a reasonable opportunity to contact counsel. I am obliged not to take a statement from you or to ask you to participate in any process which could provide incriminating evidence until you are certain about whether you wish to exercise that right. Do you understand? What do you wish to do?

> I do not consider that anything said in *Prosper* requires the police to give a detained person both the kind of advice concerning the right to

[1] See R. v. Prosper, [1994] 3 S.C.R. 236

> counsel that is routinely given at the outset of an arrest or detention as well as the advice prescribed in that case at the same time. It must be one or the other. The latter is to be given once there has been a change of mind to reinforce the former which will have been given at an earlier time. The purpose of the informational advice required when there is a change of mind about exercising a right to counsel is to insure that the apparent waiver is free and voluntary….
>
> The advice called for in *Prosper* is to be considered in the context of that case…. The person arrested in *Prosper* made an incriminating statement after attempting 15 times over 37 minutes to contact a lawyer before giving up in frustration. There is nothing to be taken from the exchange between [the officer] and the [accused] that suggests he was acting out of frustration when he said he did not want to speak to a lawyer and proceeded to talk to her about the sexual assault.
>
> Given that [the officer] fully informed the [accused] of his right to counsel and that he was not required to say anything to her about the sexual assault, I do not consider she was in the circumstances required to say more. To tell him in addition that he was entitled to a reasonable opportunity to contact a lawyer and that she could not ask him about the sexual assault in the interim would, in my view, have added nothing meaningful to the advice he was given. Indeed, it may have been confusing for a young person. What the [accused] needed to know was precisely what was explained to him as s. 11 of the Act required and he acknowledged he understood. [references omitted, paras. 80-82]

The officer complied with ss.11 and 56 of the *YOA* and was entitled to interview the accused to further her sexual assault investigation. She properly advised him of his right to counsel, which he declined to exercise.

A Second Opinion

Chief Justice Finch disagreed with the majority. First, he outlined several duties imposed on the police under s.10(b) of the *Charter*. They must inform the detainee of their right to retain and instruct counsel without delay including the existence and availability of legal aid. If the person wants to speak to counsel, the police must provide them with a reasonable opportunity to do so and refrain from eliciting evidence until the reasonable opportunity has been provided. Furthermore, he noted:

> The right to counsel may impose two further duties on the authorities, depending on the particular circumstances which confront a detainee. The first arises in situations where the nature of the jeopardy facing a detainee changes during detention and becomes more serious. In such cases, the authorities are under a further duty to advise the detainee of the change in jeopardy, remind the detainee of his or her right to counsel and provide the detainee an opportunity to contact counsel again if he or she so desires…
>
> The second additional duty with which the authorities may have to comply arises in situations where the detainee initially asserts his or her right to counsel but, before having the opportunity to contact counsel, subsequently changes his or her mind and decides to waive that right. In *R. v. Prosper*, the Supreme Court held that in such situations the authorities cannot simply accept the subsequent waiver, but instead must comply with further information duties…
>
> The Supreme Court of Canada has repeatedly confirmed that the right to counsel is not absolute. An accused or detainee must be reasonably diligent in exercising the right, otherwise the implementational duties imposed on the authorities are suspended…
>
> In addition, a detainee can waive the right to counsel. The standard for waiver of a *Charter* right is high. The waiver must be voluntary and based on an awareness of the rights being waived. Accordingly, where an accused is not properly advised of his or her right to counsel, a waiver of that right cannot be effective…[references omitted, paras. 27-30]

Although the accused was not arguing a s.10(b) *Charter* violation but rather non compliance with the YOA, Chief Justice Finch recognized that s.10(b) *Charter* jurisprudence would inform the protections afforded by ss.11 and 56 of the *YOA*. Moreover, in *Charter* cases the accused bears the burden of proving a prima facie breach of s.10(b) before s.24(2) can be resorted to whereas in *YOA* cases the Crown has the burden of proving compliance with s.56, otherwise the statement is inadmissible. In his view, the Crown failed to prove a proper waiver.

Although the officer was required to advise the accused anew of his right to counsel for the second offence, the adequacy of that warning must be assessed in context with his earlier experience. About two hours earlier he expressed a desire to speak with a lawyer after being told he had the right to do so. This did not happen even though he had waited for a lawyer to call back. The police did not tell him he had the right to a reasonable opportunity to contact a lawyer nor that they could not take a statement until he had the reasonable opportunity. Chief Justice Finch stated:

> In my view, the facts of this case closely resemble the type of situation contemplated in *Prosper, supra* where a detainee expresses a desire to contact counsel and then subsequently changes his or her mind before being provided with a reasonable opportunity to do so. Unlike this case, only one offence was at issue in *Prosper*, and the requirement for a so-called *Prosper* warning has generally been considered in cases involving only one offence…However, in the circumstances of this case – given the single episode of detention, the close temporal connection between the two interviews, and the fact that the police were dealing with a young person unfamiliar with the criminal justice system – [the accused] was entitled to the added informational components set out in *Prosper.* This is consistent with the "special guarantees" afforded by s.3(1)(e) of the *YOA* and the Supreme Court of Canada's observation that "the particular characteristics of young offenders make extra precautions necessary in affording them the full protection of their *Charter* rights". [references omitted, para. 43]

Chief Justice Finch would have allowed the appeal, ruled the statement inadmissible, and directed an acquittal. However, the appeal was dismissed since the majority found no error in the trial judge's decision.

Editor's comments: Although this decision dealt with the admissibility of a statement under the former *Young Offenders Act*, the new *Youth Criminal Justice Act* has similar provisions.

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

POLICE NEED NOT BE EXPLICIT ABOUT COUNSEL OF CHOICE INFORMATION

R. v. Grouse, 2004 NSCA 108

The accused was arrested for attempted murder after a rifle bullet penetrated the door of a police car and entered a police officer's thigh and hand, seriously wounding her. The accused was advised of his *Charter* rights and given the usual cautions. He said he wanted to talk to his own lawyer (Mr. Mancini), who worked with legal aid. A police officer contacted the on-call duty counsel, told the lawyer the accused wanted to speak with Mr. Mancini and the accused spoke to the duty lawyer in private on the phone. Fourteen hours later the accused was interrogated for over three hours, at which time he made inculpatory statements including an admission he shot at the police car. At trial the statement was ruled admissible and the accused was convicted of intentionally causing bodily harm, but appealed to the Nova Scotia Court of Appeal arguing, in part, that he was not properly advised of his right to counsel because he was not told he had the right to contact counsel of his choice.

At the time of his arrest the accused was told, among other things, that he had "the right to retain and instruct a lawyer without delay", but was not told he had the right to retain and instruct counsel "of his choice". In his view, the omission of these three words resulted in a violation of his rights under s.10(b) of the *Charter*. As a result, he suggested the statement should have been excluded. Justice Cromwell, authoring the unanimous appeal judgment, first reviewed the duties imposed on police under s.10(b) of the *Charter* and clarified the issue to be addressed:

> [Section 10(b)] imposes two types of duties on the police. The first, which flows from its opening words, is to afford detained persons the right to retain and instruct counsel. This has been referred to as the facilitation or implementation aspect of s. 10(b). It requires the police to provide a detainee who has indicated a desire to exercise the right to counsel with a reasonable opportunity to do so and to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity…The second type of duty, which flows from the concluding words of the section, has been referred to as the informational component. It requires the police to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel…
>
> It is important to understand that this appeal relates only to the second of these two types of duties. The question raised is whether the [accused] was properly informed of his right to counsel. I mention this point because the arguments on appeal sometimes lost sight of it and confused the issue of whether proper information had been given with the question of whether [the accused] exercised his right to counsel diligently. But issues of diligence are not relevant if there has been a failure to properly advise the detainee of the right to counsel. This is because a failure to properly advise the detainee is, in itself, a breach of the *Charter* and a failure on the part of the detainee to exercise the right to counsel diligently after such a breach is irrelevant…This, of course, is consistent with common sense: a person who is not told about the right to counsel cannot be expected to exercise it diligently….So the analysis here must focus exclusively on the question of whether the information given to [the accused] satisfied the informational duty of the police under s. 10(b); any failure on his part to act diligently in pursuit of his right cannot cure a breach of the duty to give him proper information about it. [references omitted, para. 10-11]

In dismissing the appeal, Justice Cromwell ruled that the police, in fulfilling the informational component of s.10 regarding counsel of choice, need not tell an arrestee anything more than they have the right to retain and instruct counsel. He stated:

> However, I am also of the view, subject of course to implementation duties, that the law did not require the police to do anything to communicate [the accused's] right to counsel of choice beyond advising him of his right to retain and instruct counsel without delay as mandated in the leading cases from the Supreme Court of Canada. I say this for three reasons: the authorities do not require more, no additional information would be conveyed by adding more express information about counsel of choice and doing so would not help fulfil the purpose of the informational component of s. 10(b).
>
> The cases from the Supreme Court of Canada make it clear that there are three elements of the informational duty. The detained person must be told: (1) that they have the right to retain and instruct counsel without delay; (2) about access to counsel free of charge where the individual meets prescribed financial criteria set by provincial legal aid plans; and (3) about access to duty counsel and the means available to access such services... The additional requirement advocated by the [accused] is not supported by authority.
>
> Moreover, the addition of a more explicit reference to counsel of choice as advocated by the [accused] would add nothing to the

information conveyed to the detainee. The right to retain and instruct counsel means, at least, the right to hire a lawyer of the detainee's choice. This is the understanding of the right on which the cases defining the informational requirements have been based. The requirements that have been engrafted onto the informational component in Brydges and Bartle were added to recognize that, absent information about legal aid and duty counsel, detained persons may think they cannot get legal advice other than through retaining counsel of their choice. For example, in Brydges, the detainee had expressed an interest in consulting a lawyer but assumed that would not be possible because he could not afford to pay. In Bartle, the detainee had assumed that a lawyer would not be available out of office hours and had no idea of how to contact a lawyer at the time of his detention.

Implicit in these cases is that the right to retain and instruct counsel is understood to refer to privately retained counsel of the detained person's choice. Addition of the words advocated by the [accused] would, therefore, not add anything.

Moreover, the addition of this sort of language would not help to achieve the fundamental purpose of the duty to advise detained persons of their right to retain and instruct counsel. The purpose of this informational component is to enable a detained person to make an informed choice about whether to exercise the right to counsel and other *Charter* rights such as the right to silence… The focus of the informational component, therefore, is the immediate need of the detainee for legal advice. The practical problem addressed by the cases is not that detainees fail to understand that they may hire a lawyer of their choice, but rather that they assume this right will be of no help in getting the sort of immediate advice they require upon detention….

In my view, the addition of the words advocated by the [accused] would not advance the purpose for which a detainee is told of the right to retain and instruct counsel without delay.

The law on the informational component has, for the most part, opted for simplicity rather than technicality, leaving the precise demands of the right to counsel in a particular case to be worked out as part of the implementational duties of the police rather than by insisting that detainees be given a detailed statement of what the right to counsel means. The cases requiring additional information beyond that contained in the words of the *Charter* itself have added information which the courts thought was essential to make the right meaningful in light of the detained person's need for immediate access to legal advice. These additions are designed to meet the practical needs of the detained person, not to assure that the detainee receives a minute exposition of the intricacies of the right itself. In my view, no such rationale can be advanced for the addition proposed by the [accused].

I recognize, as the [accused] points out, that many of the forms of caution in use across the country appear to have explicit words to the effect that the detainee has the right to counsel of choice. I am not suggesting that these cautions are therefore inappropriate. I simply conclude that there is no constitutional requirement that the detainee be advised of his or her right to retain and instruct counsel in a way that more explicitly points out that, as is undoubtedly the case, the right is to counsel of choice. [references omitted, paras. 22-29]

Furthermore, even if there was a requirement for the police to be more explicit about consulting counsel of choice, the police nonetheless adequately informed the accused of that right in the circumstances and he understood from what he was told he had the right to retain and instruct counsel of his choice. After reading the accused his rights the officer asked him if he had a lawyer. He immediately named Mr. Mancini. As Justice Cromwell noted, the accused "immediately asserted the right to consult with a lawyer of his own choice." The appeal was dismissed.

Complete case available at www.canlii.org

STATEMENT ADMISSIBLE DESPITE s.10(b) VIOLATION

R. v. C.J.L., 2004 MBCA 126

The accused, a suspect in a sexual assault case against his five year old niece, attended the police station for an interview. He was advised of his right to counsel, but was told he could have legal aid if he was charged with an offence. This warning did not conform strictly with s.10(b) *Charter* requirements. At his trial in the Manitoba Court of Queen's Bench, the trial judge concluded that the accused was aware of legal aid before his statement was made, but understood it was only available if he was charged and during trial. Despite finding a s.10(b) violation, the judge nevertheless admitted the accused's statement, which was exculpatory in nature but nevertheless used to cross examine him. The accused appealed to the Manitoba Court of Appeal arguing, in part, that the statement—which followed a *Charter* breach—should have been excluded. The unanimous Manitoba Court of Appeal, however, found the statement properly admitted.

When determining whether evidence following a *Charter* breach will be admissible pursuant to s.24(2), courts use a framework that analyzes three factors:

- the nature of the evidence and its impact, if admitted, on trial fairness;
- the seriousness of the *Charter* violation; and
- the effect of excluding the evidence on the repute of the administration of justice.

Nature of the Evidence

The accused suggested that since the statement was conscriptive evidence—created by the *Charter* breach—the trial would be rendered unfair by admitting it. However, Justice Feldman, authoring the unanimous judgment, noted that not all evidence flowing from a s.10(b) breach is always inadmissible. He stated:

> As has been made clear in a number of [Supreme Court of Canada] cases to be conscriptive, evidence must be compelled by the authorities from the accused. Evidence obtained in violation of s. 10(b) is *prima facie* compelled, and thus conscriptive evidence but it is not, for that reason, automatically excluded. [references omitted, para. 20]

In this case the trial judge had found that the accused would have talked to police even if he had been told legal aid was immediately available. In other words, the *Charter* violation had no impact on his interview with police—he would have talked anyway because he wanted to help his position. The Manitoba Court of Appeal would not interfere with the trial judge's assessment that the admission of the statement would not adversely impact trial fairness.

Seriousness of the Violation

Although a s.10(b) breach itself may be a serious *Charter* violation and render a statement inadmissible, this was not one such case. Justice Feldman wrote:

> Here, there was a partial, but incomplete and incorrect, provision of s. 10(b) information. There was no attempt to mislead (acknowledged by the accused), and there was, I am satisfied, no bad faith on the part of the police. This is a breach that is neither trivial nor egregious. My judgment is that, in all the circumstances, it is less serious, rather than more, and not so serious as to compel exclusion. [para. 28]

Effect on the Administration of Justice

The charge of sexual assault is extremely serious and the accused's statement was used only to cross examine him and challenge his credibility. Justice Feldman ruled that its exclusion, not its admission, could bring the administration of justice into disrepute:

> I cannot say with any certainty that the statement was of no value to the Crown's case. Excluding this evidence in this serious case, where there was very little else, if anything, apart from the accused's own testimony, that might reasonably touch directly on his credibility, could well bring into disrepute the administration of justice… I would say the system's reputation would be better served by its admission. [references omitted, para. 30]

The statement was properly admitted but a new trial was ordered on other grounds.

Complete case available at www.canlii.org

SMELL OF LIQUOR SUFFICIENT FOR PROPER ROADSIDE DEMAND

R. v. Butchko, 2004 SKCA 159

The police stopped a vehicle with three occupants after it was observed leaving a liquor establishment, make a u-turn, accelerate, and fishtail. An odour of alcohol was detected coming from the vehicle. The driver was asked to step out of the vehicle and the officer detected a strong smell of alcohol on his breath. When asked if he had anything to drink the driver replied that he had not. The driver was read the roadside screening demand, but refused to provide a sample and he was charged with refusal.

At his trial in Saskatchewan Provincial Court[2], the accused submitted that the smell of alcohol on his breath, by itself, was insufficient in providing a reasonable suspicion that he had alcohol in his body and that the officer required additional objective indicia of consumption. The accused filed expert evidence that the smell of alcohol detected on a person's breath may not be indicative of alcohol in the body because the ethanol may have been eliminated, while the chemical causing the odour has not. In other words, the smell of alcohol may be present in a person's breath without alcohol being in their body. In concluding that the odour was sufficient to provide the necessary level of suspicion, Justice Whelan stated:

> I accept that the Officer genuinely possessed the suspicion and believed it to be reasonable. An objective scrutiny requires that I find the Officer's suspicion was reasonable. I don't believe that it requires that the Officer's evidence be scrutinized in light of all the evidence before the Court. It's sufficient to ask; whether a reasonable person, standing in the officer's shoes, with the officer's knowledge, would have had a reasonable suspicion.

The accused was convicted but appealed to the Saskatchewan Court of Queen's Bench. Queen's Bench Justice Klebuc allowed the appeal[3], set aside the conviction and entered an acquittal. In his view, the smell of alcohol on the accused's breath was not sufficient to provide a reasonable suspicion that there was alcohol in his body. Therefore, there was no valid basis for the roadside demand and no requirement for the accused to comply. The Crown appealed to the Saskatchewan Court of Appeal.

In a unanimous judgment the conviction was restored. Section 254(2) of the *Criminal Code* allows a police officer to make a roadside demand if they reasonably suspect the driver has alcohol in their body. The legal threshold, reasonable suspicion, is low and does not require a belief that a crime has been committed. Justice Cameron, delivering the judgment of the court, adopted the Ontario Court of Appeal's view[4] where it was ruled that a smell of alcohol on a driver's breath was sufficient to found a reasonable suspicion that the driver had alcohol in their body. Even though an explanation for the odour of alcohol may be offered, it does not detract from the officer's reasonable suspicion.

Complete case available at www.canlii.org

[2] 2003 SKPC 76

[3] 2004 SKQB 140

[4] R. v.Lindsay (1999), 134 C.C.C. (3d) 159 (Ont.C.A.)

ALCOHOL TESTING: UNCONSTITUTIONAL PROBATION CONDITION

R. v. Shoker, 2004 BCCA 643

The accused was convicted of break and enter to a dwelling house with the intent to commit a sexual assault. He had entered the victim's home, undressed himself, and tried to climb into her bed. The victim called 9-1-1 and the accused was subsequently arrested. As part of his sentence, he was placed on probation for two years with several conditions, including one that he abstain from the possession and consumption of alcohol and non prescription narcotics and that he submit to a urinalysis, blood test or breathalyzer test upon demand of a peace officer to ensure compliance with the condition. The accused appealed to the British Columbia Court of Appeal arguing, among other grounds, that this probation condition was unreasonable under s.8 of the *Charter* because there was no requirement that reasonable grounds were necessary before such a demand for samples was made.

In a 2:1 decision, the British Columbia Court of Appeal held that the condition was unconstitutional. Although s.732.1 of the *Criminal Code* allows a sentencing judge to impose a requirement that the probationer submit to tests of bodily substances, the condition imposed was unreasonable and violated s.8 because "there are no legislative or regulatory standards or safeguards for the protection of the [accused's] privacy in the enforcement of the condition." Justice Levine, authoring the majority judgment, wrote:

> In the absence of standards and safeguards for the protection of the liberty, privacy and safety of the offender, the condition requiring the [accused] to submit to a urinalysis, blood test or breathalyzer test on demand has the potential to be applied arbitrarily. Although ss. 732.1(c) and (h) may authorize the imposition of such a condition, neither they nor the condition provides the appropriate standards and safeguards present in other statutory regimes for similar types of searches. In the absence of such a regime, the offender cannot be said to be "secure against unreasonable search and seizure".
>
> One of the missing safeguards in the probation condition is the requirement that the probation or peace officer have reasonable and probable grounds for suspecting or believing that the offender has breached the abstention condition. If amending the condition to add that requirement would cure the constitutional defects, this Court could order that the condition be amended in that manner. [para. 55-56]

However, simply amending the condition requiring the presence of reasonable grounds, in the court's view, would not conform the condition with s.8. There still would be no safeguards in place, such as how samples are to be collected or used. Although an offender's reasonable expectation of privacy is reduced because they have been convicted of an offence and no longer enjoy the presumption of innocence, s.8 nonetheless protects this lower privacy interest, which extends to the taking of breath, urine or blood. Despite the impact this ruling may have on enforcing non consumption orders, the court left it to government to change the law:

> I am aware that striking down this commonly used condition may create difficulty in the enforcement of abstention conditions in probation orders. I consider that there is a gap in the legislation that is the role of Parliament, not the courts, to fill. Parliament may wish to enact appropriate standards and safeguards for demanding bodily samples from offenders on probation to help authorities determine whether such offenders are in compliance with conditions to abstain from the consumption of alcohol and drugs. In the absence of such provisions, however, probation officers and police officers must rely on other methods of enforcing conditions of abstention,

including testimony as to the reasonable grounds for believing that a person has breached the condition… [references omitted, para. 60]

A Different View

Justice Hall, took a different view. In his opinion the condition, as it stood, was unconstitutional because it did not require reasonable grounds that the probationer had ingested alcohol or drugs before a demand could be made. However, if reasonable grounds were a requirement to a demand, the breath and urine tests would not be constitutionally defective. The blood test, on the other hand, would be inappropriate. Justice Hall wrote:

> When considering whether the testing requirements ordered by the sentencing judge ought to be found to meet constitutional requirements it seems to me that the degree of intrusiveness of the tests is a very relevant factor to consider. This order provides for three possible tests: a breath test, urinalysis and a blood sample. In my view, having regard to the fact that this [accused] has been convicted and is on probation, he has a somewhat lowered expectation of interference by state agents….
>
> The taking of a sample of the breath of an individual seems to me to not be in any way an invasive procedure or an interference with bodily integrity. The taking of a sample of urine for urinalysis is also not an invasive procedure provided privacy is afforded for the taking of the sample. Many persons do this every day for medical health testing purposes and it in no way interferes with bodily integrity… These two types of testing required by Condition 9 of this probation order, if conditioned upon the requirement that such a test can only be demanded upon reasonable and probable grounds, appear to me to pass constitutional muster. I do, however, consider that the requirement for a blood test found in this Condition is constitutionally unacceptable. Blood testing is an invasive procedure – the skin of the subject is broken and a substance not normally excreted by the body under natural processes is obtained by an agent of the state. This sort of procedure is normally performed by someone trained in medical procedures and is done at a medical lab or the offices of a medical professional. Such a procedure seems to me very different in kind or genus from the aforementioned breath and urine tests. [references omitted, paras. 77-78]

In Justice Hall's view, a blood test procedure would require a detailed statutory regime that is not presently be found in s.732.1 of the *Criminal Code*.

The appeal was allowed and the accused's probation condition was amended accordingly. He was now only required to abstain from intoxicants without a requirement he submit to testing.

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

NO NEED TO REITERATE s.10(b) IF ACCUSED UNDERSTANDS JEOPARDY

R. v. Jones,
(2004) Docket:C34364 (OntCA)

The accused was arrested by Peel police and advised of his right to counsel. He said he did not want to call a lawyer and was again advised of his right to counsel before he was interviewed at the police station. About three hours later the accused was interviewed by Toronto police officers investigating the robbery of a Toronto-Dominion Bank. Again he was told of his right to counsel under s.10(b) of the *Charter* but did not wish to speak to a lawyer. The accused confessed to robbing the bank and said he had robbed others.

He agreed to provide a video taped statement and was told he could discuss the other robberies then. At the beginning of the video taped statement the accused was again reminded he could speak to a lawyer but declined. He

provided a full confession to robbing the Toronto-Dominion Bank and also admitted to robbing several other specific banks when questioned. He also identified himself in surveillance photographs taken during the robberies. He was convicted by a jury in the Ontario Superior Court of Justice on seven counts of robbery and other related offences.

The accused appealed to the Ontario Court of Appeal arguing, in part, that the police failed to advise him of his right to counsel when the police discretely, but fundamentally changed their questioning from the Toronto-Dominion Bank robbery to the other robberies in the course of the video taped confession. The appeal court, however, disagreed:

> The [accused] was fully aware of his right to counsel. He had been told of that right on four occasions and declined to speak with a lawyer. When he was reminded of his right to counsel at the outset of the videotaped statement, he knew that the police were going to question him about the Toronto-Dominion Bank robbery and any other robberies that the [accused] was prepared to tell the police about. He understood the nature of his jeopardy. He knew that it would extend to any of the bank robberies that he chose to tell the police about. The [accused] had sufficient information to permit him to make an informed decision as to whether he wished to speak to a lawyer before talking to the police about the various robberies he had committed…[para. 9]

The statement had been properly admitted and the appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

Nothing so conclusively proves a man's ability to lead others as what he does from day to day to lead himself—Thomas J. Watson

JUDGE LACKS JURISDICTION FOR EXCLUSIVE RELEASE HEARING

R. v. Davidson, 2004 ABCA 337

After failing to appear in court on a probation violation, a provincial court judge issued an arrest warrant requiring the accused be brought before him to speak to release. The warrant was executed but a justice of the peace declined to conduct a release hearing because of the endorsement requiring the accused be brought before the judge issuing the warrant. The accused successfully filed a motion in the Alberta Court of Queen's Bench seeking an order of certiorari and mandamus. The Queen's Bench judge concluded the Provincial Court judge lacked jurisdiction to affix the condition that the accused be brought before him. A release hearing was ordered. The Crown appealed to the Alberta Court of Appeal arguing, in part, that a provincial court judge does have jurisdiction to endorse an arrest warrant reserving exclusive jurisdiction to hold release hearings.

LEGAL LANGUAGE
Certiorari—a writ issued from a superior court inquiring into the validity of proceedings in an inferior court and commonly used for the purpose of quashing orders.
Mandamus—a writ issued by a superior court used to ensure the proper exercise of discretion.

Section 511(1)(c) of the *Criminal Code* directs that "a warrant issued under this Part shall...(c) order that the accused be forthwith arrested and brought before the judge or justice who issued the warrant or before some other judge or justice having jurisdiction in the same territorial division, to be dealt with according to law." Crown submitted that this section clearly authorized the judge issuing the warrant to specify that the accused be brought before them, rather than another justice or judge. The accused, on the other hand, asserted he must be

brought before the issuing judge or another judge or justice having territorial jurisdiction.

The unanimous Alberta Court of Appeal ruled that any endorsement reserving exclusive jurisdiction is improper. Section 511 must be read in a way that conforms with the duty of a peace officer to bring an arrestee before a justice without unreasonable delay under s.503 of the *Criminal Code*. Furthermore, an endorsement reserving exclusive jurisdiction for release hearings may unnecessarily prolong an arrestee's detention in contravention of ss.7 and 9 of the *Charter*. Section 9, the provision protecting a person from arbitrary detention, in addition to a person's right to a bail hearing without unreasonable delay, support an interpretation of s.511 that reduces—not prolongs—the period of time between arrest and a release hearing. The members of the court stated:

> In our view, the section, read as a whole, is clear and sets out what a peace officer must be directed to do upon arrest. The officer is to be given an initial choice of either bringing the accused before the judge or justice issuing the warrant, or bringing the accused before "another justice within the same territorial jurisdiction." Such an interpretation follows from the use of the word "or" and the fact that the statute provides an option. If the peace officer chooses to bring the accused before the judge or justice issuing the warrant, however, and the judge or justice is not available, he or she must then seek out another judge or justice to comply with the statutory injunction that the entire process be accomplished "forthwith." Furthermore, we note that when a warrant is issued by a justice, rather than a Queen's Bench judge, section 2 of the Criminal Code makes clear that the phrase "another justice" includes either a Provincial Court judge or a Justice of the Peace.
>
> It follows that a warrant cannot be endorsed to require that an accused be brought back before the issuer alone to speak to release.
>
> As well as being consistent with the words of the statute, this interpretation of s. 511avoids conflict with the right of an arrested party, found in s. 503 of the Criminal Code, to seek release on bail without unreasonable delay. The law on bail makes it clear that if an accused is not released by the peace officer or the officer in charge, there is a duty to bring the accused into the judicial process without delay. This is to ensure that a person is not held incommunicado…It is a fundamental cornerstone of criminal procedure intended to ensure that the arrest and detention are brought to an impartial judicial officer as soon as possible. This right is clearly enshrined in ss. 7 and 9 of the Charter. [references omitted, paras. 22-24]

And further:

> The final factor supporting our interpretation of s. 511 is that it best suits the effective administration of justice. Arrest warrants issued from the bench, or pursuant to an information, oblige the police to arrest an accused and present him or her before the court. The peace officers charged with this task, however, have neither the time nor the resources to wait for a judge or justice who has issued a warrant to make himself available. Nor are the interests of justice served by keeping arrested people in custody, when they are likely candidates for bail, just because it is necessary to comply with a particular judge or justice's schedule. Along with being unfair, this is also an inefficient use of custodial resources. [para. 30]

Thus, the Alberta Court of Appeal concluded, "there is no jurisdiction under s.511(c) for Provincial Court judges to seize themselves of release hearings to the exclusion of the other mechanisms provided for in the *Criminal Code*."

Complete case available at www.albertacourts.ab.ca

Note-able Quote

Anyone can steer the ship when the sea is calm—Publius Syrus

ADJUDICATOR MAY INFER PROPER DEMAND FOR ADP

Taylor v. Superintendent of Motor Vehicles, 2004 BCCA 641

A driver was stopped for speeding and the officer noted a smell of liquor on his breath and other signs of intoxication. He admitted to consuming beer and subsequently failed a roadside screening test. The breathalyzer demand was read but the petitioner refused to provide a breath sample. As a consequence, he was issued with an administrative driving prohibition under the *Motor Vehicle Act*. The driver was then issued a promise to appear for impaired driving and refusal under s.254 of the *Criminal Code* and driven home.

The driver applied for a review of the administrative driving prohibition. He argued that the report submitted by the officer in support of the prohibition indicated that a "demand" was refused, but it was unclear what type of demand was made—breath samples, identification, assistance, or to follow the officer? In his submission, there was no direct link from the demand on the card to the demand required under s.254 and it was therefore not possible for the adjudicator to find that a s.254 breath demand had been made.

The adjudicator, however, inferred that when the officer said she read the breath demand in her report that she read the demand from a standard card issued to police officers. On appeal to the Supreme Court of British Columbia, Justice Grist set aside the decision of the adjudicator because there was "no evidentiary basis of what was actually said and no basis for the assessment of the quality of the demand." Simply because the demand was made from a card did not support the inference it was made from the standard card kept by officers that set out a breath demand that complies with s.254. The Superintendent of Motor Vehicles then appealed Justice Grist's decision to the British Columbia Court of Appeal.

In a unanimous judgment, the British Columbia Court of Appeal allowed the appeal. Justice Newbury, authoring the court's opinion, stated:

> We need not decide whether the facts here will support a criminal conviction, although I take [the driver's] point that a divergence between the criminal statute and the *Motor Vehicle Act* on points such as this would be undesirable. The fact remains that the adjudicator here is held only to a civil standard and is not bound by the normal rules of evidence, and that the standard of review is one of patent unreasonableness. Applying these standards, I am of the view that it cannot be said the adjudicator's decision was patently unreasonable. Indeed, I think the adjudicator was entitled to take notice of the contents of the cards carried by police officers providing the officially sanctioned wording for demands under s. 254 for breath or blood. The box on the form ticked by the constable was evidence that the demand had been made. It would, in my view, be carrying technicality much too far to require that the actual wording be provided to the adjudicator before could infer what words were used and whether a proper demand was made. The purpose of the cards carried by police officers is to ensure that approved wording is used uniformly and that disputes of this kind do not arise. The fact that the police officer did not write out in longhand the warning she gave is not in my opinion fatal to the validity of the demand and constitutes evidence reasonably capable of supporting the adjudicator's conclusion that a demand was made under s. 254 of the *Criminal Code*. [para. 6]

The adjudicator's decision—inferring the reading of the proper breath demand—was restored.

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

WITHOUT DETENTION, NO RIGHT TO COUNSEL

R. v. Bottle, 2004 BCSC 1667

After stopping the accused for going 105 km/h in a 100 km/h zone and for no licence plate light, a police officer issued him a notice and order and speeding warning. A CPIC query revealed the accused had a criminal record, including drug offences. As the accused was about to get back into his vehicle—a Ford Expedition—the officer asked him if he minded being asked some questions. The accused said no and walked back to the officer where he was asked, among other things, if he had any firearms, stolen property or narcotics. The accused answered no, but with downcast eyes, which differed from his other responses. This aroused the officer's suspicion and the accused was asked if he minded his vehicle being searched. He replied, "No, I don't."

The officer then completed a written consent to search form, which the accused signed. The officer then entered the passenger's side of the vehicle and smelled raw marihuana. The officer asked the accused if he was a user and smoked marihuana. The accused said yes and produced a tin containing marihuana roaches. He was then arrested for possession of marihuana and informed of his rights under s.10(b) of the *Charter*. He declined counsel and was advised of his right to remain silent.

The officer returned to the vehicle and continued the search, finding a golf travel bag containing three pails of cannabis bud. The accused was then arrested for possession for the purpose of trafficking and again was Chartered and warned. He now wanted to call a lawyer. During a *voir dire* in the Supreme Court of British Columbia the officer testified he did not have reasonable grounds to search, but only a suspicion and that he would have let the accused go if he had not consented.

The accused argued he had been arbitrarily detained (s.9), denied his right to counsel (s.10(b)), and subject to an unreasonable search (s.8), contrary to the *Charter*. Justice Meiklem, however, disagreed. *Charter* rights under s.9 and 10 are only engaged if there is a detention. In this case, the officer's extra questioning did not amount to a detention. The accused was told he was free to go before questioning began. Furthermore, there is no stand alone right to counsel in non-detention circumstances before obtaining consent. Finally, the consent obtained was valid. The informational components of proper consent had been conveyed in the consent to search form. The Crown rebutted the presumption of a warrantless search and no s.8 breach had been established. The evidence was admissible.

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

RECORDING DEVICES ALLOWED IN BC COURTS

On December 13, 2004 British Columbia Provincial Court Chief Judge Baird Ellan released a revised media policy, which now permits recording devices in provincial courtrooms. Generally, the policy of the court was to prohibit the use of recording devices. Now, accredited journalists presenting an Accreditation Card to the sheriff will be allowed to bring recording devices into the courtroom. However, recording devices may only be used if they do not disrupt the proceedings and their use does not impose any extra expense on the court. Furthermore, the recordings may only be used to verify a journalist's notes. The recordings may not be copied or used in any other way, such as for broadcast. Despite this new policy, a presiding judge retains the discretion to exclude recording devices in a case or part of a proceeding. For more information on this new policy check www.provincialcourt.bc.ca

ON-DUTY DEATHS RISE

On-duty peace officer deaths in Canada rose by one in 2004. Last year, seven peace officers lost their lives on the job. This is one death above the 10-year lows of six deaths in 1996, 1998, 1999 and 2003.

Motor vehicles, not guns, posed the greatest risk to officers. Over the last 10 years, 37 officers have lost their lives in circumstances involving vehicles, including automobile and motorcycle accidents (26), vehicular assault (2), and being struck by a vehicle (9). These deaths account for nearly 50% of all on-duty deaths, which is more than three times the next leading causes of aircraft accidents and gunfire, each taking 11 lives from 1995 to 2004. On average, 15 officers every two years lost their lives during the last decade, while 1997 and 2002 had the most deaths at 11 per year.

"They are our heroes.
We shall not forget them."[5]

2004 Roll of Honour

Corporal James Galloway
Royal Canadian Mounted Police, CAN
End of Watch: February 28, 2004
Cause of Death: Gunfire

Constable Chris Garrett
Cobourg Police Service, ON
End of Watch: May 17, 2004
Cause of Death: Stabbed

Constable Tyler Boutilier
Ontario Provincial Police, ON
End of Watch: May 23, 2004
Cause of Death: Automobile accident

Parole Officer Louise Pargeter
Correctional Service of Canada, CAN
End of Watch: October 6, 2004
Cause of Death: Assault

Customs Inspector Adam Angel
Canada Border Services Agency, CAN
End of Watch: October 17, 2004
Cause of Death: Heart attack

Auxiliary Constable Glen Evely
Royal Canadian Mounted Police, CAN
End of Watch: November 13, 2004
Cause of Death: Vehicular Assault

Constable Michael Siydock
Ontario Provincial Police, ON
End of Watch: November 26, 2004
Cause of Death: Heart attack

Canadian Peace Officer On Duty Deaths (by year)

Cause	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	Total
Aircraft accident		2		1	2	1		4		1	11
Assault	1										1
Auto accident	1	3	5	2	1	1	2	2	2	4	23
Drowned				1			1	1	1		4
Fall					1						1
Gunfire	1		1	2				3	2	2	11
Heart attack	2		1		1		1	1			6
Motorcycle accident		1			2						3
Natural disaster			1								1
Stabbed	1						1				2
Struck by vehicle			3		2	2	1		1		9
Training accident				1		1					2
Vehicular assault	1					1					2
Total	**7**	**6**	**11**	**7**	**9**	**6**	**6**	**11**	**6**	**7**	**76**

Source: Officer Down Memorial Page www.odmp.org/canada [accessed January 21, 2005]

[5] Inscription on Canadian Police and Peace Officer Memorial—Parliament Buildings

MERE POSSIBILITY CONVERSATION OVERHEARD NOT A s.10(b) BREACH

R. v. O'Donnell, 2004 NBCA 26

The accused was arrested for impaired driving, Chartered and warned and read the breathalyzer demand. After speaking to his lawyer on a telephone located in a small room with the door partially open, he provided a breathalyzer sample and failed, resulting in a charge of over 80mg%. During a *voir dire* in New Brunswick Provincial Court to determine the admissibility of the breathalyzer certificate, the accused testified that although he could hear voices outside the phone room—but not the words—it did not interfere with his conversation with his lawyer. The officer testified he did not hear the accused's conversation with counsel.

The Provincial Court judge concluded that the accused's right to counsel under s.10(b) of the *Charter* had been infringed because it was "theoretically" possible for the officer to hear what was being said, but the certificate was admitted in any event pursuant to s.24(2). The accused was convicted. He appealed to the New Brunswick Court of Queen's Bench arguing the trial judge erred in admitting the certificate, but his appeal was dismissed. In the appeal court justice's opinion, the mere possibility that the accused's conversation could be overheard was insufficient for a s.10(b) breach. The accused further appealed to the New Brunswick Court of Appeal.

Justice Robertson, authoring the unanimous judgment, first examined the test for privacy included in s.10(b), stating:

> It is settled law that the right to retain and instruct counsel, under s. 10(b) of the *Charter*, includes a corollary right to consult in private. Without the requisite degree of privacy, the constitutional right to counsel becomes illusory. Although waiver of the right is a possibility, the issue does not arise in the present case. While the amount of privacy need not be great, at a minimum, an accused must be able to converse with his or her lawyer without the conversation being overheard. Moreover, those who exercise their right to counsel are not required to request privacy or greater privacy than what the police are willing to provide. Furthermore, the right to consult in private extends to legal advice that is sought over the telephone and it matters not whether the advice sought is of minimal scope (whether to provide breath samples). Indeed, nearly all the privacy cases involve telephone consultations following a demand for breath samples…
>
> The legal rationale for the privacy requirement is not complicated. An accused must be able to discuss the circumstances of his or her detention without fear of being overheard…
>
> In theory, a frank exchange between an accused and counsel may require the making of incriminating statements if uttered in the presence of the police. Without privacy, the law presumes that an accused was unable to converse freely, thereby affecting his or her ability to obtain advice and make an informed decision as to what should be said or done…[paras. 4-6, references omitted]

The Court of Appeal then reviewed four tests to determine which one was the appropriate test for determining whether the right to consult counsel in private was infringed. These tests were articulated as follows:

1. the accused must establish, on a balance of probabilities, that the police did in fact overhear the accused's conversation with counsel;

2. the accused must establish, on a balance of probabilities, that it was more probable than not that the police did or could overhear the accused's conversation with counsel. The term "could" in this context means a "real" or "substantial" possibility;

3. the accused must establish, on a balance of probabilities, that there was a possibility the police overheard the accused's conversation with counsel. This test recognizes a breach when there is a "theoretical" or "mere possibility" that police overheard the privileged conversation, such as failing to close the door to the room where the accused is speaking with his lawyer on the telephone; or

4. the accused must establish, on a balance of probabilities, that the accused reasonably believed that the police could overhear the accused's conversation with counsel and whether this belief inhibited the accused's conversation with counsel. This two-prong test, referred to as the "reasonable apprehension test", is subjective—it focuses on what the accused thought—and requires the accused to have suffered prejudice—their ability to effectively communicate with counsel was affected (they would have acted differently but for their privacy violation).

Justice Robertson rejected test 1, 3, and 4 and chose the second test as the correct one to apply as the test for privacy. He held:

> The second formulation poses the following question: whether it was more probable than not that the police did or could overhear the accused's telephone conversation with counsel. What sets this formulation apart from the first test is that emphasis is also placed on whether the police "could" have overheard the conversation, in addition to whether they actually "did". In my view, this is the proper test. It recognizes that uncertainty over whether the accused was denied the requisite degree of privacy may be resolved in favour of the accused. Consequently, the test can be applied without the court having to make a credibility finding either for the police or the accused. Moreover, the test is objective in that it is applied from the viewpoint of a disinterested observer. I hasten to add that to distinguish the second formulation from the third, it is necessary to ask whether, on a balance of probabilities, there was a "real" or "substantial" possibility that the police could have overheard the accused's conversation with counsel. Above all else, it is important to recognize that there is no room in law for the third and fourth formulations of the test. [para. 12]

In this case, the trial judge erred. He applied the mere possibility standard. The theoretical possibility that the police were able to overhear the accused's conversation with his lawyer was insufficient to find a breach of his privacy right under s.10(b) of the *Charter*.

Complete case available at www.canlii.org

ADDITIONAL SENTENCE INVALIDATES PROBATION ORDER

R. v. Amyotte, 2005 BCCA 12

The accused was sentenced to two years in prison for possession of stolen property and 30 days concurrent for possession of cocaine and two years probation following each sentence. Some 19 months later he was sentenced to a further 20 months for theft, to be served concurrently with his earlier two year term. With the five month overlap, the accused's sentence would total more than 40 months. The accused appealed his sentence to the British Columbia Court of Appeal with respect to the probation orders, arguing they were invalid.

Under s.731(1)(b) of the *Criminal Code*, a probation order may be imposed on an offender if the offender is sentenced to imprisonment for a term not exceeding two years. Furthermore, s.139(1) of the *Corrections and Conditional Release Act* deems a person sentenced to additional time while currently serving a sentence to be sentenced to one sentence, starting at the beginning of the first sentence

and ending at the expiration of the last sentence.

In this case the sentenced overlapped by about five months and the total sentence, when adding the two sentences together, exceeded two years (see Figure 1). Therefore, the probation orders, which were initially valid when imposed on the first sentence, became invalid when the second sentence was imposed.

Figure 1

1st sentence: 2 years	
	2nd sentence: 20 months
Total sentence: 3 years 4 months and 13 days	

The probation orders were quashed.

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

EVIDENCE ADMISSIBLE DESPITE UNCONSTITUTIONAL ARREST

R. v. Scott, 2004 NSCA 141

Following the early morning robbery of a convenience store by a female wearing a ski mask, a police tracking dog traced footprints in the fresh snow to an apartment building. On the approach to the parking lot of the apartment building, police saw a red or wine coloured Grand Prix or Grand AM leaving the parking lot at an unusually high speed. Shortly thereafter two police officers observed a wine coloured Grand Prix enter a service station. The officers approached the occupants—the accused and her adult male companion—and asked them to submit to a pat down search. Although they were not arrested, officers accompanied them as they went about their business at the service station for about half an hour. In the meantime, police determined the male companion had a criminal record and was recently released on parole. The two were subsequently arrested, given the police caution, read their *Charter* rights, and transported separately to the police detachment.

At the detachment the accused asked to speak with a lawyer, which was facilitated. Shortly afterwards, she was asked if she would consent to a search of her residence. After the accused said she would not say anything until she saw her 11 year old daughter, the police drove her home, picked up the daughter, and brought them both back to the detachment. Police then asked the accused to sign a consent to search form, told her she was a suspect in a robbery and again advised her she was entitled to speak to a lawyer. After speaking with counsel a second time, the accused signed the consent form. During the search of her residence the police seized a ski mask and jacket. The accused's male companion was interviewed and provided a statement to the police implicating the accused in the robbery.

At her trial in the Supreme Court of Nova Scotia the judge admitted the evidence seized by police from the accused's residence. Although the judge concluded the accused had been detained at the shell station, he ruled that the police had articulable cause to detain her to further their investigation. However, the judge ruled that when the arrests were made the police lacked an objective basis for connecting the arrestees to the robbery—even though they believed they had sufficient grounds. Thus, there were no reasonable grounds for arrest under s.495 of the *Criminal Code*. The judge made no explicit finding of a *Charter* breach, but nonetheless admitted the evidence under s.24(2) of the *Charter*. She was convicted by a jury of robbery and wearing a disguise and sentenced to 18 months in jail followed by a term of probation. However, she appealed to the Nova Scotia Court of Appeal arguing, among other grounds, that the seized items were not properly admitted.

On the appeal the Crown conceded that the arrest of the accused violated her right not be arbitrarily detained under s.9 of the *Charter*.

Since the signed consent was obtained after this unconstitutional arrest, the accused suggested the consent was invalid and the items seized from this warrantless search were derivative evidence (conscriptive real evidence). Justice Fichaud, authoring the unanimous Nova Scotia Court of Appeal decision, noted that an unconstitutional detention does not automatically render consent to search invalid. Rather, the consent to search will be invalid if the Crown fails to prove it was both informed and voluntary. However, assuming, without deciding, that the consent was involuntary and invalid, the evidence was nonetheless admissible under the s.24(2) criteria—trial fairness, serious of the violation, and administration of justice.

Trial Fairness

The evidence obtained from the accused's apartment was not derivative evidence—an item of real evidence discovered when the accused is conscripted against themselves (usually in the form of a statement) as a result of a *Charter* violation. It was discoverable by another independent means—the police could have obtained a search warrant from the statement of her male companion implicating her in the robbery. Even if this statement was made to police while her male companion was under unconstitutional arrest, it does not render the evidence derivative. Determining whether evidence is derivative evidence does not turn on whether the alternative method of discovery is constitutional. It is only when the evidence is found to be conscriptive that the alternative means of discovery requires compliance with the *Charter*. Justice Fichaud stated:

> Accordingly, in my view, it is irrelevant to the admissibility of the seized items whether [the accused's companion] was under unconstitutional arrest when he gave his statement. His statement was the alternate route by which the police could have obtained a search warrant and seized the items. The seized items were not derivative conscriptive evidence against [the accused]. [para. 57]

Since the evidence was not compelled self incrimination, the trial would not be rendered unfair.

Seriousness of the Violation

The *Charter* breach was not serious. The police acted in good faith, had sufficient grounds to detain, and believed they had sufficient grounds to arrest even though they lacked a sufficient objective basis. With respect to the detention of the accused, Justice Fichaud stated:

> I agree with the trial judge's conclusion that the police had "articulable cause" or, as rephrased in *Mann* "reasonable grounds", to detain. The police had tracked the robber from the store to the apartment building, and had seen a red or wine coloured Grand Prix or Grand AM speeding from the apartment building's parking lot. Shortly after, the RCMP saw a wine coloured Grand Prix containing [the accused] and [her companion] enter the Shell station nearby. The threshold for a detention is lower than for an arrest. Although the Crown has conceded that the arrest at 1:15 a.m. violated the *Charter*, there is no concession for the earlier detention at the Shell station. In my view, the trial judge correctly ruled that the police had articulable cause or reasonable grounds to detain [the accused and her companion] at the Shell station, before their arrest. [para. 35]

Had the initial detention been unconstitutional, the later unconstitutional arrest would have compounded the *Charter* breach rendering it more serious than an unconstitutional arrest alone. Furthermore, the police read the accused her *Charter* rights and twice provided the opportunity for her to talk to counsel. Unlike the determination of derivative evidence, the constitutionality of the alternative means of discovery becomes a consideration under this branch of the s.24(2) analysis. However, as the court noted, even if her companion's arrest was unconstitutional—a fact not conceded to by Crown—the same factors mentioned regarding

the accused's arrest would apply. Thus, the breach was not serious.

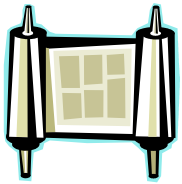
Administration of Justice

The trial judge did not err in holding that the exclusion of evidence, not its admission, would adversely affect the administration of justice.

The appeal was allowed on other grounds, the accused's conviction was quashed, and a new trial was ordered.

Complete case available at www.canlii.org

BC POLICE GET NEW CODE OF ETHICS



On January 14, 2005 the British Columbia Police Code of Ethics was unveiled at the Justice Institute of British Columbia during a formal signing ceremony. The Code was endorsed by the BC Association of Chiefs of Police, RCMP, BC Association of Municipal Chiefs of Police, Vancouver Police Officers Association, Vancouver Police Union and BC Federation of Police Officers.

The British Columbia Police Code of Ethics

The people of British Columbia expect the police to serve with courage, fairness, impartiality and integrity and to apply democratic principles that honour human dignity in the pursuit of justice. Recognizing that the policing profession is distinguished by the character and values of the individuals within it, the British Columbia Police Code of Ethics reflects the commitment of all Police Officers in British Columbia, regardless of their rank or position, to ethical principles and values, and acceptance of the responsibilities and privilege that accompany public service. Moreover, it is recognized that the Police Code of Ethics applies both individually and collectively, and as such applies equally to the organizations and agencies that make up the policing profession in British Columbia.

Fundamental Principles

Police Officers in the Province of British Columbia, along with their respective organizations and agencies, embrace the following Fundamental Principles, which underpin the Guiding Values, Primary Responsibilities and Decision-Making framework.

- democracy & the rule of law
- justice & equality
- protection of life & property
- safeguarding the public trust
- that the police are the public and the public are the police
- the principles of the Constitution of Canada
- the rights enshrined in the Charter of Rights & Freedoms

Guiding Values

Police Officers in the Province of British Columbia, along with their respective organizations and agencies, look to the following Guiding Values, which should direct all our decisions. Moreover, we recognize that our decisions will be judged according to how well they correspond to these values.

- citizenship
- courage
- fairness
- impartiality
- integrity
- loyalty
- public service
- respect

Primary Responsibilities

Police Officers in the Province of British Columbia, along with their respective organizations and agencies, affirm the following Primary Responsibilities, which are defined in terms of three key relationships. First, there is

the Public, for whom we serve. Next there are Professional Partners, with whom we work, and ourselves Personally, to whom we must be true. Moreover, we recognize that responsibility occurs personally and collectively, and that accountability must accompany responsibility for it to be effectual.

The Public

Our basic policing duties are to protect lives and property, preserve peace and good order, prevent crime, detect and apprehend offenders and enforce the law, while at the same time protecting the rights and freedoms of all persons as guaranteed in our Charter of Rights and Freedoms. In fulfilling these duties, we must strive for excellence, which includes the exercise of professional discretion and judgment in a manner consistent with our Fundamental Principles and Guiding Values. Recognizing, however, that the ability of the police to perform their duties is dependent upon public approval, support and willing cooperation, we must also provide open, responsive, impartial and accessible service. In other words, to safeguard the public trust, we will be responsible to the public and accountable publicly for what we do.

The Policing Profession and Partners

Consistent with our duties and responsibilities to the public, we are also responsible to the policing profession. First, we must always respect and to the best of our abilities abide by the standards of the profession, while at the same time seeking to improve them. To accomplish this, we will demonstrate a willingness to engage in open dialogue, which raises important issues and significant opportunities that can advance the profession for the purpose of providing better policing service to the public. This entails an openness to change and recognition of the need for the policing profession to develop informed, collaborative and participative police officers.

In addition to the policing profession, we are responsible to other professions that also serve the public. We must always cooperate with other police and law enforcement professionals, and with all those in the criminal justice system, in order to develop an open, just, and impartial justice system. As well, we must always strive to cooperate with other public service professionals in order to advance the public good. This involves the sharing of information in a relationship-building manner that celebrates the interdependent nature of professionals in promoting the goals of the justice system. This information sharing must balance confidentiality needs and due process with the needs of professionals, who are working for justice and the common good.

Personally

We accept personal responsibility for acting legally and ethically. The Police Officer is a model of discipline under trying circumstances, but to achieve this we must practice humility and a desire to learn from our experiences and mistakes and those of others. As individuals we must have a clear idea of how to separate private advantage from public service and to make decisions that avoid conflicts of interest and the appearance of personal gain. As well, ethical behaviour entails duties that we owe to ourselves personally. In addition to reflecting upon what is right and what is wrong in the context of policing, we must as individuals develop a proper balance between our work and our personal life

Ethical Decision-Making

Acting responsibly towards the Public, the Policing Profession and its Partners, and to ourselves Personally, will reduce the number and severity of ethical difficulties faced in policing, but it will not eliminate them. Ethical difficulties emerge when Police Officers, either as individuals or collectively, act in a way that is not defensible on legal and ethical grounds. To avoid such difficulties, Police Officers, along with their respective organizations and agencies,

should ask themselves the following questions, which help to identify ethical issues and to test decisions on ethical grounds.

1. Is the activity or decision consistent with organizational or agency policy and the law?
2. Is the activity or decision consistent with the British Columbia Police Code of Ethics?
3. What are the outcomes or consequences resulting from the activity or decision and whom do they affect?
4. Do the outcomes or consequences generate more harm than good? Do they create legitimate controversy?
5. Is the activity or decision likely to raise actual or perceived conflicts of interest where a personal advantage is gained because of one's professional position?
6. Can the activity or decision be justified legally and ethically? Would the activity or decision withstand public scrutiny on legal and ethical grounds if it resulted in problems that became known generally?

If the answers indicate that there may be a question of professional ethics, then consultation should occur with someone trustworthy and experienced who can provide reasonable direction and advice.

Policing is serious work and there are important issues at stake. It requires not only technical competence but also a willingness to take difficult action in trying times. As well, it requires a recognition that we must act with a concerted commitment to serve and protect using democratic principles in the service of the law while honouring human dignity in the pursuit of justice. And it is this commitment to principled policing that distinguishes us as professionals, both to ourselves and to the public.

COURTS GET TOUGHER ON FLIGHT FROM POLICE

R. v. Roberts, 2005 ABCA 11

Following a citizen report of a car prowler in a residential neighbourhood, the police attempted to stop the 22 year old accused driving a stolen truck, but he fled and failed to stop for the emergency equipment. A pursuit ensued on slippery roads through major and residential areas, with speeds reaching 110 km/h. He ran through some intersections without stopping. Two officers in a patrol car were about to get out of the vehicle and lay a spike belt across the road at a residential intersection when the accused drove straight at them and rammed the police car head on, severely damaging it and seriously injuring the officers inside. He ran from the crash but was found hiding by a police dog in the yard of a residence. He fought with officers until the police dog subdued him. The accused was also wanted on a warrant for failing to attend court on an earlier possession of stolen vehicle charge.

The accused plead not guilty and was let out on bail. He failed to show for his preliminary hearing and was later arrested, but again let out on bail. He failed to show for his trial and was again arrested. He ultimately plead guilty to possession of stolen property over $5000 and police pursuit causing bodily harm and apologized some 17 months after the offence. Charges of dangerous driving and fleeing an accident scene were dropped. At his sentencing hearing he told the judge he ran from police because he had been using drugs and had amphetamines in the truck. He said he did not intend to ram the police car, but the crash occurred because of speed and road conditions. The judge believed him and also recognized his guilty plea as a mitigating factor in sentencing. He sentenced the accused to about 34 months on the flight charge, but nothing for the possession charge.

The Crown appealed the sentence to the Alberta Court of Appeal.

First, the Alberta Court of Appeal addressed the non-sentenced possession offence. Noting that "possession of a stolen vehicle is a serious offence, especially when the driver recklessly demolishes the vehicle", Justice Cote, authoring the unanimous judgment, concluded that a sentence for the possession offence concurrent to the flight offence, as the accused suggested, would not be appropriate. They require completely separate elements and intents, even though they involve the same truck and overlap in time. Justice Cote stated:

> Furthermore, flight causing bodily harm is a new separate crime. Why would anyone lead police on a chase if he had been doing nothing wrong when told to stop, and was not wanted by police? Why would he do it if he were driving his own vehicle with his own license plate? Flight then would be pointless. That rarely occurs. Usually drivers flee because they are either then committing another offence, or have clear evidence of another offence in their vehicle. Often the vehicle is stolen.
>
> To give concurrent sentences then would be to wipe out one of the offences, for all practical purposes. So long as the penalty given for flight were not larger, this would be a virtual judicial repeal of Parliament's new criminal flight crime. That would violate Parliament's strong message…. Alternatively, if the flight sentence were equal or higher, a concurrent sentence would wipe out the predicate offence which the criminal was fleeing, and so make the flight successful. It would reward flight, not punish it. It would take Jonathan Swift to appreciate the irony. [paras. 33-34]

Second, the mitigating factor attributed to the guilty plea was militated by the accused's two failure to appears where more than a dozen witnesses, including the two injured officers had been in attendance. Rather than promptly pleading guilty gratuitously, he belated his guilty plea until over 17 months after the offence in exchange for the dropping of several charges. Moreover, the police had caught the accused red handed and there were many professional witnesses making a conviction inevitable. The sentencing judge should not have given any significant credit for the guilty plea.

Nor was the accused's ongoing drug problem or his use of drugs at the time a mitigating factor. Rather, it should have been considered an aggravating factor. "Choosing to drive after knowingly consuming drugs or alcohol clearly aggravates any driving offence then committed," said Justice Cote. Furthermore, the fact the accused fled the accident, hid, had to be tracked, fought with police, and took other steps to evade conviction also created aggravating circumstances. As well, the prevalence of vehicle flight from Edmonton police along with bodily injury climbing exponentially was also an aggravating factor overlooked by the sentencing judge.

Finally, the reason provided by the accused for evading the police—to escape trouble from drug offences—was not a mitigating factor at all. "Those who flee the police and engage in a chase usually do so to hide something illegal," said Justice Cote. "Possessing amphetamines is not a minor matter, like having an out-of-date address on one's operator's permit." Similarly, the suggestion that the collision resulted more from negligence, rather than an intentional act, was not mitigation. Justice Cote wrote:

> Had the [accused] deliberately rammed the car containing the two constables, that would have been a different, deliberate crime, such as attempted murder, maiming, assault causing grievous bodily harm, or aggravated assault…
>
> The offence for which the [accused] was sentenced was causing bodily harm, by operating a motor vehicle in a manner dangerous to the public, while being pursued by a constable in a motor vehicle and failing to stop to evade the constable (Criminal Code s.249.1(3)). No intent to injure or cause a collision is necessary to complete

that offence. The mode of driving required by s.249.1(3) is that in s.249(1)(a), dangerous driving. It is trite law that no intent to injure is necessary under that section. [paras. 50-53, references omitted]

In determining a proper sentence in this case, the only mitigating factors recognized by the Alberta Court of Appeal were the accused's relatively young age, the possibility of rehabilitation, and his belated remorse. On the other hand, flight from police is an aggravated criminal offence. When someone is injured as a result, the maximum sentence is 14 years, significantly more serious than criminal negligence, dangerous driving or impaired driving resulting in bodily harm. The manner of driving in this case made a collision highly probable and the serious injuries resulting were far from fluke, bad luck nor unforeseeable. In passing s.249.1 of the *Code*, Parliament recognized that the offence is very dangerous to the public, the moral turpitude is greater than dangerous driving because of the deliberateness and contumacy required, and the penalties must be equal to or greater than penalties of the offence being fled. The accused's conduct was dangerous and resulted from a conscious decision to flee for some distance. He was not seduced or bullied by others into the offence and continued to flee and show his disregard for others even after the crash.

The accused's sentence on the flight causing bodily harm was increased to three and a half years and an additional four months and 14 days consecutive for the possession offence was added, after the court recognized the "globality" principle that combined sentences should not be unduly long as well as crediting some time for pre-trial custody.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

People may fail many times, but they become failures only when they begin to blame someone else--Unknown

PHYSICAL ACCESS, NOT VISUAL ACCESS, DEFINES PUBLIC PLACE

R. v. Clark, 2005 SCC 2

Neighbours in a nearby house looking across their backyard from their partially lit family room saw the accused standing in his illuminated living room masturbating. They moved to their darkened bedroom and continued to watch the accused for 10-15 minutes from a distance of 90 to 150 feet. At one point the neighbours used binoculars and a telescope to confirm what the accused was doing. The police were called and the accused was arrested and charged under s.173(1)(a) and (b) of the *Criminal Code*. Under s.173(1)(a) it is an offence to willfully commit an indecent act in a public place in the presence of one or more persons. Public place is defined in s.150 of the *Code* as including "any place to which the public have access as of right or by invitation, express or implied." Section 173(1)(b) makes it an offence to commit an indecent act in any place with the intent to insult or offend any person.

At his trial in British Columbia Provincial Court the accused was acquitted under s.173(1)(b) because the judge concluded he did not know he was being watched nor that he intended to "insult or offend any person" as required by the section. However, he was convicted of committing an indecent act in a public place under s.173(1)(a) since his living room had been converted into a public place—since he could be seen through his window—and willfully did it in the presence of one or more persons (the neighbours). The accused's appeals to the British Columbia Supreme Court and the British Columbia Court of Appeal were unsuccessful.

On further appeal to the Supreme Court of Canada, the accused's conviction was vacated and an acquittal was entered. Justice Fish, authoring the unanimous Supreme Court judgment,

concluded that the accused's living room was not a public place for the purpose of s.173(1)(a). The type of access contemplated in the definition of public place requires physical access within, not visual access from without. Justice Fish stated:

> Section 150 of the *Criminal Code* uses the word "access" in reference to a "place" -- in this case, a private home. And our concern is with access to that place "as of right or by invitation". In common usage, "access" to a place to which one is invited or where one has a right to be refers to entering, visiting or using that place -- and not, as I said earlier, to looking or listening in from the outside. When we are told that someone has access, as of right or by invitation, to an apartment, a workshop, an office, or a garage, this does not signify to us a mere opportunity or ability to look through a window or doorway and to see what is happening inside. [para. 45]

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

COPS AS CROOKS NOT PERSONS IN AUTHORITY

R. v. Grandinetti, 2005 SCC 5

The police commenced an undercover operation to obtain evidence from the accused, the principal suspect in the murder of his aunt. The officers, posing as members of a criminal organization, recruited the accused and gained his confidence and trust. They engaged him in various criminal activities, including money laundering, theft, receiving illegal firearms, and drug dealing, and encouraged him to talk about his role in the murder because, as they told him, they needed to ensure none of the organization's members were under police investigation. He was also told the organization had the ability to divert suspicion of his involvement in the murder by using corrupt police officers who could influence the investigation. He believed they could influence the prosecution by having witnesses and physical evidence disappear and he ultimately confessed to his involvement in the murder, provided details and took them to the crime scene.

At his trial, the judge concluded that the undercover officers were not persons in authority and therefore a *voir dire* to determine the admissibility of the statements was not necessary. His statements were admitted and the accused was convicted of first-degree murder. He appealed to the Alberta Court of Appeal, but a majority dismissed his appeal. The accused further appealed to the Supreme Court of Canada arguing, among other grounds, that the undercover officers were persons in authority because he believed they could influence his aunt's murder investigation.

Person in authority-who did the accused believe he was talking to?

The common law confessions rule requires the Crown prove beyond a reasonable doubt that a statement made to a person in authority is voluntary. If this burden is not met, the statement is excluded as evidence. The rationale for this rule is twofold; it encourages statement reliability and discourages improper police coercion. In determining whether a confession is admissible in court, the accused bears the initial burden of showing there is a valid issue for consideration that they believed the person receiving the statement was a person in authority. If the accused meets this threshold determination, the burden shifts to the Crown to prove beyond a reasonable doubt that the accused did not reasonably believe the receiver was a person in authority or, if they did hold such a reasonable belief, that the statement was nonetheless voluntary.

Generally, a person in authority is someone engaged in the arrest, detention, interrogation or prosecution of an accused, but could also include someone the accused perceives to be allied with, an agent of, or acting on behalf of or in concert with the police or prosecuting

authorities. Justice Abella, writing the Supreme Court of Canada's opinion, dismissed the accused's appeal. She stated:

> The test of who is a "person in authority" is largely subjective, focusing on the accused's perception of the person to whom he or she is making the statement. The operative question is whether the accused, based on his or her perception of the recipient's ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment.
>
> There is also an objective element, namely, the reasonableness of the accused's belief that he or she is speaking to a person in authority. It is not enough, however, that an accused reasonably believe that a person can influence the course of the investigation or prosecution…[paras. 38-39]

In her view, the accused believed the undercover officers were crooks, not cops. Even though they said they had corrupt police officers they controlled and could potentially influence the murder investigation against him, the coercive power of the state—which the confessions rule is designed to address—was not engaged and the statements were therefore not made to a person in authority.

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

RANDOM DOG SNIFF NOT A SEARCH

R. v. Davis, 2005 BCPC 11

The police randomly used a passive alert narcotic detector dog aboard a BC Ferry as part of a drug interdiction operation to sniff around vehicles on a parking deck that was open to public access. The dog indicated on a van after it put its nose up to the opening of a pop out window and sat down. The accused was sleeping in the front passenger seat with the window partially open. As officers approached the van they smelled a strong odour of fresh marihuana coming from it. They tapped on the window, identified themselves, and arrested the accused for possession of a controlled substance. The vehicle was secured, taken back to the police station and searched after a warrant was obtained. Behind the driver's seat police found a container with 18 ziplock bags of marihuana and the accused was charged with possession of marihuana for the purpose of trafficking.

During a *voir dire* in British Columbia Provincial Court to determine the admissibility of the evidence, the accused argued his rights under s.8 of the *Charter* securing him from unreasonable search and seizure had been violated. For the purposes of the constitution a search occurs when police conduct interferes with a person's reasonable expectation of privacy. Although there was little doubt the accused had a privacy interest in his vehicle's interior, Judge Auxier ruled he did not have a reasonable expectation of privacy in the air containing the odour of marihuana surrounding its exterior that was detected by the dog.

Relying on the recent Supreme Court of Canada decision *R. v. Tessling*, 2004 SCC 67 in which the court concluded the use of a FLIR device on a home was not a search engaging constitutional protection, the judge found the information supplied by the dog's actions did not reveal a biographical core of personal information nor reveal intimate details of lifestyle. Thus, the accused did not have a reasonable expectation of privacy in the area surrounding his vehicle when parked on a ferry deck open to public access and therefore the dog sniff was not a search under the *Charter*. On that basis, there was no breach and the evidence was admissible.

Complete case available at www.provincialcourts.bc.ca

Note-able Quote

Fall seven times. Stand up eight—Japanese Proverb