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.

INCIDENTAL SEARCH MAY PRECEDE ARREST WHILE REMAINING LAWFUL

R. v. Sinclair, 2005 MBCA 41

Two police officers saw a vehicle pull into a donut shop parking lot at 1:00 am and park. A male approached the car, reached in through an open window, engaged in some sort of transaction, and then left. The car then departed and one of the officers thought he had just witnessed a drug transaction based on his experience, the circumstances, and the location. The police followed the car and the licence plate check was blank. Thinking the car might be stolen, the officers stopped it, but the accused could not produce a licence or identification. He was asked to step from the car and the officer observed two balls of rolled up tinfoil, thought to be crack cocaine, in the middle of the driver's seat. A cell phone could also be heard ringing.

The officer escorted the accused to his police unit, patted him down, and found cash on him. The officer returned to the car, seized the two tin foil balls and the cell phone. The tinfoil was opened and found to contain cocaine. The accused was arrested for trafficking in cocaine and possession of proceeds of crime. A couple hours later two calls were received on the cell phone ordering cocaine.

At trial the judge concluded that the police had reasonable grounds to arrest the accused when they saw the tinfoil balls in the car before the search took place. However, he found the search illegal because it was warrantless and neither incidental to detention or arrest. In his view, the police should have applied for a search warrant. The search and seizure was unreasonable and the evidence was excluded under s.24(2). The accused was acquitted.

The Crown appealed to the Manitoba Court of Appeal arguing that the trial judge erred. Justice Freedman, authoring the unanimous judgment, agreed with the trial judge that the police had reasonable grounds to arrest the accused before the search took place. He stated:

> The combination of the suspicious events in the parking lot, the tin foil balls which were in plain view of the officer, his informed suspicion and thought (far more than a mere hunch) that it was crack cocaine, the ringing cell phone, the time of day, all against the backdrop of the officer's experience, and the previous event in the parking lot, all provide a sufficient evidentiary foundation for the conclusion. [para. 14]

However, the Manitoba Court of Appeal disagreed with the trial judge and found the search lawful as an incident to arrest. Although searches incidental to arrest usually follow an arrest, "a search prior to arrest will still be incidental to the arrest provided that prior to the search there were reasonable…grounds for the arrest," Justice Freedman stated. The fact the search and seizure preceded the arrest was not relevant to the lawfulness of the search in this case. There was no s.8 violation and the evidence was admissible. The acquittal was set aside and a new trial was ordered.

Complete case available at www.canlii.org

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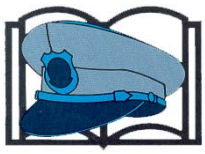

Here are some of our readers' comments about the publication.

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"Just a quick note to thank you for the…newsletter. It's a valuable resource, and I look forward to continuing to receive it. I've taken the liberty of distributing it to members…Some may be in touch requesting that their names be added to the distribution list. Again, thanks for staying in touch!"—**Police Inspector, Ontario**

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"I'm interested in receiving your publications…I spent approximately 5 years at our College instructing on a variety of topics. Although I am no longer teaching I'm still very interested in receiving your newsletter."—**Staff Sergeant, Ontario**

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"I have read my first copy of your newsletter. It is very impressive, please add me to your list."—**Government Employee, Ontario**

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"Every now and then an issue [of In Service: 10-8] pops up in my parade room and I always find it to be a good learning source."—**Police Constable, British Columbia**

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"The 10-8 newsletter is outstanding"—**Police Constable, British Columbia**

All past editions of this newsletter are available online by clicking on the Police Academy link at:

www.jibc.bc.ca

Note-able Quote

A criminal trial is not a quest for the truth, but rather a search for admissible evidence—author unknown

Managing Your Workforce: The Risks[1]

Paul Ceyssens[2]

INTRODUCTION

The increased prominence and complexity of managing human resources issues in the police workplace requires a periodic examination of both the extent of legal risk and the appropriate measures to manage that risk. This paper, and my presentation at the conference, is intended to provide one such examination, and proposes to do so by answering three questions: (i) what is risk management?; (ii) how should the legal risk be managed generally?; and (iii) what are the most effective specific strategies?

Given the brief time allotted for the presentation, I have elected to restrict my comments to managing human resources issues that are connected with the law of human rights. There are other important aspects of managing human resources issues – the complaint and discipline process is one prominent example – but a discussion of those topics should await another day.

Any reflection of this sort is necessarily coloured in some fashion by the background of the observer, and my biography has been circulated. With that caveat, I will proceed to address these three questions.

WHAT IS RISK MANAGEMENT?

(a) Why Worry About It?

The starting point in addressing this first question is to reflect upon the purposes of risk management. In other words, we should ask why it matters before we determine how best it should be performed. We believe the following are the principal objectives of risk management:

1. improve service delivery
2. avoid financial costs arising from disputes
3. avoid negative effects on organization arising from disputes ("organizational disruption" or "organizational distraction")
4. avoid negative effects on individuals arising from disputes
5. avoid damage to reputation of the constabulary generally
6. win disputes that do occur despite your best efforts
7. lose small if the result is unfavourable

(b) Management of Legal Analysis: The Analysis

Opinions vary concerning the proper approach to managing legal risk. Our firm generally restricts its practice to employment law and human rights law, and provides advice to employers, executives, unions, individuals, governing bodies, oversight bodies and governments. We provide advice in various sectors across Canada, including policing. We also provide extensive training in the management of legal risk and other areas. Both in our formal legal advice and in our training, we favour a three-stage approach on the issue of risk management.

The first stage involves assessing trends. Organizations and individuals in particular sectors should be aware of the general direction of both courts of law and administrative tribunals[3] in matters of significance. That knowledge should be supplemented by awareness of important developments as they occur. As well, assessment of trends should be not only *historical* (to be aware of decisions that *have been* rendered by courts and administrative tribunals), but also *prospective* – organizations and individuals should have a sense of the likely direction of future trends. Among other things,

[1] Presentation to CACP "Operational Challenges in Managing Human Resources" Conference March 20-22, 2005—Vancouver, B.C.

[2] Of the Bars of British Columbia and Ontario. Parts of this paper have relied on a draft of an article coauthored by the writer to be submitted for publication. The writer may be contacted at pc@saltspring.com.

[3] Two examples of administrative tribunals that affect policing are police discipline tribunals and human rights tribunals.

complex litigation often takes many years to resolve, and a formal proceeding commenced today may be decided five or more years from now when the judiciary's approach to a particular issue may be different. The time to make an educated assessment as to where the courts will be in five years is before a decision is taken on a complex matter, or on a general policy direction. The following considerations, while not exhaustive, apply to trends in human rights issues that arise in the police workplace: (i) the past twenty years has seen a higher number of formal legal proceedings than has historically been the case; (ii) many of these proceedings are unprecedented ("cutting-edge" cases); (iii) judgment has been awarded against the police in various significant decisions; (iv) in some cases, the total of damage awards, legal fees and other costs is extremely large; (v) other cases follow on the heels of precedent-setting cases; (vi) various human rights cases have attracted considerable unfavourable publicity.

The second stage in the analysis involves assessing the extent to which these legal trends affect risk. In the case of human rights issues in the police workplace (and legal issues generally in the police workplace), it can safely be stated that risk has increased in the past fifteen years, such that organizations and individuals require an increased level of literacy in the area of risk management. Generally speaking, risk has increased measurably but not dramatically, although risk has increased considerably in respect of particular issues, some of which will be discussed below.

The third stage in the analysis involves assessing the response to the increased risk. Various strategies are available, and they will also be discussed below.

HOW SHOULD THE LEGAL RISK BE MANAGED GENERALLY?

One of the essential distinctions in the management of legal risk is between reactive and proactive. Many organizations react to issues, problems and crises as they arise without devoting much attention to the rewards that proactive, preventive strategies can generate.

The legal profession has seen considerable movement in recent years towards embracing preventive law. This trend is based on the common-sense observation that many problems can be foreseen before they occur, and strategies may be implemented to prevent the risk from materializing. Lawyers can bring enormous value to an organization by providing advice on prevention and avoidance, as distinct from the traditional model of seeking legal advice only when an adverse event has occurred.

Organizations on various sectors have also moved to embrace the concept of prevention. One excellent example in Canada appears in a report entitled *Building a Safer System: A National Integrated Strategy for Improving Patient Safety in Canadian Health Care*, authored by the National Steering Committee on Patient Safety (the "Committee")[4]. Although the report addresses risk management in the hospital sector, much of its analysis involves general principles that apply equally to the police workplace. The quality of this report is extremely impressive and it represents some of the most considered work undertaken in this regard in Canada.

The report emphasizes the value of undertaking an exercise that proactively assesses structure, processes and outcomes to avoid what the Committee refers to as "preventible adverse events". It borrows from successful risk-management efforts in the airline industry in the United States:

> Aviation is an excellent example in which a high-risk industry implemented co-ordinated and comprehensive strategies to reduce preventable accidents. Also, the study of

[4] See www.cpsi-icsp.ca for a PDF of the entire report, or call toll-free 1-866-421-6933 for a paper copy. Permission to reproduce this material is gratefully appreciated.

> human-factors engineering has led to an understanding that, although adverse events will occur in any human endeavor, they can be minimized through the design of equipment or tools, design of the tasks themselves, the environmental conditions of work, the training of staff, and the selection of workers. Airline regulators, plane manufacturers, and commercial airline carriers have combined human-factors engineering with the knowledge that failures in communication and co-ordination among team members have led to tragic aviation accidents. Their collaboration resulted in a wide variety of mandatory and voluntary processes that have dramatically improved passenger safety.[5]

This strategic approach applied to managing human resources in the police workplace would reduce risk quite considerably. Many "preventable adverse events" are easily predictable, and a comprehensive strategy applied proactively would reap measurable benefits.

A survey of recent significant decisions concerning human resources in the police workplace (decided by courts of law, human rights tribunals, police discipline tribunals and arbitrators) provide easy examples of the predictability of events that have a high likelihood of contention. As well, a survey of relevant decisions shows that some mistakes – even basic mistakes – are consistently repeated.

One area which has regularly produced litigation is the extent of an employer's obligation under human rights legislation to accommodate employees. In the police workplace, this issue ordinarily arises in the context of an employee who suffers from a disability, or a pregnant employee. One author offers a succinct definition of accommodation:

> ... the tailoring of a work rule, practice, condition or requirement to the specific needs of an individual or group. The need may be associated with their religion, gender, disability or other human attribute enumerated in human rights codes. An accommodation can include such steps as an exemption of the worker from an existing work requirement or condition applicable to others, the provision to the worker of a benefit not ordinarily or routinely provided to others, and the provision of some kind of job support or assistance ... The litmus test of the accommodation's necessity is whether such a measure is needed to ensure that the worker can fully and equally participate in the workplace.[6]

A person who believes that the employer has failed to provide accommodation may make an allegation of discrimination[7].

Complaints of pregnancy-related failure to accommodate arise regularly, despite two cases from the mid-1990s that exhaustively explored the extent of a police employer's obligations in this regard.[8] The result of the most recent reported case was likewise unfavourable to the employer.[9]

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[5] National Steering Committee on Patient Safety, *Building a Safer System: A National Integrated Strategy* for Improving Patient Safety in Canadian Health Care, p. 6.

[6] D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1992), 1 Can. Lab. L.J. 1 at 3. The leading case on the issue of the obligation to provide accommodation in the context of employment is *British Columbia Public Service Employee Relations Commission* v. *British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 (the "B.C. Firefighter's Case").

[7] The concept of discrimination has various complexities, but the basic principles are as follows: (1) Discrimination is initially made out when three requirements are established: (i)"*differential treatment*": the person alleging discrimination (the "complainant") has been subjected to "differential treatment", to his or her disadvantage; (ii) "*protected area of activity*": the subject matter falls within certain "areas" of activity set out in the *Human Rights Code*, such as employment, services or housing; and (ii) "*prohibited ground*": the basis for the differential treatment involved a "prohibited ground" of discrimination: age, sex, disability, family status, race, and various others, (2) Human rights legislation in all jurisdictions prohibit discrimination in employment on the basis of a prohibited ground. (3) A complainant who has established the three requirements – "*differential treatment*", "*protected ared*", "*prohibited ground*" – is said to have established a "*prima facie*" case. (4) Where a complainant has made out a *prima facie* case, the burden shifts to the party facing the allegation (the "respondent"), who has various options, one of which is to raise a defence or exemption. For example, an applicant for police employment who is unsuccessful because he suffers from serious hearing impairment can easily establish a *prima facie* case, but case law has established that a police employer can raise the defence that a certain level of hearing ability is a legitimate occupational requirement for the position of constable. On the other hand, if an unsuccessful applicant suffering from asthma established a *prima facie* case of discrimination, the employer may have a difficult time raising a defence, since police officers commonly function well, despite their asthma, (5) Allegations of discrimination are adjudicated against the background of a large body of jurisprudence confirming that human rights law is to be interpreted in a "fair, large and liberal" fashion.

[8] *Lord* v. *Haldimand-Norfolk Police Services Board* (1995), 23 C.H.R.R. D/500 (Ont. Bd. Inq.); *Orangeville* Police Association and Orangeville Police Services Board (1994), 40 L.A.C. (4th) 269 (Knopf).

[9] *Saunders* v. *Kentville (Town)*, N.S. Bd. Inq., 20 August 2004.

Complaints of disability-related failure to accommodate arise frequently, and involve a broad range of afflictions. Examples include multiple sclerosis[10], learning disabilities[11] and diabetes.[12] The cutting-edge issue in accommodation in the police workplace (and other workplaces) involves whether an employer owes an obligation to "cobble together" responsibilities from various positions in order to create a tailored position for a police officer suffering from disability. Such cases invariably involve issues of complexity and sensitivity, and several decisions unfavourable to the employer have been rendered so far.[13]

There is an abundant supply of decisions in human rights-related complaints – whether they are brought under human rights legislation, the *Police Act*, the *Charter* or the grievance arbitration process – based on discrimination outside of accommodation. Racially inappropriate or sexually inappropriate language[14] or treatment[15] is a common source of formal legal proceedings.

WHAT ARE THE MOST EFFECTIVE STRATEGIES?

As noted above, the third stage of the approach we recommend to manage legal risk involves assessing what preventive strategies are available to reduce risk.

The first important preventive strategy, and perhaps the most important, involves careful recruitment. Given the extent to which courts of law and other tribunals are now closely scrutinizing police conduct, police employers should obtain all possible relevant data that will allow an informed decision concerning the suitability of an applicant for employment. Particular emphasis should be paid to conducting both a thorough background investigation and administering psychological testing, including a clinical interview for all candidates. Our firm regularly sees lack of rigour in the recruitment process, including cases where police officers with notorious employment histories resign and promptly thereafter begin employment with another police force[16]. The issue of careful recruitment also arises post-appointment, when decisions are made concerning the selection of those in charge of human resources, professional standards and many other important positions within the organization.

The second important preventive strategy is legal training. Organizations and individuals need to know about developments as they occur, lest they adopt a course of action that a court of law or administrative tribunal has already examined and criticized. In some workplaces, even decisions of the Supreme Court of Canada take several years to implement[17], and such delay involves the unnecessary assumption of significant risk.

The third important preventive strategy is policy development and "standard setting". This means that appropriate policies are crafted, that they are updated as necessary and that employees receive training on the content of the policies. Lawyers who practice in this area of the law can readily identify workplaces in which employees are aware of the standards, and establishment and enforcement of such standards quickly repays an employer's investment.

The fourth important preventive strategy is competent supervision. Increased expectations

[10] *Krznaric* v. *Chevrette* (1997), 154 D.L.R. (4th) 527, 98 C.L.L.C. 230-004 (Ont. Gen. Div.).
[11] Justice Institute of British Columbia v. British Columbia (Attorney General) (1999), 17 Admin. L.R. (3d) 267, 99 C.L.L.C. 230-023 (B.C. S.C.).
[12] Barnard v. Fort Frances (Town) Board of Commissioners of Police (1987), 9 C.H.R.R. D/4845 (Ont. Bd. Inq.).
[13] *Essex Police Services Board and Essex Police Association (Horoky)*, 26 April 2002 (Goodfellow); *Halifax Regional Municipality and Municipal Association of Police Personnel (Smith)* (2002), 104 L.A.C. (4th) 232 (Outhouse); Akwesasne Police Association and the Mohawk Council of Akwesasne, 2002 (Chapman).
[14] Examples include *Monaghan and Toronto Police*, O.C.C.P.S., 1 May 2003; *Deviney and Toronto Police*, O.C.C.P.S., 10 February 1999; *Drennan and Hamilton-Wentworth Regional Police* (1996), 2 P.L.R. 444 (O.C.C.P.S.).
[15] Examples include *Clark* v. *Canada*, [1994] 3 F.C. 323; *Lewin and Toronto Police* (2001), 3 O.P.R. 1472 (O.C.C.P.S.).
[16] See J. Middleton-Hope, Gypsy Cops: An Analysis of the Level of Conduct of Previously Experienced Police Officers (Unpublished Master's Thesis, University of Calgary, 2002).
[17] See, for example, T. Tyler, "Cheating Lawyers Called Criminals" *Toronto Star* (on-line edition), 18 November 2002, quoting a senior prosecutor: "'Knowledge of the law has not filtered into the police community as it should have.' Sheriff said it usually 'takes about three years' for information about court decisions that have changed the law to be fully absorbed by the police".

on the part of courts of law and administrative tribunals requires that supervisors be carefully selected and properly trained. Even if promotional practices are sufficiently rigourous, risk will be unnecessarily increased where successful candidates do not receive supervisory training that will allow them to function in a fashion that will protect themselves personally, and their employers corporately. In the United States, there has been much emphasis in the development of early intervention systems as part of implementing effective supervision[18], and some police forces in this country are beginning to rely upon early intervention systems.

The fifth important preventive strategy is legal advice. Some police employers have established in-house legal counsel, while others use private sector counsel offering expertise in this area of the law. Ideally, lawyers will offer advice not only in response to matters that arise, but advice to reduce the likelihood of problems arising in the first place.

Even where it is not possible to prevent an adverse event—and even the most refined risk management strategy will not reduce risk to zero—risk can still be reduced by examining whether practices such as mediation or other informal resolution of complaints are appropriate to assist in resolving an issue.

Effective implementation of these strategies—and there are other effective proactive strategies—will serve to reduce risk at a time when courts of law and other bodies are examining the conduct of police as closely as they ever have.

Note-able Quote

We need to lead the people we have. Not the people we used to have. Not the people we wished we had. But the people we have—author unknown

[18] See, for example, S. Walker, *Early Intervention Systems for Law Enforcement Agancies: A Planning and Management Guide* (U.S. Dept. of Justice, 2003), available at www.cops.usdoj.gov.

COURTHOUSE SECURITY SEARCH REASONABLE

R. v. Campanella,
(2005) Docket:C39402 (OntCA)

The accused attempted to enter a courthouse to appear on a drug charge. Before passing through the metal detector at the entrance to the courthouse, she passed her purse over to a special constable who opened it and saw a baggie of marihuana. She was arrested and charged under the *Controlled Drugs and Substances Act* with possession.

At her trial in the Ontario Court of Justice, the accused argued she was subjected to an unreasonable search and seizure under s.8 of the *Charter* when her purse was inspected. Justice Cooper found the search reasonable and convicted the accused, which was affirmed on appeal by the Ontario Superior Court of Justice. The appeal judge found there had been no search since the security screening procedures did not infringe upon a reasonable expectation of privacy. Furthermore, even if there was a search, Justice Cavarzan concluded no warrant was required and the search was authorized by a reasonable law and was carried out in a reasonable manner. The accused, however, launched a further appeal to the Ontario Court of Appeal.

Assuming without deciding whether the accused had a reasonable expectation of privacy, Justice Rosenberg concluded on behalf of the unanimous Ontario Court of Appeal that the warrantless search of the purse did not violate s.8. First, he examined the security screening program at the courthouse and described the process as follows:

> Anyone without a security clearance must pass through metal detectors. The person seeking entrance is asked whether they have any metal in their pockets. Bags and purses that contain metal are searched manually. Police officers,

lawyers, court officials and court staff have security clearances. The purpose of the security check is to ensure that no one entering the courthouse has any offensive, restricted or prohibited weapon or anything that could be used as a weapon. A person in possession of an illegal weapon will be arrested. A person in possession of an object that could be used as a weapon, such as a pen knife, is given the option of leaving the building or surrendering the item for later destruction. If a person refuses to allow a search, he or she is asked to leave the building. A person in the security line can turn back at any time and return without items he or she does not wish to be examined. The person can even pause to transfer non-metallic objects from hand baggage to a pocket that will not be searched.

There are signs at all the public entrances to the courthouse that read as follows: NOTICE TO THE PUBLIC [.] ALL PERSONS WISHING TO ENTER THIS COURT FACILITY WILL BE SUBJECT TO A SECURITY SEARCH. NO PERSON IN POSSESSION OF A WEAPON OR AN ARTICLE THAT COULD BE DANGEROUS TO THE PUBLIC PEACE WILL BE ALLOWED ENTRY INTO THIS COURT FACILITY. PERSONS IN POSSESSION OF ILLEGAL ARTICLES WILL BE SUBJECT TO ARREST AND MAY BE CHARGED CRIMINALLY.

The security check has a number of "levels". First, all persons must pass through a metal detector. Prior to going through the metal detector, the person is instructed to empty his or her pockets of any metal objects and the contents are visually inspected. Second, all personal belongings that would set off the metal detector must be presented for manual inspection by special constables. If the person still sets off the metal detector, a hand scanner is used. A secondary search of the person can be done if the hand scanner is activated and there is a need to visually verify the cause of the activation. A person of the same gender will perform the search in private. At the time of the trial, no secondary search had been necessary. Any person can refuse to enter the metal detector, present their belongings for inspection or submit to a secondary search and leave the building. Any person may retain non-metal objects in their pockets, in which case they would not be subject to inspection. [paras. 3-5]

Second, the Ontario Court of Appeal considered the legislation involved. Under s.3(b) of Ontario's *Public Works Protection Act*, a guard or peace officer "may search, without warrant, any person entering or attempting to enter a public work," which includes "any provincial or municipal public building," such as a courthouse. Section 137 of Ontario's *Police Services Act* also provides that the police services board is responsible for courthouse security as well as ensuring the security of judges and persons participating in or attending court proceedings and persons in custody on or about the premises. This legislation was found to withstand constitutional muster. The law was designed to address a legitimate concern—the safety of all in the court complex. Justice Rosenberg noted:

> I start with the importance of the government objective. It is notorious that, unfortunately, there have been serious incidents of violence in the courthouses of this province by the use of weapons that have been brought into the courthouse. Court proceedings are emotionally intense. Family, criminal and civil and litigation involves matters of great consequence to the parties and those associated with them. The proceedings can provoke strong emotions. Everyone with business in the courthouse and ordinary members of the public have the right to expect that a courthouse will be a place of safety. The public generally expects the government to ensure the safety of people who are either required or wish to attend court. We pride ourselves on having an open and transparent justice system. A necessary incident of that system is that people who attend the courthouse to participate in or merely observe the proceedings will feel safe when they do so. Most members of the public would expect the government to take reasonable measures to ensure the safety of the courtroom environment. [para. 18]

Moreover, the law was neither vague nor over-reaching and the security procedures used were non-intrusive and bore no stigma. Nor would prior authorization based on reasonable grounds—usually a pre-condition for a valid search and seizure—be feasible. Justice Rosenberg stated:

> The purpose of courthouse searches is to protect members of the public including litigants, witnesses, counsel, court officials and judges. It is not reasonable to insist on prior judicial authorization to validate this governmental objective. Over 1,000 people enter the Hamilton courthouse every day. The security officials could not possibly obtain prior authorization from a judicial official to search even a small number of these people. In my view, given the importance of the government objective and the context in which these searches take place it is reasonable to authorize warrantless searches of those entering courthouse facilities. [para. 17]

And further:

> First, courthouse searches like the one carried out in this case are not conducted for the purpose of criminal investigation. The state and the individual are not antagonists in the same way that they are in a criminal investigation. The search is not conducted for the purpose of enforcing the criminal law or investigating a criminal offence.
>
> Second, even if the person has a reasonable expectation of privacy in their personal belongings when entering a courthouse, that expectation is considerably diminished. Prominent signs warn everyone that they will be subjected to a security search and that they are not permitted to bring weapons or dangerous items into the courthouse. Regrettably, in this day and age, people expect that they will be subject to some kind of security screening when entering prominent public buildings such as courthouses or the Legislature. These buildings, which are symbols of authority, are believed to be potential targets by some individuals and groups. People reasonably expect that everyone without prior clearance will be searched on a non-discriminatory basis in a reasonable manner to ensure the safety of all persons in attendance at the building.
>
> Third, as the Crown points out, the persons being searched are also the beneficiaries of the process. Like the security clearance at airports, the search provides reassurance to all members of the public that they will be safe from attack by persons with weapons within the confines of the courthouse despite the sometimes volatile nature of the proceedings. [paras. 22-24]

Finally, the legislation in this context only authorized a search of persons entering the courthouse. It was not conducted in an unreasonable manner and there was no evidence of an ulterior motive unrelated to courthouse security. The appeal was dismissed.

Complete case available at www.ontariociourts.on.ca

INVESTIGATIVE DETENTION OK TO PREVENT OFFENCE

R. v. Bilodeau,
(2004) 192 CCC (3d) 110 (QueCA)

At 3:55 am the police observed the accused driving a vehicle in a residential neighbourhood at a very slow speed with its brake lights flashing on and off. The passengers appeared to be looking for houses or an address. The vehicle pulled into a driveway and the engine was turned off and lights extinguished. The licence plate was checked on the computer and it was determined the owner of the vehicle did not live in the area. The officers were suspicious and had the impression the vehicle was driving slowly to check out the residential dwellings. About two minutes later the vehicle started up again, backed out of the driveway, drove down the roadway, and pulled into another driveway. The vehicle was then stopped because the officers believed they might be preventing the crime of theft and wanted to make enquiries. As a result of the stop the accused was charged with impaired driving

and over 80mg% after police obtained a breath reading of 340 mg%.

At his trial in the Court of Quebec, the accused unsuccessfully argued that his rights under ss.8, 9, and 10 of the *Charter* had been violated and that the evidence should be excluded. Although there was no doubt the police were not acting under the authority of Quebec's *Highway Safety Code* when they stopped the accused, the trial judge found the police were acting under their duty to prevent crime. The accused was convicted of over 80mg% while a stay of proceedings was entered on the impaired charge.

The accused, however, appealed to the Quebec Superior Court where his arguments were accepted and an acquittal was entered. Justice Grenier found the police decided to stop the accused prior to entering the second driveway and had no reasonable grounds to arrest him—nobody exited the vehicle, forced a door or window to a residence, or lit a flashlight in the direction of a vehicle or house. The computer check revealed the accused neither had a criminal record nor any outstanding charges nor was the vehicle stolen. Nor did the registered owner living out of the area provide a constellation of discernible facts allowing them to detain the accused.

The Crown then appealed to the Quebec Court of Appeal arguing the police officers believed they were in the presence of burglars and were exercising their powers under s.48 of Quebec's *Police Act*, which requires officers to "maintain peace, order and public security, to prevent and suppress crime and…offences under the law and municipal by-laws, and to apprehend offenders." The officers' belief, the Crown contended, was based on the following:

- the time (middle of night)
- the location (in the residential quarter of a small village)
- the unusual driving pattern (slow speed, constant braking)
- stopping at the first residence
- discovering the vehicle's owner resided out of the area
- the subsequent conduct of the occupants (including extinguishing the lights)
- departure from the first driveway and entering the second driveway.

The accused, on the other hand, countered that the officers' suspicion that he was going to commit an offence was based only on a hunch. In testimony, the officer used words like "impression", "suspicions", "questions", and "perhaps", which did not meet the articulable cause standard necessary for a legitimate detention submitted the accused. In his view, the detention was not properly founded on objective grounds and was therefore arbitrary and the evidence should have been excluded.

Justice Forget, writing the judgment for the Quebec Court of Appeal, concluded that the trial judge did not err and the police had "reasonable grounds to intervene in order to avoid an attempted breaking and entering in a residence during the course of the night." After reviewing the case law on investigative detention, Justice Forget outlined five guiding principles to be applied to investigative detention cases:

> First of all, the hunch of a police officer which proves to be founded thereafter does not retroactively prove that he had reasonable grounds prior to acting. On the other hand, the grounds of police officers do not cease to be reasonable purely because follow-up events do not confirm what they had initially suspected…
>
> Secondly, the Court has to determine whether grounds are reasonable by placing itself in the circumstances with respect to time, place and the urgency which the police officers were confronted with, and not by a sophisticated analysis which is assisted by hindsight.
>
> Thirdly, the reasonable grounds often arise out of the overall circumstances. One should be careful not to dissect and analyze each element of proof separately. It may be that

each element is consistent with innocent conduct, whereas the overall picture points in quite a different direction.

Fourthly, it is not always possible to determine with absolute precision at what time police officers believed they had reasonable grounds. With all due respect, it appears to me that the justice of the Superior Court -- by [a] posteriori analysis -- attached undue importance to the fact that the police officers decided to intervene prior to the vehicle entering the second driveway, when we know that all these events occurred within a very short period of time.

Fifthly, we should not forget that police officers have a duty of prevention. Counsel for the [accused] wrote in his factum that the occupants of the vehicle made no attempt to enter into the residence at 161, rue Bilodeau. The role of police officers is not limited to arresting persons who commit crimes or who are attempting to commit crimes. This is all the more evident if one examines the situation from the point of view of citizens who reside at 161, rue Bilodeau. How could police officers have justified their failure to intervene if an attempted breaking and entering in their residence occurred during the night? When residents notice the presence of an automobile or a pickup parked in their private driveway during the night with its lights out, can they not contact the police? Would they then be prevented from carrying out an investigation? [para. 55-59]

The Court of Appeal also noted that s.177 of the *Criminal Code* creates an offence for trespassing at night, which includes loitering or prowling on another's property near a dwelling from 9 pm to 6 am. In this case, the accused's vehicle was parked with its lights out in the middle of the night on the parking lot of a residential dwelling, in a district where the owner of the vehicle did not reside.

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

POLICE MAY DETAIN SHORT OF FORMAL ARREST

R. v. T.D., 2005 NSCA 30

A police officer responded to a complaint by two chaperones that the accused, a young offender, was selling drugs to students outside a high school dance. The accused, who was known to the officer, was located shortly afterwards walking with two other persons along a highway. The officer asked the accused to approach the police car to speak to him about the complaint. The accused falsely identified himself and said he did not want to speak to the officer. The officer told the accused that he was investigating the selling of drugs at the school, but the accused swore at the officer, refused to talk, and said he was leaving. The officer again asked the accused to come to the car to answer questions, but the accused refused. The officer took hold of the accused and led him to the police car. The accused resisted, head butted the officer, and began to flee. The officer grabbed the accused and arrested him for assaulting a police officer.

The accused was charged with, among other offences, assaulting a police officer in the lawful execution of his duty and assault cause bodily harm. At his trial the Youth Court Justice acquitted the accused of the assault charges because he was being unlawfully detained. Although the officer had reasonable grounds to arrest the accused he did not and, in the trial judge's view, the officer had no right to detain the accused without making an arrest.

The Crown appealed to the Nova Scotia Court of Appeal arguing the Youth Court Justice erred in concluding the detention was unlawful. Justice Fichaud, authoring the unanimous appeal court judgment, agreed. In *R. v. Mann*, 2004 SCC 52, the Supreme Court of Canada recognized that the police have the common law power to detain individuals for investigative purposes provided

there are reasonable grounds to suspect the individual is connected to a particular crime and that the detention is necessary. Even though the Youth Court recognized the officer had reasonable grounds to arrest—a higher standard that that required for investigative detention—she assumed the police could not detain short of a formal arrest, which was in error. The acquittals on the assault charges were set aside and a new trial was ordered.

Complete case available at www.canlii.org

BAIL BREACH SATISFIED WHEN CONDITION IGNORED

R. v. Custance, 2005 MBCA 23

The accused was released on a Thursday on a recognizance of bail with conditions that he reside with his alcoholics anonymous sponsor at a specific apartment unit, maintain a curfew, and present himself for curfew checks. His preliminary hearing was to begin on the Monday following his release. However, the accused knew he would be unable to take possession of the apartment that weekend because his sponsor had not yet obtained the keys to the apartment. So the accused decided to stay in the parking lot of the apartment building for three days until his preliminary hearing—rather than turn himself in to police or return to the remand centre. The police attended the address listed in the bail and found it was a storage room—not a suite—and that the caretaker told police the accused was not a resident of the building. The police then attended the accused's preliminary hearing date and arrested him at the courthouse for breaching his recognizance.

In Manitoba Provincial Court the accused was convicted of failing to reside at the address directed, failing to maintain his curfew, and failing to present himself for a curfew check. The trial judge found the accused intended to breach the recognizance by ignoring the court order during the days he stayed in the parking lot. The accused appealed to the Manitoba Court of Appeal arguing the trial judge rendered an unreasonable verdict. In his view, the Crown failed to prove the *mens rea* of the offence.

In order to secure a conviction for breaching a recognizance under s.145(3) of the *Criminal Code*, the Crown must prove the following:

- the accused was bound by a recognizance (*actus reus*);
- the accused committed an act prohibited by the recognizance or the accused failed to perform an act required to be performed by the recognizance (*actus reus*); and
- the accused knowingly and voluntarily performed or failed to perform the act or omission (*mens rea*).

In this case, Justice Steel of the Manitoba Court of Appeal found the Crown had proven both elements of the *actus reus*—that the accused was bound by the recognizance and failed to comply with the conditions. As for the *mens rea*, the court noted that the Crown does not have to prove that the accused intended to breach the recognizance but only that the accused intended to commit the *actus reus*. Recklessness (seeing the risk and taking the chance) meets the *mens rea* requirement under s.145(3), but carelessness or negligence will not.

In upholding the trial judge's ruling that the accused did not act with due diligence and did not have a lawful excuse for breaching the conditions of the recognizance, Justice Steel concluded:

> The answer is he should have surrendered himself to the authorities. This is not a situation of a wrong suite number in the apartment building. This is a situation of no residence at all. The accused knew full well he was in trouble. His attempt to comply by remaining in the parking lot arose out of an understandable desire to avoid returning to the Remand Centre. Although technically still a

> breach of recognizance, the trial judge acknowledged the unique factual circumstances by way of a sentence of time served. While this court also has some sympathy for the position the accused found himself on that weekend, the interests of the justice system are not best served by allowing individuals to decide for themselves the legal parameters of compliance with the conditions of a recognizance. [para. 31]

The appeal was dismissed.

Complete case available at www.canlii.org

BLOOD TAKEN FOR MEDICAL PURPOSE NOT CONSCRIPTIVE EVIDENCE

R. v. Stinn, 2005 BCCA 41

Following a motor vehicle accident the accused was transported by ambulance to hospital. A police officer informed the accused he was being investigated for impaired driving, but the accused did not want to speak with a lawyer. A blood demand was read but the accused refused to consent. A laboratory assistant at the hospital arrived to take blood samples from the accused for medical purposes. Later the investigator learned from another officer that an unidentified hospital staff member disclosed that the hospital sample had been tested for alcohol content and the reading was well in excess of the legal limit. The officer attended the hospital to obtain the vial number of the blood sample and a search warrant was obtained to seize the hospital sample and the records related to the tests performed on the blood. Although the sample had been destroyed when the warrant was served, the officer seized records related to the tests.

At trial the judge was very critical of the officer who learned of the hospital record reading and found the disclosure of the information about the blood alcohol reading to police by hospital staff was a serious s.8 *Charter* breach, but admitted the hospital records under s.24(2). In his view, the investigating officer would have obtained a warrant even without the tainted information provided by his colleague. An expert testified and, based on the hospital records, was able to provide an opinion that the accused's blood alcohol reading was between 180mg% and 200mg% at the time of the accident. The accused was convicted of impaired driving causing bodily harm and dangerous driving.

The accused appealed to the British Columbia Court of Appeal arguing the blood alcohol evidence derived from the hospital records should have been excluded because of the s.8 breach. In his view, his rights were also breached when the police obtained a vial number for the samples taken at the hospital to include in the search warrant application.

The accused's appeal was dismissed. Blood taken for <u>medical purposes</u> is not conscriptive evidence, unlike blood taken at the request of the police for <u>police purposes</u>, which would be conscriptive. The officer also took the proper steps in obtaining the hospital blood sample and records—a search warrant. The interaction between the police officer and the unidentified hospital staff was not crucial evidence in this case. Even without the communication from the hospital employee of the blood alcohol content, the officer would have applied for a search warrant anyways and the remaining information provided a sound basis for a search warrant. Justice Hall held:

> It is clear that the investigating officer…had, entirely aside from any information gleaned by [his colleague], decided to seek a search warrant so that he could obtain the [accused's] blood sample or the results of a test of the sample. His observations of the [accused] around the time of the accident afforded a proper basis to obtain such a warrant. It was on the basis of this warrant that the

> necessary evidence was obtained and expert testimony was tendered at trial based on this evidence. I do not see how it can be argued that this evidence was somehow "tainted" by what had occurred between [the investigator's colleague] and an unidentified employee of the hospital. The situation here is very different and distinguishable from what occurred in cases…where the evidence relied upon for conviction had been obtained as the result of a serious *Charter* breach. [para. 40]

Obtaining the vial number for the samples was not a s.8 breach. It was not personal information about the accused and it disclosed no information about him or his condition. It was obtained to precisely delineate what material the police were seeking to obtain under the search warrant.

The trial judge did not err in admitting the evidence. Admitting it would not adversely affect the repute of the administration of justice. The appeal was dismissed and the convictions were upheld.

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

VEHICLE STOP TO SERVE PROHIBITION NOT ARBITRARY

R. v. Sironen, 2005 BCSC 158

A police officer stopped a vehicle after querying its licence plate. During the rolling computer check it was learned that the registered owner should be served with a notice of driving prohibition from the Superintendent of Motor Vehicles. The sole purpose of the stop was to determine whether the driver was the person who should be served the prohibition. The accused, who was the owner, met the officer outside his vehicle and was confrontational. The officer told him he would be served with a four month driving prohibition. While the officer wrote up the prohibition the accused entered his vehicle. The accused was asked to exit his vehicle for service of the prohibition, but refused. After being told he was prohibited, the accused said he was not and stated he was going to move his vehicle.

The officer told the accused he would be arrested if he moved the vehicle. The accused then locked his door. After further unsuccessful requests to exit the vehicle and threat of arrest for obstruction, the officer smashed the vehicle window, unlocked the door, and arrested the accused for obstruction. The accused was transported to the police station and a prohibition notice was served. The following day the accused was stopped driving by another police officer and charged with driving while prohibited. In British Columbia Provincial Court he was convicted of driving while prohibited, but appealed to the Supreme Court of British Columbia arguing, in part, that his s.9 *Charter* right protecting him against arbitrary detention was violated.

Justice Slade disagreed. Even though s.73 of British Columbia's *Motor Vehicle Act* allows a peace officer to randomly stop a motorist—such stop being arbitrary under s.9 of the *Charter* but demonstrably justified under s.1—in this case the stop was not random. Justice Slade stated:

> The [accused] was not, in the present case, stopped at random. The vehicle was stopped as the license number search revealed it to be owned by a person who the Superintendent of Motor Vehicles, acting under the authority of s. 93 of the *Motor Vehicle Act*, had decided to prohibit from driving a motor vehicle. The police officer stopped the vehicle to determine whether the driver was the registered owner. If he was, the officer intended to serve a notice of driving prohibition. [para. 14]

And further:

> The police stop of the [accused's] vehicle for the purpose of determining his identity, and effecting service of a notice of driving prohibition was not an arbitrary detention for the purposes of s. 9 of the *Charter*. [para. 39]

Furthermore, service of a driving prohibition is within a peace officer's duties and responsibilities. As Justice Slade noted, "Although s.96 [of the Motor Vehicle Act] does not expressly confer on peace officers the authority to serve notice of prohibition, it clearly contemplates the existence of such authority." As well, the continued detention while the officer prepared the notice—lasting only a few minutes—was also within the scope of the officer's duties.

The arrest was also lawful. Justice Slade held:

> The officer believed, and had reasonable grounds to believe, that the [accused] would, in the immediate future, commit the offence of driving while prohibited.
>
> .....
>
> The police officer acted within his authority in demanding that the [accused] get out of his vehicle. The [accused] refused to do so.
>
> It is an offence under s. 129 of the *Criminal Code* to resist or wilfully obstruct a peace officer in the execution of his duty. It is plain that [the officer] had the authority, and in the circumstances the duty, to effect an arrest. The [accused] resisted arrest, and was detained and taken into custody for obstruction. There was no breach of the [accused's] s. 9 *Charter* rights. [para. 43-46]

The accused's appeal was dismissed.

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

SHOWING BAC DIFFERENT NOT ENOUGH TO REBUT PRESUMPTION

R. v. Cook,
(2005) Docket:C40362 (OntCA)

The accused was charged with impaired driving and over 80mg% after he failed a roadside screening test and provided breathalyzer tests of 229mg% and 235mg%. At his trial in the Ontario Court of Justice, the accused testified he had consumed a 26 oz. bottle of rum the day before his arrest and filed a toxicologist report, using elimination rates, suggesting his blood alcohol concentration would have been between 0 and 95mg% at the time of driving.

The trial judge rejected the accused's "evidence to the contrary" and convicted the accused of over 80mg%. The charge of impaired driving was dismissed. The accused then appealed to the Ontario Superior Court of Justice arguing, in part, that the trial judge erred in failing to consider his evidence to the contrary, but the appeal was dismissed.

The accused then appealed to the Ontario Court of Appeal. Section 258(1)(d.1) of the *Criminal Code* creates a presumption that breathalyser results taken within two hours of driving were the same readings at the time of driving. In other words, the level of blood alcohol content at the time of driving and the time of tests are identical. This presumption is known as the presumption of identity and is rebuttable if there is evidence tending to show the blood alcohol level did not exceed 80mg%.

In rebutting s.258(1)(d.1) it is not sufficient to lead evidence that the blood alcohol level at the time of the test was different than the time of driving. Rather, the accused must lead evidence tending to show that the concentration at the time of the offence did not exceed 80mg%. So, as in this case, leading evidence that the accused blood alcohol level straddled both sides of 80mg% was not enough. The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

Let us not become weary in doing good—Galations 6:9

REASONABLE GROUNDS MUST BE SUPPORTED OBJECTIVELY

R. v. Perello, 2005 SKCA 8

The accused was given a warning ticket after he was stopped driving his camper van on the Trans Canada Highway because he was traveling 107 km/h in a 100 km/h zone. The accused consented to a search of his van following a discussion about contraband. The officer did a thorough search, opening cupboards and drawers. A second officer arrived to join in the search and found money wrapped in bundles in a duffle bag. The accused told police the bag contained $55,000.

The accused was arrested for a proceeds of crime investigation and the money and van were seized and taken to the detachment. The van was more thoroughly searched and it was discovered that the sewage tank had been modified, there was an odour of marihuana detected coming from the shower drain, and small quantity of psilocybin was identified. The accused was charged with possessing the psilocybin and released.

After further investigation a search warrant was obtained for the accused's British Columbia residence where a tiny amount of marihuana was found. The accused was charged with possession of proceeds of crime ($55,000) and possession of money with intent to conceal or convert.

At trial the accused submitted that all the evidence was inadmissible. The trial judge, however, disagreed and convicted the accused of all charges. In her view, the amount of cash found, its manner of transportation and packaging, and the accused's physical reaction to its discovery provided sufficient grounds to make an arrest for possession of proceeds of crime. The accused then appealed to the Saskatchewan Court of Appeal arguing, in part, that he was arbitrarily detained contrary to s.9 and that the seizure of the money was unreasonable under s.8 of the *Charter*.

A lawful arrest requires reasonable grounds. Reasonable grounds must be both subjectively held by the officer and objectively justified. In this case, the police had the following circumstances:

- the accused was travelling in a van bearing Ontario plates west on the TransCanada Highway in Saskatchewan;
- he consented to a search of his van;
- the officer was aware the accused did not have a criminal record;
- the accused was cooperative and helped police in their search, but became extremely upset when the money was found; and
- only $55,000 had been found prior to the arrest.

Justice Sherstobitoff, writing the unanimous Saskatchewan Court of Appeal judgment, found "the discovery of $55,000.00 cash in a vehicle registered in another province and being driven on the TransCanada highway," with nothing more, insufficient to meet the objective component of reasonable grounds. At the time of arrest there was no direct evidence that the money was proceeds of any crime; therefore there were no reasonable grounds to believe an offence occurred that would justify an arrest. The arresting officer did not tell the accused he had committed an offence, but rather said he was "under arrest for proceeds of crime investigation." Justice Sherstobitoff wrote:

> In this case, there was no evidence, at the time of arrest, that the [accused] had committed any crime of which the funds were the proceeds or that he knew that the funds were the proceeds of a crime, nor any evidence from which it could reasonably be so inferred. That being so, objectively, there were no reasonable and probable grounds to support the arrest. The arrest was not lawful.
>
> .....
>
> In this case, we have found that there were no reasonable and probable grounds to believe that the offence of possession of the proceeds of crime had occurred so as allow arrest without a warrant. Furthermore, the

> evidence indicates that at least some of the police involved in the arrest were, at the very least, doubtful that reasonable and probable grounds to believe that the offence had occurred. They nevertheless arrested the [accused]. The arrest was arbitrary within the meaning of s. 9. [paras. 39-41]

Since there were no reasonable grounds to justify the arrest, similarly there were no reasonable grounds to justify the seizure of the money. The appeal court held:

> It logically follows that, notwithstanding the consent to the search, if the arrest was unlawful, the seizure of the $55,000.00 was unlawful and in violation of the [accused's] right granted by s. 8 of the Charter of Rights and Freedoms to be secure against unreasonable seizure. We have determined that the police did not have reasonable and probable grounds to believe that the [accused] had committed the offence of possession of the proceeds of crime. The same reasoning establishes that there were no reasonable and probable grounds to believe that the monies were the proceeds of crime. The police cannot rely on an unlawful arrest, whether arbitrary or not, to gain the requisite grounds to seize the money. The situation here is…that…the police had no reasonable or probable grounds to believe at the time of seizure of the money that it was the proceeds of crime. [para. 42]

The evidence was excluded under s.24(2) and the convictions were quashed and acquittals entered.

Complete case available at www.lawsociety.sk.ca

ARREST LAWFUL DESPITE OFFICER USING THE WORD 'DETAIN'

R. v. Dickinson, 2005 BCPC 41

A police officer received information from a reliable informant that the accused, who was an active dealer and always had drugs on him, was trafficking in methamphetamine in $40 to $80 amounts. The officer was also given the accused's cell phone number. A couple of days later the officer called the cell phone number and asked to purchase an eighty of methamphetamine. The accused, who the officer knew and voice he recognized, told the officer he did not have any, but to call him later to make a meet. The officer also talked to members of the drug task force and was told the accused was a target of theirs and was involved in trafficking drugs.

The officer subsequently stopped the accused after he was seen skateboarding and talking on his cell phone. The accused was told he was under detention and would have to return to the detachment to be searched. He was handcuffed and his backpack was taken from him. A search of his backpack netted three baggies of methamphetamine, a scale, and other items. The accused was charged with possession of methamphetamine for the purpose of trafficking.

During a *voir dire* in British Columbia Provincial Court, Justice Sinclair was tasked with determining whether the accused had been lawfully arrested and whether the search of his backpack that followed was also lawful. In holding the arrest proper, Justice Sinclair stated:

> Firstly, I conclude briefly that there is no doubt in my mind that the accused was placed under arrest on the street notwithstanding the word used. He was under arrest and I attach little or no significance to the word used. I conclude that it was clear to both the constable and to him that he was under arrest; he was handcuffed, he was placed in the police car, not given any choice whether he was going to accompany the officer.
>
> Reasonable and probable grounds to make an arrest of a subject must be justifiable both on a subjective and an objective basis. Certainly I am satisfied that the police officer had subjective grounds to arrest the accused. I am also satisfied, given the information known to

> him, that the arrest passes the objective standard; that is, briefly, a reasonable man in the position of the police officer and, knowing what he knew, would believe that the accused was probably guilty of the offence charged. [paras. 7-8]

Since there were reasonable grounds to justify the arrest, the resultant search was lawful as an incident to arrest.

Furthermore, even if the search breached s.8 of the *Charter*, the evidence should not be excluded under s.24(2). It was non-conscriptive, its admission would not render the trial unfair, and the breach was not serious. The evidence was admissible.

Complete case available at www.provincialcourt.bc.ca

WHAT DOES 'MORE THAN ONE MURDER COMMITTED AT DIFFERENT TIMES' MEAN?

R. v. Samra & Maljkovich,
(2005) Docket: C40709/C40710 (OntCA)

The accused Samra was convicted of two counts of first degree murder and one count of attempted murder for a shooting incident in court where a lawyer and a lawyer's associate were killed. Samra had pulled a gun and started shooting after the presiding judge read out an unfavourable decision.

The accused Maljkovich was convicted of two counts of second degree murder and one count of attempted murder after he killed his wife, left the room, locked the door, and killed his daughter in the hallway. The accused then tried to kill his daughter's boyfriend after the boyfriend tried to aid.

On an *ex parte* application by Crown, Justice Marshall of the Ontario Court of Justice granted an application that DNA substances be taken under s.487.055 of the *Criminal Code* for the DNA databank since both men had been "convicted of more than one murder committed at different times."

LEGAL LINGO
Ex parte—an application made by one party to a proceeding in the absence of the other party.

The accused applied for *certiorari* and Justice McCombs of the Ontario Superior Court of Justice quashed the authorizations and ordered the DNA profiles be removed from the DNA databank and destroyed. In his view, the legislation did not extend to multiple murders committed as part of the same transaction. If it were otherwise, Justice McCombs reasoned, parliament would not have used the phrase "committed at different times." The Crown appealed the order of Justice McCombs to the Ontario Court of Appeal arguing he incorrectly interpreted the meaning of the phrase "more than one murder committed at different times."

LEGAL LINGO
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 Ontario Court of Appeal rejected Justice McCombs transaction theory, but affirmed his order in any event. In interpreting the phrase "more than one murder committed at different times," a court must read the words in their entire context, in their grammatical and ordinary sense with the scheme of the Act, the object of the Act, and the intention of Parliament. In doing so, Justice Weiler, authoring the unanimous appeal judgment, dismissed both of Crown's appeals, stating:

> The phrase "more than one murder committed at different times" has a twofold meaning. First, time is divisible by time periods such as days, weeks, months, years. Second, time is also divisible by events that differ in nature or quality. An example of the first meaning occurs when a contract killer agrees to kill two people and kills one person in January and the other in February. This meaning is not in issue. An example of the second occurs when two persons are taken hostage by a terrorist in an office in downtown Toronto. One person attempts to escape and is shot dead by the

terrorist. Ten minutes later the police rush the office and, as they do so, the second hostage tries to overpower the terrorist and is shot dead by him. The murders are committed at different times because they are distinguishable in nature or quality and did not occur simultaneously.

I must now apply this definition to the cases before us. The murders committed by Samra were not committed at "different times" because they were committed immediately after the court's decision was read out in court and are not distinguishable in nature or quality. I would therefore dismiss the Crown's appeal in relation to Samra.

Given the proximity in time of Maljkovich's two murders, he may also not have committed more than one murder at different times. Because Maljkovich exited the bedroom and closed and locked the door to it, arguably, however, the murders were committed at different points. I will therefore examine the nature and quality of those murders. In the transcript of the guilty plea and sentencing proceedings, [Justice Then] commented on defence counsel's submissions that Maljkovich saw his marriage deteriorating and had to face the fact that he was going to lose much of what he had worked to achieve. He also lost his ability to work for himself. He could no longer provide for his family and was losing his place within the family structure. His children were becoming increasingly independent. He was losing his marriage, his wife, his children, and his financial security. [Justice Then] found that the evidence suggested Maljkovich became alienated from his family. He further found Maljkovich suffered from various unresolved mental health problems. As [Justice Then] stated, "The reason for this tragedy will also, no doubt, lie somewhere in the darkness of the depression and personality difficulties which the accused has experienced and will continue to experience into the future". On this record, the murders of Maljkovich's wife and daughter are not distinguishable in nature or quality. Accordingly, I would also dismiss the Crown's appeal in relation to Maljkovich. [paras. 22-24]

Complete case available at www.ontariocourts.on.ca

'SHARING' MARIHUANA AMOUNTS TO TRAFFICKING

R. v. Smith, 2005 BCPC 27

Acting on a complaint from a university's security services that there was open marihuana use and possible trafficking near a fountain on campus, plain clothed police officers surveilled the accused. He was neither a student nor employee of the university, but rather the president of Hempology 101. He drove to the campus and set up a signboard, literature, and a sound system. At 4:20 pm the accused yelled, "It's 4:20 everybody," and a group of 30 to 50 people began to congregate. He then addressed the crowd about the laws regarding marihuana and its medical benefits. The accused then removed about five cigarettes and passed them around. When the cigarette reached the undercover officer it was pocketed. After the meeting disbanded, he was arrested. His briefcase and a green bag he possessed were searched and police found a total of 7.8 grams of marihuana. He was charged with trafficking in marihuana and possession for the purpose of trafficking.

At his trial in British Columbia Provincial Court, the accused argued several of his rights under the *Charter* were violated including s.9 (freedom from arbitrary detention or imprisonment). In his view, he was singled out by the police and targeted. Justice Kay, however, disagreed. She stated:

> An arbitrary detention occurs when there in an entire absence of reasonable and probable grounds for arrest. That is not the case here. The officers were at the gathering to investigate a complaint, they smelled the marihuana, saw hand rolled cigarettes in a box in [the accused's] briefcase, and were present when these cigarettes were lit and passed around. I find that these observations in conjunction with the other information they had been given, gave them reasonable grounds,

> both objective and subjective, to believe that a law was being broken. Upon arrest, further marihuana was found in [the accused's] possession. Therefore, I find that this was not a "capricious, despotic, or unjustifiable" arrest which would violate Charter rights and I find that [the accused's] s. 9 rights were not violated. [para. 33]

The accused also argued that his rights under s.2 of the *Charter*, guaranteeing him the freedoms of peaceful assembly and association were breached because he was released on an undertaking by police after his arrest that prohibited him from going to the university campus. It was his submission that this condition was an unreasonable restriction. This argument was rejected:

> The Criminal Code of Canada sets out the procedure for both the police and for the courts to follow after an individual has been arrested. An accused may be released from custody by either a peace officer or the court pursuant to several sections including ss. 503 and 515 of the Code. These sections clearly authorize either a police officer or the court to attach conditions to an accused's release.
>
> There are also sections of the Code which allow an accused to apply to the court to vary the terms of an undertaking on which he has been released. There is no evidence that [the accused] has ever applied to vary the condition that he not go to the University of Victoria. As a result, I find that [the accused's] ss. 2 (c) and (d) have not been violated. [paras. 24-25]

In convicting the accused of trafficking in marihuana, Justice Kay held:

> [The accused] has been charged with trafficking marihuana. Trafficking is defined in s. 2 of the *Controlled Drugs and Substances Act* as "to sell, administer, give, transfer, transport, send or deliver the substance. Within the plain meaning of the word, I find that [the accused] was giving or transferring the substance to others in the gathering. [The accused] would have the court characterize his activities as "sharing a joint" with others, and submits that the laying of a charge of trafficking for this activity is disproportionate to the behaviour and conviction in the circumstances of this case would bring the administration of justice into disrepute. [The accused] equates his behaviour with that of two persons sitting in a car or on a bench quietly "sharing" a joint. There is compelling evidence that such an analogy is not accurate. [The accused] was "sharing" marihuana in a very public way, routinely, with a large gathering. He was very publicly flouting the law, and while one can only speculate about the reasons for this, I find that his behaviour was intended to provoke a reaction from the authorities. [para 42]

The charge of possession of marihuana for the purpose of trafficking was stayed because of the Kienapple principle.

LEGAL LINGO
Kienapple principle— where there is both a legal and factual nexus between two or more offences as charged, a conviction on only one offence is possible.

Complete case available at www.provincialcourt.bc.ca

WAITING A SECOND OR TWO BEFORE ENTRY INSUFFICIENT

R. v. Mai & Tang, 2005 BCSC 29

After investigating a marihuana grow operation at a residence in an officer's neighbourhood, the police attended the premise with a search warrant. They knocked on the door, shouted "Police. Open the door," and "Search warrant. Open up." After waiting only a second or two, they breached the door with a battering ram. Both accused—husband and wife—were found inside the house along with a marihuana grow operation located in the basement. They were arrested and subsequently charged with unlawful production of marihuana, possession of marihuana for the purpose of trafficking, and theft of electricity.

At their trial in the Supreme Court of British Columbia the accused argued, in part, that their rights under s.8 of the *Charter* had been violated because the search had been carried

out in an unreasonable manner. In their view the police failed to comply with the knock, and announce rule.

Justice Joyce agreed. Although the police did knock and announce their presence, they did not give the occupants a reasonable opportunity to respond before they rammed the door. He stated:

> The knock and announce rule may be required in order to give the occupants a reasonable time to respond to the demand for entry pursuant to the warrant… It may be only to permit the occupants to prepare to be safely detained or arrested and to put down toy guns, channel changers or other objects that have the potential to mistakenly life-threatening danger to the entering police officers. What is a reasonable delay between the announcement and the breach may be different depending on which of these purposes is to be met.
>
> It is not necessary for me to determine, in this case, which of those purposes govern. In either case, a second or two is an insufficient time. A second or two is insufficient warning for an occupant to realize what is happening and to understand and appreciate the police are at the door and intending to enter. It gives insufficient time to prepare oneself and certainly insufficient time to comply with the demand to open up. I am satisfied that unnecessary and unreasonable force was used by the police in entering the premises in breach of the accused's right to be free from unreasonable search. [paras. 55-56, references omitted]

In finding the entry into the residence a s.8 *Charter* breach, the evidence was excluded under s.24(2). Justice Joyce held:

> In this case, [the officer in control] knew he should wait a reasonable time to permit the occupants to respond. He did not do so. There was no change of circumstance that heightened any risk upon which an assertion of good faith can be founded. It is clear that [the officer] had a personal interest in this matter in the sense that he was understandably concerned about a possible marihuana grow operation in his own backyard, so to speak. In my view, he let his zeal and his desire to do something about the situation overcome what he knew was his duty. While I do not conclude he acted with the expressed intention of violating the accused's rights, I do not think it can be said that he acted in the belief that he was observing it. In my view, the reputation of the administration of justice would suffer if this evidence were admitted. The evidence is excluded. [para. 61]

The accused were acquitted of all charges.

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

INVALID ARREST RESULTS IN UNREASONABLE SEARCH

R. v. Luc, 2004 SKCA 117[19]

Police in Saskatchewan stopped a British Columbia plated rental vehicle for speeding on the TransCanada Highway. The driver produced a photo driver's licence while the accused passenger produced a photo Canada Immigration identification card. After querying the occupants' names on CPIC, an officer received information that the driver was wanted on an outstanding Canada immigration warrant. After returning to the vehicle and asking for more identification, the driver looked down at the floor. He was asked to come back to the police car and was arrested on the outstanding warrant.

Police searched the vehicle incidental to the driver's arrest for more identification. They searched the glove box, console, and front seat area. On the front seat police found a wallet with identification, but no photos. The police then immediately went to the rear hatch area of the vehicle—skipping the back seat—and found marihuana in a Rubbermaid container. The driver and the accused passenger—who was the renter of the vehicle—were then arrested for

[19] Leave to appeal to the Supreme Court of Canada was dismissed without reasons April 14, 2005.

possession of marihuana for the purpose of trafficking. The car was then towed to the detachment and searched further. In the container police found seven one pound packages of marihuana. Twenty four more pounds of marihuana was found in two cardboard boxes and a suitcase.

The next day the driver was fingerprinted to confirm he was the one wanted by Immigration, but the officer realized the driver was not the person wanted in the warrant. The driver's name was "Huang, Shi Lin" while the person wanted on the warrant was "Lin, Huo Shil". They had different dates of birth but both were born in the same year.

At trial, the judge found the arresting officer had reasonable grounds to arrest the driver on the outstanding warrant under s.495(1)(c) of the *Criminal Code* and the honest mistake made did not detract from those grounds. He then concluded the search was incidental to the arrest and the marihuana was admissible. Moreover, even if he had found a *Charter* violation, the trial judge would have admitted the evidence under s.24(2) in any event. The accused appealed to the Saskatchewan Court of Appeal arguing, in part, that the trial judge erred in finding the accused's s.8 and s.9 *Charter* rights had not been violated.

Chief Justice Bayda, for the unanimous court, ruled the accused, as a passenger, did not have his s.9 right violated when the police initially stopped the car. He stated:

> Section 40(8) of The Highway Traffic Act…coupled with the decision of the Supreme Court of Canada in R. v. Ladouceur…and this Court's decision in R. v. Tremblay… authorized the two police officers to stop the Toyota and detain the occupants (including the passenger) for the time necessary to carry out the officers' responsibilities under The Highway Traffic Act. Excessive behaviour aside, where officers are so authorized, the stop and the concomitant exercise by them of those responsibilities do not constitute a violation of the s. 9 Charter rights of the vehicle's occupants.
>
> The [accused's] counsel made submissions to us to the effect that in light of the failure by the officers to use the radar device or a "clock" procedure to establish the true speed, it is reasonable to infer the supposed speeding infraction was the ostensible reason for the stop. The real reason was to check the vehicle for possible contraband. This sort of ulterior motive is difficult to prove at the best of times and it was not established in this case. As [Supreme Court of Canada Justice Sopinka] in his concurring judgment in R. v. Belnavis…pointed out: "an automobile... pursuant to decisions of this Court, can be lawfully stopped by police officers virtually at random." [paras. 22-23]

However, a search incidental to arrest will be valid only if the arrest is lawful, the search is conducted as an incident to the arrest, and the search is carried out in a reasonable manner. In this case, the trial judge found the arrest lawful under s.495(1)(c) of the *Criminal Code*, which permits a police officer to arrest without warrant if they have reasonable grounds to believe that a warrant of arrest or committal in any form set out in Part XXVIII is in force. Here, the warrant was issued under s.103(1) of the *Immigration Act*, which did not fall within "any form set out in Part XXVIII" of the *Criminal Code*. The arrest was therefore unlawful and any power to search incidental to that arrest was invalid.

Furthermore, the search failed to meet the second condition of a valid search incident to arrest—for safety reasons or to find evidence. Although the officer testified he wanted to find further evidence to support the identity of the driver, there were serious doubts that this was the real reason for his search of the Rubbermaid container. Chief Justice Bayda stated:

> In the circumstances of the present case once the police ensured their own safety - and no question was raised about their safety - what

could properly justify the search of the Rubbermaid tub in the back of the vehicle? [The officer] stated his purpose was to find "further evidence to support the identity of the driver." Does this purpose meet the requisite reasonable subjective and objective criteria? In assessing reasonableness, these questions come to mind: Was there a need to secure further evidence of identity? What evidence of identity did the searcher already have? Was there a more effective way of establishing identity than the kind of search that was undertaken?

Before he commenced the search, [the officer] had already concluded that the names Huo Shil Lin appearing on the warrant and Huang, Shi Lin appearing on the driver's licence were essentially the same and that they referred to the same person. He concluded that the driver was that person. If that were not the case, then there was no justification for the arrest. The driver was not arrested for having committed an offence so there was no question of securing evidence of any offence.

Before he searched the Rubbermaid tub, [the officer] had five items of identification in his hand…identifying the driver as Huang, Shi Lin, the same person as he earlier concluded Huo Shil Lin to be. How could his purpose have been advanced with a sixth piece of identification in the name of Huang, Shi Lin? Why did his search take him from the front seat of the vehicle where he found the additional four items of identification directly to the back of the vehicle (skipping the back seat) and, what is equally puzzling, not to the suitcase, not to the clothing where he was more likely to find some item of identification, but to the Rubbermaid tub, the last place where one would expect to find an item of identification? Why did he abandon the sole purpose of his search, namely a search for further evidence of identity, the moment he discovered some marihuana?

There was a suggestion by [the officer] that the driver was using an alias. As noted, he testified "I believed the driver of the vehicle was not exactly who he said he was." Did he mean by this that "Huang, Shi Lin" was an alias? Did he mean that "Huo Shil Lin" was an alias, as well? (After all, he concluded they were essentially the same name.) And, that the arrest warrant was issued not in the immigrant driver's true name, but an alias? Or did he mean that "Huang, Shi Lin" was the alias, but "Huo Shil Lin" was the true name? Or did he mean that the two names could possibly be referring to two different persons? Why would someone travelling, using an alias, carry in his belongings some document that established his true identity?

All of those unanswered questions leave one with a feeling of unease. They cast a serious doubt on the purpose of the search asserted by [the officer]- in other words, a doubt on the reasonableness of the subjective element of the test.

If identity were truly an issue, a reasonable person looking at the matter objectively would have asked: What is the most effective way to match up the driver's identity with that of the person named in the warrant? The answer would have been precisely the answer that [the officer] came to the following day: match the fingerprints. No search of the Rubbermaid tub was required or reasonable in light of that answer. As a 13-year veteran of the R.C.M.P., [the officer] was likely aware of that answer before he undertook the search of the Rubbermaid tub. [paras. 45-50]

However, despite the *Charter* violations in this case, the evidence was admitted because to exclude it would bring greater disrepute for the administration of justice. The accused's appeal was dismissed.

Complete case available at www.lawsociety.sk.ca

Note-able Quote

on Media Influence— *We're careful to teach our kids not to talk to strangers or wander the streets by themselves. Most of us make sure we know where are children are physically and with whom. And yet, day after day, year after year, we let them wander alone, virtually unsupervised, through this other universe—almost completely oblivious to what they're seeing, hearing, playing with, and learning*—James P. Steyer

RECORDED STATEMENT NOT PRESUMPTIVELY NECESSARY FOR VOLUNTARINESS

R. v. Swanek,
(2005) Docket:C39541 (OntCA)

After arresting the accused who was already in custody at a jail facility, two officers questioned him regarding two robberies. At trial the officers testified the accused admitted his involvement in the robberies, but declined to sign the officers' notebooks where the questions and answers had been recorded or to sign photographs of his accomplices he identified. As well, the officers said they offered the accused an opportunity to put his statement on audiotape but he declined. The accused, on the other hand, testified he did not make the inculpatory statements when asked about the robberies and was not asked to sign the photographs. Despite these contradictions the accused was convicted in the Ontario Superior Court of Justice.

The accused unsuccessfully appealed to the Ontario Court of Appeal arguing, in part, that his convictions based on the non-recorded statements were presumptively unreasonable. Although courts have emphasized the importance of an appropriate recording by police and the failure to properly record a statement will weigh heavily against the Crown when the voluntariness of a statement is at issue, there is no such per se rule. Rather, "the extent to which the failure to create an independent record of a statement undermines the credibility of the police version as it relates to voluntariness or the content of the statement will depend on the circumstances of the case." As Justice Doherty stated:

> It cannot be gainsaid that a proper recording of a statement is most beneficial in assessing both its voluntariness and the content of the statement. It is, however, a long step from that observation to the conclusion that any statement that is not properly recorded should be excluded if it is the only evidence relied on by the Crown. [para. 10]

Complete case available at www.ontariocourts.on.ca

POLICY BASED STOP ARBITRARY

R. v. Schaeffer, 2005 SKCA 33

A police officer stopped the accused driving in a regional park just before midnight. The only reason he was stopped was because the police had a policy to stop all vehicle and pedestrian traffic in the park after 11 pm. The police had been requested by the Regional Park Association to check vehicles because of previous thefts and parties involving young persons. As well, park passes were required for persons in the park after 11 pm. The accused was flushed, had watery eyes, and smelled of liquor. He failed a roadside screening device and subsequently provided breath samples over 80 mg% and was charged accordingly.

At his trial in Saskatchewan Provincial Court the judge concluded the accused had been arbitrarily detained under s.9 of the *Charter*. Although s.40(8) of Saskatchewan's *Highway Traffic Act* allows police to stop motorists for purposes related to highway or vehicle safety, that was not why the police stopped the accused in this case. Rather, the accused was stopped for the purposes of enforcing a policy to discourage would-be partiers, vandals, thieves, and to check park permits. This was a random stop not related to violations under the *Highway Traffic Act*. The breathalyzer tests were excluded under s.24(2) and the accused was acquitted. The Crown's appeal to the Saskatchewan Court of Queen's Bench was dismissed.

The Crown further appealed to the Saskatchewan Court of Appeal arguing that the accused was not arbitrarily detained because the police had an articulable cause to stop him. In

rendering a decision, Justice Richards, authoring the unanimous judgment, first noted that the legality of a stop and the arbitrariness of a stop are conceptually distinct. For example, an illegal stop may not necessarily be arbitrary while a legal stop may be arbitrary. He stated:

> It is admittedly difficult to imagine a situation where there are reasonable grounds to detain an individual and where, at the same time, the detention of that person could be characterized as arbitrary. In other words, the existence of reasonable grounds to detain is inconsistent with the characteristics of capriciousness and randomness which mark arbitrary action. Nonetheless, it is best not to confuse the conceptually separate issues of authority and arbitrariness. I prefer to deal directly with the arbitrariness of the [accused's] detention rather than to analyze it indirectly by way of a concept like articulable cause/reasonable grounds to detain.
>
> Maintaining the distinction between legal authority and arbitrariness recommends itself in this case for an additional reason. The concept of reasonable grounds to detain was developed in relation to detention for the purpose of investigating criminal offences…It thus reflects a balance between the need to safeguard individual liberties on the one hand and the need to ensure that the police can protect the community from crime on the other. To the extent that the stop in this case was driven by an attempt to enforce a policy of the Regional Park Authority or a Park Authority bylaw which might or might not even create offences for noncompliance, there is a question of principle as to whether the reasonable grounds to detain doctrine would be applicable. The extension of police powers to allow for investigative detentions in respect of issues well beyond the criminal realm is a matter of some consequence. I would not want a discussion featuring articulable cause or reasonable cause for detention to be taken as mapping out the limits of police powers when, in fact, the issue before the Court in this case is the separate matter of whether the [accused's] detention was arbitrary. [paras. 33-34, references omitted]

The Crown contended that because only individuals with park passes were supposed to be in the park after 11 pm, it was not arbitrary to stop persons after that time to check for passes and doing so was the only effective way the pass requirement could be enforced. This submission was rejected, however, because other police initiatives which stop all highway traffic to check licences and registrations have been held to be arbitrary (although saved by the justifiability analysis under s.1 of the *Charter*).

Nor did the officer have an articulable cause or reasonable grounds to detain the accused, which would have rendered the stop not arbitrary. Justice Richards wrote:

> In the present case, [the officer] offered no reason for stopping the [accused] other than that he was driving in the Park after 11 p.m. There was nothing about him, his driving, his vehicle or the circumstances to distinguish him from anyone else in the Park or to suggest, in any positive way, that he had committed an offence or violated Park policies…No explanation distinguishing the respondent from other drivers or suggesting that he was breaking the law or a Park rule was provided in this case.
>
> Section 9 of the Charter must be interpreted purposively. Seen from that perspective, it must surely engage when a police detention is based on nothing more than the bare possibility that the individual detained somehow might have offended the law in some fashion unknown to the officer making the stop. Detentions of that sort reflect the capriciousness and randomness which are perhaps the most revealing characteristics of arbitrary action. [paras. 43-44]

The Crown's appeal was dismissed.

Complete case available at www.lawsociety.sk.ca

Note-able Quote

Doing the same behaviour but expecting a different outcome is the definition of insanity— author unknown

COPS AS CROWN MAY CONTINUE

R. v. Cooper et al, 2005 BCCA 256

The accused were issued traffic tickets and at trial the police officer who issued the tickets presented the case for the Crown while also giving evidence. Although it was conceded that the practice of the prosecutor and the enforcement officer (witness) being the same person violated the accused's right to a fair trial pursuant to s.11(d) of the *Charter*, the procedure was found to be a reasonable limitation prescribed by law under s.1 of the *Charter* by the British Columbia Supreme Court. The accused, however, appealed to the British Columbia Court of Appeal arguing the judge erred in characterizing the breach as a potential conflict of interest creating a risk of unfairness rather than an actual conflict of interest creating real unfairness.

Under British Columbia's *Offence Act*, a prosecutor includes an informant, which in turn includes an enforcement officer who signs a violation ticket. Justice Saunders, authoring the unanimous judgment, summarized the importance of these definitions as follows:

> A prosecutor may be an informant. An informant may be the enforcement officer who signs a violation ticket. Thus under the Offence Act the officer signing the motor vehicle violation ticket may be the prosecutor and by ss. 64 and 65 may conduct the case, including by examining and cross-examining witnesses. As the enforcement officer signing the ticket is likely the key prosecution witness, it can be said that the Offence Act contemplates the enforcement officer functioning both as witness and as prosecutor. The procedure in issue is one "prescribed by law" within the meaning of s. 1 of the Charter. [para. 6]

Moreover, she agreed with the trial judge's finding that the police officer filling a dual role was saved by s.1 of the *Charter*. She stated:

> Accepting for the purpose of discussion that this statement accurately states the law in British Columbia, the question is whether the same applies to proceedings such as these, which are regulatory or quasi-criminal in nature. Notwithstanding Mr. Nathanson's able submissions, I am not persuaded that the procedures adopted here are unconstitutional. The procedure in issue here is, in my view, justified within the meaning of s. 1 of the Charter, having consideration to the regulatory nature of the Motor Vehicle Act and the enforcement provision of the Offence Act, the nature of the offences charged, the volume of like cases to be handled, the geography and resources of the province, and significantly, both the procedural safeguards established in the Offence Act and the independent role of the Justice of the Peace. [para. 13]

And further:

> I consider that the summary conviction appeal judge correctly identified the scheme. It is a scheme designed to process, simply and efficiently, a large number of violation tickets for minor offences, in an inexpensive but balanced hearing process. While simplicity, efficiency and cost-effectiveness are important components to that objective, so too is the objective of a fair hearing process. The objectives have benefit for the public, who must pay for the enforcement process, as well as to the disputants who receive a simple and cost-effective system by which they may contest a ticket.
>
> The importance of this objective may be seen by considering the evidence of volume. For the years 1998 to 2000 there were over 70,000 violation tickets disputed annually under the Act. In one twelve-month period there were over 40,000 trials on traffic related matters, above, before a Justice of the Peace. Tickets are issued and disputed across the province of British Columbia, from north to south, east to west. The detachment areas of the Royal Canadian Mounted Police in which the police act as both prosecutor and witness are numerous, and include many, if not most, of the less populated areas of the province. It is obvious that a simple and efficient

> enforcement system, both in terms of money and administrative detail, is required. I have no hesitation in agreeing with the summary conviction appeal judge that the administrative efficiency and cost effectiveness objectives are important.
>
> But there is more to the objective. The intention is also to provide a fair and balanced system. In the context of such a large volume of trials on relatively minor matters, fairness and balance are in part achieved and access to justice is enhanced, by an expeditious and relatively inexpensive process, provided always that the core hallmark of a fair trial, an opportunity to make full answer and defence before an independent and impartial tribunal, is maintained. [27-29]

The nature of the offences was also an important aspect of the s.1 analysis. The trial was not criminal and conviction did not create a criminal record. Nor was a person's liberty at risk. There was only risk of a fine or other impact through the licensing system.

Finally, it was not necessary to have a second officer attend and prosecute a ticket as suggested by the accused. Justice Saunders wrote:

> Given the volume of tickets disputed, and the number of detachments that make full use of the impugned practice, one can say with confidence that a requirement that a second officer attend each trial to act as prosecutor will have the effect of reducing enforcement resources available for other duties, will increase expenditures, will require more officers to leave their detachment area to attend court, will increase administrative processes, and will create scheduling issues. Such consequences are significant. They go beyond simply a question of money into questions of community safety and expeditious resolution of the disputes, and they demonstrate, in my view, the importance of the impugned practice to the scheme as a whole. That is, I consider that the impugned practice is rationally connected to the objectives of the larger scheme. [para. 32]

The practice of having an enforcement officer assume dual roles as both a prosecutor and witness at a trial for regulatory offences with minor consequences was demonstrably justified under s.1 of the *Charter* and the appeal was dismissed.

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

FOLLOWING DRIVER INTO PARKING GARAGE LAWFUL

R. v. Clarke,
(2005) Docket:C42410 (OntCA)

Police officers saw a car make a right turn without signaling about a block ahead of them. The officers caught up to the car and activated their lights and sounded their air horn. The accused stopped briefly, but turned into the underground parking garage of an apartment building. He rolled down his window to activate the door opener and proceeded into the garage. The police followed and the accused backed into the police car causing minor damage.

The accused had an odour of alcohol on his breath and exhibited signs of intoxication. A roadside screening test was administered and the accused failed. He was arrested for over 80 mg% and advised of his right to a lawyer. After speaking to counsel, the accused provided two samples of his breath and he was charged with driving with more than 80 mg%.

At trial in the Ontario Court of Justice the accused was convicted. Among other issues, the trial judge found the accused had not been arbitrarily detained nor subject to an unreasonable search. The failure to signal his turn had attracted the attention of the officers, which was the reason for the stop. As for entering the underground parking lot, the trial judge ruled that although the accused had an expectation of privacy he could not use his property as a sanctuary to avoid apprehension for his immediately preceding conduct. She also

found that the police had implied consent to enter the garage and were not trespassing because they were not asked to leave.

The accused successfully appealed to the Ontario Superior Court of Justice and his conviction was set aside. Among several *Charter* breaches, the appeal justice found the officers were not close enough to be affected by the accused's non-signalled turn; therefore it was not an offence under Ontario law. The ensuing detention was thus arbitrary since the police had no authority to stop the accused. As a consequence, the police had no authority to enter the parking garage—an element of the accused's dwelling—and the resulting breath samples violated his s.8 *Charter* rights. The *Charter* breaches were serious and the breath samples were not admissible. An acquittal was entered.

The Crown then appealed to the Ontario Court of Appeal arguing, in part, that the accused was not arbitrarily detained nor subject to an unreasonable search and seizure.

The Detention

Section 142(1) of Ontario's *Highway Traffic Act* does not create an offence for failure to signal a turn unless another vehicle may be affected. It reads as follows:

> s.142(1) *Highway Traffic Act*
> The driver or operator of a vehicle upon a highway before turning to the left or right at any intersection or into a private road or driveway or from one lane for traffic to another lane for traffic or to leave the roadway shall first see that the movement can be made in safety, and if the operation of any other vehicle may be affected by the movement shall give a signal plainly visible to the driver or operator of the other vehicle of the intention to make the movement. [emphasis added]

To make out an offence under this section it is only necessary to show that another vehicle may be affected by the movement, not that another vehicle was actually affected. In this case, the trial judge found that the police car was in the vicinity that may have been affected by the movement of the accused's vehicle.

Moreover, the police may stop motorists at random for highway safety reasons whether or not they have reasonable grounds to believe highway legislation has been violated. Justice Sharpe, writing the opinion of the court, stated:

> The [accused] in this case was not pulled over at random. Rather, he was stopped by police officers who had observed him driving in a manner which was capable of giving them reasonable grounds to believe a *Highway Traffic Act* offence had been committed. Accordingly, even if, contrary to the findings of the trial judge, the [accused] committed no offence when he failed to signal his turn, it is my view that as the police were acting within the lawful scope of their authority pursuant to s. 216(1) [of the Highway Traffic Act] when they demanded that he stop.
>
> I do not accept the [accused's] submission that we should approach this case on the basis that the police purported to arrest the [accused] for an offence that does not exist in law. There is an offence of failing to signal a turn and that is what the police, on reasonable grounds, thought he had done. Even if the Crown was unable to establish that the police car was close enough to be a vehicle affected by the movement, to justify the actions of the police, the Crown only needs to prove the existence of reasonable grounds, not the actual commission of the offence.
>
> The [accused's] failure to stop pursuant to the s. 216(2) provided the police with grounds to arrest him pursuant to s. 217(2). Accordingly, subject to my analysis of the second issue relating to the police entry into the parking garage, I conclude that the summary conviction appeal judge erred in finding that the respondent had been arbitrarily detained. [para. 25-27]

The Parking Garage Entry

Regardless of whether the police were allowed to enter the garage under the implied licence doctrine, they were allowed to follow the accused into the garage. Justice Sharpe held:

> …As I have already concluded, the [accused's] failure to stop when directed to do so by the police constituted an offence for which the [accused] could be arrested without a warrant pursuant to s. 217(2). This was one continuous transaction with the police in constant pursuit. The [accused] could not thwart their demand that he stop by escaping to the sanctuary of his garage. The parking garage was an element of the respondent's dwelling but, as the trial judge found, one does not have the same reasonable expectation of privacy in such a parking garage as one has in one's dwelling. In the circumstances of this case, if the police were entitled to demand that he stop his vehicle on the street, they were entitled to pursue it into his garage when he failed to comply with their demand…[para. 29, references omitted]

Since the police lawfully entered the parking garage, their subsequent conduct in obtaining breath samples was valid.

Complete case available at www.ontariocourts.on.ca

UNLAWFUL ARREST NOT NECESSARILY AN ARBITRARY DETENTION

R. v. Wilson, 2005 BCPC 0014

A police officer attempted to stop a vehicle reported as a possible impaired driver, but the accused would not pull over for 4-5 minutes until the officer pulled in front of her and cut her off. She was arrested for failing to stop, her vehicle was impounded, and she was transported to the police detachment. She was booked into cells and not released until morning, about eight hours after the arrest. During that time the accused was seen by EHS after complaining of shortness or breath and chest pains.

At trial in British Columbia Provincial Court, the officer testified he kept her overnight because her vehicle had been towed, she had nowhere to stay, she was suffering from the condition that led to EHS being called, the weather was inclement and she was acting strange. Despite these reasons the accused argued she had been arbitrarily detained and that a judicial stay of proceedings should be entered.

Justice Auxier first ruled the arrest unlawful. Under s.495(2) of the *Criminal Code* an arrest is "not to be done if the officer believes, on reasonable grounds, that the public interest may be satisfied without so arresting the person," he stated. Examples of public interest include establishing identity, securing and preserving evidence, and preventing the continuation, repetition, or commission of an offence. However, Justice Auxier found none of those conditions existed. The officer knew the accused's identity, had no evidence to secure or preserve, had no concern about her continuing to drive since her car had been impounded, and had no grounds to believe she would show up for court.

An unlawful arrest, however, is not necessary arbitrary. Justice Auxier ruled:

> …In the case before me, the officer canvassed with [the accused] if she had any friends or family in the area who might assist her. She didn't. There were no shelters available in the community. There was no ferry still running at that hour, even assuming the accused could have found transportation to take her to the ferry. The weather was inclement. She had just suffered some shortness of breath and chest pains, requiring attendance from EHS. So the officer's decision was hardly capricious or despotic or unjustified. [para. 22]

Since there was no arbitrary detention and thus no *Charter* breach there was no reason to enter a judicial stay.

Complete case available at www.provincialcourt.bc.ca

ACCUSED NOT A 'KNOWN' IN POLICE PROJECT: INTERCEPTS ADMISSIBLE

R. v. Chow, 2005 SCC 24

The accused, along with two others, were charged with first degree murder. The Crown's tendered private communication intercepted during eleven successive authorizations. The accused was first named as a target in the third authorization and the calls related to the murder were intercepted during the sixth and seventh authorizations.

At his trial in the Supreme Court of British Columbia the trial judge admitted the evidence after finding no *Charter* breaches under s.8. Under s.185(1)(e) of the *Criminal Code* an affidavit for the interception of private communications must disclose the existence of known persons whose conversations are targeted or any ensuing interceptions of their communication will be rendered unlawful. It reads:

> s.185(1)(e) *Criminal Code*
> An application for an authorization…shall be made ex parte and in writing…and shall be accompanied by an affidavit, which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters…(e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence…[emphasis added]

Although there was much evidence indicating that the police ought to have known the accused was a target, the Crown was not relying on any interceptions the accused was not a named target found the judge. As well, each authorization was a separate order and its legality was independently determined; earlier authorizations had no bearing on the admissibility of subsequent intercepts.

On appeal to the British Columbia Court of Appeal, the court found the wiretaps had been properly admitted. The accused then appealed to the Supreme Court of Canada arguing, in part, that the trial judge erred in admitting the intercepted communications. In his view, his existence and relevance to the investigation was known at its outset and he should have been named in the first and second applications. Moreover, he submitted that the third and subsequent authorizations rested on the information obtained form the second authorization and therefore were inadmissible.

Justice Fish, authoring the unanimous Supreme Court of Canada judgment, dismissed the appeal. When the first and second authorizations were made, some officers knew the accused was involved in criminal activity but were unaware of his connection to the illegal cocaine and heroin trafficking project under investigation. During the second authorization a connection was made between the accused and another target of the authorization. The accused was then appropriately named as a target in the third authorization. As a result, the accused's privacy was not violated and the appeal was dismissed.

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

POLICE MAY LEGITIMATELY PERSUADE ARRESTEE TO TALK

R. v. Edmondson, 2005 SKCA 51

The accused was arrested two days after a 12 year old girl was sexually assaulted. He was informed of his right to remain silent and of his right to retain and instruct counsel without delay. He was transported to the police detachment where he told the officer he would like to call his father. This was permitted along with a phone call to his lawyer, which lasted about nine minutes. He was advised by his lawyer of his right to remain silent and not to speak to police. The accused then told the police

what his lawyer said, but he was taken to an interview room, engaged in conversation, and persuaded to make a statement. The officer made the following suggestions:

> The officer went on to suggest that what had happened was probably a spur of the moment thing because it seemed out of character for [the accused]. He then said that there were two sides to every story and that he needed to hear [the accused's] side…
>
> .....
>
> The officer continued, saying he could not make any promises or threats, for that would be against the law, and suggesting it was "time for the truth."
>
> .....
>
> With that, the discussion turned to bail. The police officer suggested the police would release [the accused] on bail but not immediately, assuring him the police would be talking to the other two men and suggesting to him that it would be well for the officer to have [the accused's] side of the story.
>
> .....
>
> At this juncture [the accused] suggested that perhaps he should talk to his father again, to which the officer responded, "I think you talked to enough people." The officer then asked [the accused] what time he had to be at work. "Three o'clock," [the accused] replied.
>
> .....
>
> The officer continued, commenting on the seriousness of the matter, on [the accused's] apparent good character, and on the officer's role in the investigation of the occurrence. He told [the accused] that the girl was not in a bad way physically, was scheduled for release from hospital that day, and that there may have been several things in play. He suggested [the accused] may have been drinking, reacting to peer pressure, responding to the girl having come-on to him, and so on, saying that for all he knew the girl might have been the aggressor….
>
> .....
>
> The officer went on appeal to [the accused's] sound upbringing and generally lawful behaviour, suggesting again that what had occurred seemed out of character and that [the accused] may not have been at fault. And again he suggested that [the accused] give him his version of the story, reminding him that he had been identified as one of three men involved, that he seemed to have been the primary actor, and that the other men were likely to talk about what had happened. [The accused] wanted to know who had identified him and, when told, asked if the others had also been identified. The officer told him the police had names and descriptions of the others, and urged him to be honest.[paras. 14-19, transcript portions omitted]

At his trial in the Saskatchewan Court of Queen's Bench, the trial judge admitted the statement. In his view the police strategies—including overstating the strength of the evidence, minimizing or understating the seriousness of the offence, suggesting he should help himself, playing on his lapse of judgment and good family background—did not create an atmosphere of oppression or inducement sufficient to exclude the statement. Nor was the reference to bail a *quid pro quo* offer. The statement met the threshold requirement for voluntariness.

LEGAL LINGO
Quid Pro Quo—something for something; a party receives or is promised something in return for something they promise.

As for the accused's right to silence (s.7 *Charter*), the trial judge found there had been no violations despite this case being close to the line. The statement and a videotaped interview were admitted as evidence and a jury convicted the accused.

The accused appealed to the Saskatchewan Court of Appeal arguing, among other grounds, that the trial judge erred in admitting the incriminating statement. The unanimous Saskatchewan Court of Appeal, however, disagreed.

A statement made by an accused to a person in authority will be admissible if the Crown proves beyond a reasonable doubt that it was voluntary. In holding that the trial judge did not err in this respect, Justice Cameron wrote:

> …The accused was fully aware of his rights, and there is little if anything to suggest the

police officer subjected him to any form of harsh, aggressive, or overbearing interrogation. Nor did the officer make any improper promise or threat, or offer any improper inducement. [para. 28]

Unlike the voluntariness rule, when a *Charter* right is at issue the accused—not the Crown—bears the burden of proof, on a balance of probabilities, that their *Charter* right was breached. In this case, the accused did not meet that burden. In addressing the right to silence issue, Justice Cameron stated:

> …we note that the accused was in no position to satisfy the trial judge that he did not know he could remain silent. He was informed of his right to silence, first by the police when they arrested him, and then by counsel. Indeed, counsel advised him to exercise his right to silence by saying nothing to the police. That being so, and having regard for the trial judge's findings in relation to the maturity and intelligence of the accused, the accused can hardly be said to have established that he did not know he had the choice of speaking to the police officer or not. So the question reduces to whether that choice was somehow vitiated by the conduct of the officer taking the statement: Did the techniques of persuasion employed by the officer cross the line?
>
> In keeping with R. v. Hebert [[1990] 2 S.C.R. 151] the police officer was not obliged to protect the accused against making a statement if he chose to do so. Indeed, it was open to the officer to use legitimate persuasion to encourage [the accused] to choose to talk about what had occurred, and to do so in the absence of counsel. As noted in Hebert, at p. 184, "police persuasion short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence."
>
> The police officer used several persuasive techniques to encourage [the accused] to talk. He began by suggesting it was necessary for him to find out what had happened-bearing in mind there are always two sides to every story-and necessary for him to collect evidence pertaining to both sides of the story. There can be nothing objectionable about this, notwithstanding the fact that the police officer knew that the accused had been advised by counsel to say nothing and that the officer's aim was to overcome that advice, in the sense of persuading the accused to talk despite counsel's advice not to do so…Nor can there be anything objectionable about the police officer's later suggestions that it was time for the truth; that he was going to be talking to the others; that the occurrence seemed out of character; or that he needed the accused's version of events to assess the situation and draw the requisite conclusions. Again, these were legitimate forms of persuasion.
>
> Later, the police officer played upon the strength of what he supposedly knew, suggesting the information incriminated the accused in particular but allowing as how the matter might simply have gotten out of hand, and understandably so. He followed up by an appeal for honesty and for further information in the interests of a complete investigation, suggesting that for all he knew the accused might have been acting innocently. He then repeated his request for the accused's side of the story, suggesting that the accused help himself out, as his friends were apt to do when they talked to the police, and reminding the accused that the truth would ultimately emerge. He went on to ask the accused to take him through what had happened, step by step, assuring him the police were going to talk to everyone involved and evaluate the situation in light of the whole. Once again these were legitimate means of persuasion, aimed as always at persuading the accused to talk despite counsel's advice to the contrary. [paras. 30-33]

The accused knew he had the choice to talk to the police or not. They simply persuaded him to talk through legitimate means. The appeal was dismissed.

Complete case available at www.lawsociety.sk.ca