POLICE ACADEMY
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IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On June 3, 2005, 46 year old **RCMP Constable J.M.J. (Jean) Minguy** went overboard from an RCMP patrol vessel. On June 5, 2005 a remote operating vehicle located Constable Minguy's body.

Constable Minguy was a 23 year veteran of the RCMP. He had been posted in North Vancouver, Tofino and lastly in Vernon for the past nine years. Constable Minguy leaves behind an estranged wife and two sons, aged 13 and 11. He is survived by his mother and two sisters who reside in the Province of Quebec.

On July 4, 2005, 45 year old **RCMP Constable Jose Agostinho** was killed in Millet, Alberta and another officer was injured after a parked cruiser was rammed by a truck on a flat, straight section of a main highway south of Edmonton.

Constable Agostinho was posted to Wetaskiwin, Alberta at the time of his death and had also served in the Canadian Armed Forces. He was a nine year veteran of the RCMP and is survived by his wife and two children.

On July 20, 2005, 29 year old **OPP Constable Andrew J. Potts** and another officer responded to a domestic dispute shortly after 2:00 a.m. The two officers were driving in a marked OPP cruiser when they were involved in a collision with a moose crossing the roadway. After striking the animal, the cruiser came to rest in the ditch. The weather was foggy and the moose was on the roadway at the time of the collision.

Constable Potts, who was driving the cruiser, was pronounced deceased at the scene. The second officer was transported by ambulance to hospital and later airlifted with serious injuries to Toronto.

Constable Potts, was a seven-year veteran with the OPP. He was initially posted to Pickle Lake Detachment in Northwestern Ontario and then returned home to Muskoka and Bracebridge Detachment. He is survived by his parents, sister and girlfriend

With the deaths of these three officers, a total of seven peace officers have died in the line of duty in 2005. This year's total equals the number of officers who died in all of 2004. The other officers to lose their lives in 2005 are:

RCMP Constable Anthony Gordon

RCMP Constable Lionide (Leo) Johnston

RCMP Constable Brock Myrol

RCMP Constable Peter Schiemann

"They are our heroes, We shall not forget them"

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

HIGHLIGHTS IN THIS ISSUE

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

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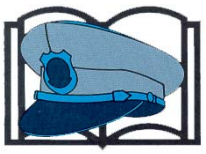
'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"Would you please add me to your electronic distribution of 'In Service: 10-8'. I usually pick up your newsletter from our Training Section, but I would prefer receiving it by e-mail, so I do not miss it. I have been reading it for the past 4 years; it is a great contribution to our knowledge base. However, I must admit that I find reading [some] inane decisions… thoroughly depressing!"—**Police Sergeant, British Columbia**

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"Just thought I would drop you a quick note of appreciation for all the work you do with this newsletter. I am a Training Officer in my department of 600 officers, and we use your newsletter ALL THE TIME. You have done (and continue to do) a wonderful job of keeping your fellow officers updated with the latest from the courts (no small task!)."—***Training Officer, Ontario***

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"Thanks for [the newsletter]…although I am no longer in Training, I appreciate this info as a Patrol Sergeant"—**Police Sergeant, Ontario**

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"Great Newsletter! Good info & an easy read, I really enjoy them. THANX!"—**Police Constable, Ontario**

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"I have recently started my career in policing and have quickly become aware that, in this profession, it is vitally important to continue to learn and to stay abreast of case law and current events. I enjoy reading your newsletter and find it a helpful resource."—**Police Constable, British Columbia**

Note-able Quote

It's not the mountain we conquer, but ourselves—Sir Edmund Hillary

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

www.jibc.bc.ca

ID REQUEST NOT AN UNLAWFUL SEARCH

R. v. Williams,
[2005] O.J. No. 1887 (OCJ)

A police officer approached a suspicious vehicle parked on park property. The officer was part of a team of officers routinely patrolling public parks at night in response to many complaints of drug and alcohol activity. The officer asked the accused, one of four occupants, what he was doing in the park at that time and why he was parked facing outwards from the curb. The accused said they were "hanging out". The officer asked for identification and ran the subjects for warrants and other information.

The officer learned the accused had misidentified himself and was bound by an undertaking which he was breaching—a non-association condition. The accused was arrested and searched and charged with possession of a controlled substance and breach of undertaking.

At his trial in the Ontario Court of Justice, the accused argued his rights under s.10(b) of the *Charter* had been violated. He submitted that he was detained before his identification was requested and he felt compelled to produce it; therefore the officer should have advised him of his right to counsel. Since he was not informed of his right to a lawyer, he contended the request for identification was an unlawful search and the evidence should be excluded.

Justice Halikowski disagreed. In his view there were no *Charter* breaches. He stated:

> …this Court finds that the officer was acting within the general scope of his duties and his requesting identification of the parties within the vehicle did not constitute a detention within the meaning of the Charter and therefore no rights to counsel were necessary to be given. Further, this court does not find that the request for identification in any way constituted an unlawful or warrantless search within the context of this investigation by this officer. At its highest the contact between this officer and the accused was in fulfilment of the officer's duty to prevent crime and apprehend wrong-doers and the accused's duty as a citizen to accept a minimal intrusion on his liberty. He was at liberty at any time to refuse to cooperate with the officer but he chose not to do so. [para. 7]

The accused's *Charter* application failed.

ROADSIDE SCREENING MEASURES PERMISSIBLE WITHOUT A LAWYER

R. v. Orbanski & R. v. Elias,
2005 SCC 37

In two consolidated cases, the Supreme Court of Canada overturned two Manitoba Court of Appeal and ruled there is no need for a motorist to be advised of their right to counsel before undertaking roadside screening measures, such as asking about recent alcohol consumption or participating in sobriety tests.

Facts & History: *R. v. Orbanski*

The accused was stopped by police after he ran a stop sign, made a wide turn and swerved back and forth on the road. After detecting an odour of liquor on the accused's breath and observing that his eyes were glassy, the police officer asked him if he had been drinking. He admitted to having one beer and was asked to perform voluntary field sobriety tests—reciting the alphabet, walking heel to toe while counting to

10, and following the officer's finger with his eyes. The accused failed the tests and he was arrested, fully advised of his right to counsel, and read the breath demand. After speaking to a lawyer he provided samples above the legal limit and he was charged with impaired driving and over 80mg%.

At his trial in Manitoba Provincial Court the accused was acquitted. In the trial judge's view the sobriety tests were authorized by the common law—although the accused was not bound to perform them. However, he was not properly informed of his right to counsel prior to the tests being administered. Without the results of the sobriety tests, the officer would not have had reasonable and probable grounds to arrest the accused nor make a demand for breath samples under the *Criminal Code*. The trial judge excluded the sobriety tests and breathalyzer readings under s.24(2) of the *Charter* and the charges were dismissed.

On appeal by Crown to the Manitoba Court of Appeal a new trial was ordered. Justice Philp, authoring the appeal court's judgment, ruled there was no common law or statutory authority to request the sobriety tests nor was there a limit on the right to counsel under s.1 of the *Charter*. However, Justice Philp disagreed with the trial judge on the admissibility of the evidence. In his opinion, the evidence should have been admitted under s.24(2).

Facts & History: *R. v. Elias*

The accused was randomly stopped by police after he was seen enter a pickup truck and leave a hotel. The officer detected an odour of liquor and asked the accused if he had been drinking. The accused responded, "yes" and the officer read a demand for a roadside breath sample into an approved screening device. The accused failed and was arrested for impaired driving, informed of his rights regarding counsel, and given the breathalyzer demand. He subsequently provided breathalyzer samples over the legal limit and he was charged with impaired driving and over 80mg%.

At trial in Manitoba Provincial Court, the judge found the accused's rights under s.10(b) of the *Charter* had been violated because he was not advised of his right to counsel before the officer asked him if he had been drinking. The judge excluded the results of the roadside test under s.24(2); therefore there was no basis for the breathalyzer demand. He was acquitted on all charges.

On appeal, the Manitoba Court of Queen's bench set aside the over 80mg% acquittal and ordered a new trial. In the appeal judge's opinion the officer did not have to advise the accused of his right to counsel before asking him about whether he had been drinking. On further appeal to the Manitoba Court of Appeal, a majority concluded that asking the accused about recent drinking without first advising him about the right to a lawyer breached s.10(b) of the *Charter* and could not be saved by s.1. However, once again, Manitoba's high court admitted the evidence of the roadside screening and breathalyzer tests under s.24(2).

The Supreme Court Weighs In

Both of these cases made their way before the Supreme Court of Canada in which the Crown made several concessions:

1. both accused were detained for constitutional purposes from the moment they were directed to pull over thereby triggering the right to counsel under s.10(b) of the *Charter* (para.31);
2. neither accused was afforded their right to counsel until they were arrested (para. 32);
3. the evidence obtained without the right to counsel could only be used as an investigative tool to confirm or reject the officer's suspicion of impairment and provide grounds for a demand, but could not be used as direct evidence at trial to incriminate the driver (para. 58);

4. Manitoba statute relevant at the time did not expressly limit the right to counsel (para. 69); and

5. drivers are under no obligation to perform sobriety tests or to answer questions about consumption (para. 82).

Justice Charron authored the majority Supreme Court judgment. He made several important observations concerning the context of these stops:

- these cases were concerned with the licensed and regulated activity of driving on a highway, rather than liberty in a general sense;
- drinking drivers are a menace and effective screening can only be achieved through enforcement by police officers in the field;
- police must be able to screen drivers at a road stop before they are involved in an accident;
- effective screening at the roadside ensures the safety of the driver being screened along with their passengers and other highway users;
- the need for regulation and control involves both federal and provincial legislation—the federal legislation concerned with deterring and punishing criminal offences while provincial legislation allows for action even if the danger presented does not reach the criminal level, such as immediate driving licence suspensions; and
- these cases deal with the interaction between police officers and motorists during a roadside screening procedure from when they are stopped by police to when they are either arrested or allowed to continue of their way.

The right to counsel under s.10(b) of the *Charter* is triggered on arrest or detention, however it is not absolute. It may be suspended under s.1 of the *Charter* if there is a reasonable limit placed on it that is 1) prescribed by law and 2) can be demonstrably justified in a free and democratic society. Even though a detained driver does not have to answer questions about alcohol consumption nor perform sobriety tests on police request, both of these procedures are prescribed by law and arise through necessary implication from the operating requirements of federal and provincial legislation.

Police in Manitoba, as in most provinces, have the statutory right to stop motorists for highway safety reasons—checking driver's licences and insurance, sobriety, and vehicle fitness—under the general power found in s.76.1 of the *Highway Traffic Act* or under the common law authority to check driver sobriety. Since the police had the power and the duty to check both accused's sobriety in these cases, measures could be taken by police to fulfill their duty, even though there were no explicit provisions authorizing the investigative measures undertaken. The Supreme Court ruled the screening measures of asking about alcohol consumption and performing sobriety tests were reasonable and necessary under the circumstances and implicit under general stop provisions.

The limit on the right to counsel in these circumstances was also reasonable. Using the same rationale advanced in roadside screening device cases—where the right to counsel may be suspended before administering the test—Justice Charron found the sobriety tests and questions in these cases were the functional equivalent of a roadside screening device. Thus the limit on the accused's s.10(b) rights were prescribed by law, which was also justified given the importance of detecting and deterring impaired drivers, the regulated nature of driving, the limits imposed on the types of screening (must be reasonably necessary) and the limited use of the evidence (for reasonable and probable grounds only).

As a result, Orbanski's appeal was dismissed while the Crown's appeal in Elias was granted.

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

'FORTHWITH' REQUIRES A PROMPT DEMAND

R. v. Woods, 2005 SCC 42

The accused was stopped by police and a strong odour of liquor was detected. After demanding a roadside breath sample into an approved screening device (ASD) under s.254(2) of the *Criminal Code*, which the accused refused, he was arrested for failing to comply with the demand and was informed of his rights. The accused said he wanted to speak with a lawyer but was told he would have to wait until at the office, since there was no cell phone available in the police car.

The officer waited for a tow truck which caused a delay in arriving at the police station, more than an hour after the arrest. After speaking with a lawyer, the accused then told the officer he wished to provide a sample. The ASD demand was read again and after seven attempts the accused failed. He was then arrested for impaired driving, given a breathalyser demand, and re-advised of his right to counsel. He again spoke with a lawyer, subsequently provided two breath samples—both 120mg%—and was charged with driving over 80mg% and impaired driving.

At his trial in Manitoba Provincial Court the accused was convicted of driving over 80 mg% and a stay of proceedings was entered for the impaired driving. The trial judge found that the ASD sample had been taken "forthwith"—as s.254(2) of the *Criminal Code* requires—because the refusal was continuous from the time he was stopped until one hour and 10 minutes later when he changed his mind at the police station. Thus, in the trial judge's opinion, the sample provided was in response to the demand made at the roadside[1].

On appeal to the Manitoba Court of Queen's Bench, the appeal justice concluded the accused's rights under s.8 of the *Charter* had been breached. In the appeal justice's view, the breath sample ultimately provided was in response to the demand made at the police station—not the one made at the roadside—and went well beyond that contemplated by the meaning of "forthwith". Consequently, a verdict of acquittal was entered. The Crown then appealed to the Manitoba Court of Appeal[2].

Justice Philp, writing for the unanimous Manitoba Court of Appeal found s.254(2) of the *Criminal Code* provides for the testing of the presence of alcohol in a vehicle operator's breath provided a peace officer reasonably suspects they have alcohol in their body. Under this section, a peace officer may make a demand requiring the person forthwith provide a sample of their breath into an ASD—"a screening test to be administered immediately and with minimal inconvenience to drivers..."

Since the accused provided the sample more than one hour after the stop—not with the promptitude and immediacy required under the section—it could not be said the sample was taken forthwith. Rather, the ASD sample provided at the police station was a consequence of the invalid second demand. This fail reading at the police station, therefore, could not be relied upon as part of the reasonable and probable grounds required for a breathalyzer demand. The breathalyzer analysis evidencing the concentration of alcohol in the accused's blood was inadmissible and the Crown's appeal was dismissed. Justice Philp noted, however, that there was no apparent reason why the accused could not have been prosecuted for the initial roadside refusal[3].

The Crown launched one further appeal to the Supreme Court of Canada, arguing the court ignore the second demand made at the police station and interpret the phrase "to provide forthwith" found in the ASD demand section

[1] see R. v. Woods, 2004 MBCA 46

[2] see footnote 1.

[3] see footnote 1.

broad enough to encompass the circumstances of this case.

Justice Fish, authoring the unanimous Supreme Court judgment, rejected the Crown's appeal, holding that the breath sample was not provided "forthwith". In reaching his conclusion, Justice Fish first noted that there are two methods for obtaining a legal ASD breath sample:

1. voluntarily (which Crown conceded was not the case); or

2. pursuant to a valid demand under s.254(2) of the *Criminal Code*. Under this subsection, the police can require a person forthwith provide a sample of their breath into an ASD if an officer reasonably suspects the person operating or in care or control of a motor vehicle has alcohol in their body.

An ASD demand is the first of "a two-step detection and enforcement procedure to curb impaired driving." An ASD provides for immediate roadside screening upon interception of a motorist and helps determine the presence of alcohol and whether more conclusive testing is warranted. At this stage, limits are placed on a drivers constitutional guarantees, such as the right to counsel. The second step, a breathalyzer demand, allows for breathalyzer testing which is regularly conducted at the police station. These results determine the alcohol concentration in a driver's blood. At this stage, *Charter* rights must be respected and enforced, such as the right to counsel.

In this case, the police made two ASD demands under s.254(2); one at the roadside and the other at the police station some time after the stop. The second demand made at the station was not lawful and, as Crown urged, should be ignored for the purposes of resolving the appeal. This left Crown contending that the ASD sample obtained at the police station was a product of the ASD demand at the roadside even though "compliance" was achieved more than one hour later.

Justice Fish, however, dismissed this long-delay compliance argument and ruled that the delay occurring from the first ASD demand to the taking of the ASD sample fell outside the ambit of "forthwith", which means immediately or without delay (although there may be a somewhat flexible interpretation, such as brief and unavoidable delays). "The 'forthwith' requirement in s. 254(2) appears to me…to connote a prompt demand by the peace officer, and an immediate response by the person to whom that demand is addressed," said Justice Fish. "To accept as compliance 'forthwith' the furnishing of a breath sample more than an hour after being arrested for having failed to comply is in my view a semantic stretch beyond literal bounds and constitutional limits."

Here, the accused did not provide a breath sample in response to the first demand at the roadside. The evidence was clear that he expressly refused at the roadside and was arrested for failing to comply. The ASD sample was furnished after the second demand, which was invalid since it was not made forthwith. It was the police who later decided not to prosecute the accused for the refusal after he had provided the evidence to support an over 80mg% charge. As Justice Fish noted, "drivers upon whom ASD demands are made are bound by s.254(2) to comply immediately—and not later, at a time of their choosing, when they have decided to stop refusing!"

The breathalyzer demand and subsequent breathalyzer tests performed at the police station depended on whether the police had reasonable and probable grounds to make such a demand. The only evidence or such a demand was the ASD result obtained at the police station. Since the ASD sample provided by the accused at the police station was not obtained lawfully—forthwith in response to a proper demand—the breathalyzer results were inadmissible. The Crown's appeal was dismissed.

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

TYPE OF PHOTO-LINEUP USED GOES TO EVIDENTIARY WEIGHT

R. v. Grant, 2005 ABCA 222

The accused appealed his conviction for armed robbery arguing, in part, that the photo lineup used by police to identify him as the robber was tainted because the police failed to comply with the recommendations of the Sophonow Report (2001). In the Sophonow Report, the commissioner recommended that a photo pack contain 10 subjects to be shown to a witness by an officer other than the investigator and the photos be presented sequentially (individually one at a time). In this case, the photo pack contained 8 subjects selected and administered by the investigator as a package, rather than sequentially. The trial judge, however, noted that the officer did not aid any witnesses in their choice and had instructed the witnesses that the robber may or may not be found in the photos.

In rejecting the accused's appeal, Justice Fruman, for the Alberta Court of Appeal, cited an Ontario Court of Appeal decision that described the Sophonow recommendations as "persuasive tools". In Justice Fruman's view, there "are no rigid rules respecting the weight to be placed on this evidence." The trial judge did not err in giving the photo lineup some weight. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

NO PRIVACY IN SISTER's CELL PHONE RECORDS

R. v. Pervez, 2005 ABCA 175

The accused was implicated in the murder of a man suspected of being involved in his brother's murder. At trial, the Crown theorized that the accused hired his co-accused to commit the murder and actively directed him. The police obtained a search warrant for phone records, including a cell phone to which the accused's sister was a subscriber, but the trial judge found a facial defect and ruled the warrant invalid; therefore the search was warrantless. Nonetheless, the phone records were admitted at the trial.

Three types of records related to the cell phone were introduced. These records are kept by cell phone service providers enabling them to track calls and bill for service charges and roaming fees:

1. subscriber information that revealed the name and address of the phone subscriber;
2. call detail records that revealed the calls received or made by a particular cell phone along with the time of the call and duration;
3. cell tower information that revealed the general location of the cell phone at the time of the call.

The sister's cell phone records showed extensive communication with the co-accused's phone leading up to and immediately before the murder, but no contact during or after the murder. As well, the accused's sister's cell phone could be placed in an area nearby the murder scene. The accused suggested he had a privacy interest in the phone because he made extensive use of the phone, made payment when the bill was in arrears, and gave the number of the phone out to his employee and a business manager at a car dealership. The accused was convicted, but appealed to the Alberta Court of Appeal arguing the trial judge erred in determining that he did not have a privacy interest in the phone records related to his sister's telephone.

The accused had argued at trial that he had a privacy interest in the cell phone records because they revealed a biological core of information revealing intimate details about his

lifestyle and personal choices, the substance of what s.8 of the *Charter* protects. He suggested the intimate details revealed the following:

- established a link between himself and his co-accused;
- demonstrated the extent of their communication preceding the murder and a temporal nexus to the murder;
- placed the accused within a geographical area at a time relative to the murder;
- demonstrated movement by the accused toward or away from the murder scene;
- showed that there were no incoming or outgoing calls at the time of the murder;
- demonstrated the phone contact between the accused and his co-accused;
- assisted in obtaining a search warrant; and
- corroborated the testimony of two Crown witnesses.

Justice Ritter, authoring the unanimous Alberta Court of Appeal judgment, rejected the accused's submission. In her view, the trial judge did not err in concluding the accused had no privacy interest in his sister's cell phone records. She held:

> The records do not reveal intimate details of [accused's] lifestyle or personal choices. They merely show that a cell phone he used was in a certain place at a certain time and facilitated contact with another cell phone. The records only acquire significance when they are considered alongside the remaining evidence. The inferences provided by the records confirm the evidence of various witnesses….
>
> Furthermore, the records were created as part of a commercial relationship between the cell phone service provider and [the accused's sister]. There was no evidence that the service provider was bound to keep the records confidential. [The accused] argues that his use of the cell phone generated the records, thus creating a privacy interest. However, any expectation of privacy on the part of [the accused] is vitiated by the fact that the records of his use were provided to his sister on a regular basis through billing statements. One measure of an individual's privacy interest is whether that the person can assert any control over the records. [The accused] was not able to do so. If, for example, he had contacted the service provider to demand copies of the records, the provider could have refused and [the accused] would have had no recourse. It is doubtful that [the accused] even knew of the existence of some of the information. It was created for legitimate commercial purposes. It was subject to a commercial contract, to which [the accused] was not a party.
>
> Persons who want to maintain privacy rights have, at a minimum, to structure their affairs in a manner consistent with that desire. Using a cell phone that is owned by another party does not entitle the user to a privacy interest over records that are relevant to the relationship between the cell phone provider and the owner of the cell phone. [paras. 12-14]

The accused could not establish a reasonable expectation of privacy in the records and he therefore had no standing to advance a s.8 *Charter* violation.

Complete case available at www.albertacourts.ab.ca

OFFICER'S GROUNDS OBJECTIVELY SUPPORTED: DETENTION NOT ARBITRARY

R. v. Tsai,
(2005) Docket:C39249 (OntCA)

Police obtained an authorization to intercept telephone communications of a man who, along with his associates, were involved in stealing drugs using violence. Investigators learned that an Asian male, known as "Sean" who drove a white Infiniti, had 80 pounds of marihuana and would be the target of a robbery after arranging to meet for a drug deal. During one of the intercepted calls, police

learned that Sean would meet a grey Cavalier that afternoon at a Dunkin' Donuts shop near the airport. Hoping to intercept Sean before the robbery happened; police arrived and observed a man drive into the parking lot in a white Infiniti followed by a grey Cavalier.

After parking his car and getting out, the accused was arrested for possession of a controlled substance for the purpose of trafficking. Nothing was found during a search of his person but police could see a shrink-wrapped package of marihuana under the driver's seat. The car was searched and police found two garbage bags of marihuana and two cell phones in the trunk, as well as the shrink wrapped package of marihuana under the driver' seat. At trial, the judge was satisfied that the officer had reasonable grounds that a drug transaction was about to occur; the arrest and search was therefore lawful. The accused was convicted and sentenced to 22 months imprisonment.

The accused appealed to the Ontario Court of Appeal arguing, in part, that he was arbitrarily detained contrary to s.9 of the *Charter*. Although the accused conceded that the officer subjectively believed he had reasonable grounds to arrest, he submitted there were no objective grounds. In his view, the police required reasonable grounds there was marihuana in the car and that the accused was the "Sean" mentioned in the wiretaps.

The Court rejected this ground of appeal, agreeing with the trial judge that the police had the necessary grounds to justify the arrest:

> In response to the [accused's] submission that the police would only have had objective grounds to arrest if, on the balance of probabilities, they knew he had the drugs in his possession, we make two comments. First, objective grounds to arrest exist if a crime is about to occur and the trial judge found a drug transaction "was about to take place". Second, the intercepted communications combined with the officers' observations did provide [him] with objective grounds from which to infer, on a balance of probabilities, that the [accused] had drugs in his possession.
>
> With respect to whether the person arrested was the person named Sean in the wiretaps, [the officer] knew they were looking for an Asian male who wore glasses and who would be driving a white Infiniti in the Dunkin' Donuts parking lot. [The officer] also knew that Sean would be meeting a person driving a gray Cavalier and the officer observed a gray Cavalier in the parking lot of the donut shop. The trial judge found that, "The [accused] fit all of these descriptors and nothing about him was inconsistent with the information the police had. In these circumstances, it cannot be said that the arrest was not based on reasonable and probable grounds…" We are not persuaded that the trial judge erred in her findings of fact and we agree with her conclusion. [references omitted, paras. 14-15]

The conviction appeal was dismissed, but the accused's sentence was reduced to 18 months.

Complete case available at www.ontariocourts.on.ca

SAME SEX SAFETY SEARCH REASONABLE: OPPOSITE GENDER NOT REQUIRED

R. v. Sepulveda, 2005 BCPC 0236

The accused was arrested on outstanding warrants for drug trafficking and failing to appear. A male police officer began to search the accused for weapons, in either her jacket pockets or around her waistband. She pulled away, demanded that a female officer search her and prevented the search by flailing and screaming. A second male officer assisted in controlling the accused and a search around her waistband was completed. During the struggle to search her, the accused spat in the second officer's face.

The accused was charged with assaulting a police officer in the lawful execution of his duty under s.270 of the *Criminal Code*. At trial in British

Columbia Provincial Court the accused argued that the officer was not in the lawful execution of his duty because the strip search undertaken in these circumstances did not comply with the rules enunciated by the Supreme Court of Canada in *R. v. Golden*, [2001] 3 S.C.R. 679. Since the search was unreasonable, the accused submitted, it amounted to an assault upon her which she was legally entitled to repel. The Crown, on the other hand, countered that the search was not a strip search, but rather a "frisk" or "pat down" search which was justified and reasonably performed.

A "strip search" was defined by the Supreme Court of Canada as "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments." Strip searches, as British Columbia Provincial Court Justice A. Rounthwaite noted, are intrusive, significantly interfere with personal privacy, and are potentially humiliating, embarrassing, or degrading and require a higher burden of justification than a quick pat or frisk search. In this case, Justice Rounthwaite found the search was a cursory or pat down search, not a strip search as advanced by the accused. She stated:

> It is clear from all the evidence that this search lacked any of the humiliating or embarrassing aspects of strip searches. The search was not significant enough for the independent civilian witness…to mention it in his account of the interaction between [the accused] and the officers. There is no evidence that [the accused's] genital areas or undergarments were exposed to anyone's view. Her clothes were neither removed, nor rearranged to permit visual inspection of her private areas. The waistband of her pants was simply patted and lifted out in a search for weapons. Such a search must be characterised as a cursory frisk or pat down rather than a strip search.
>
> This search had a valid objective. The officers had ample grounds to believe [the accused] might be carrying a needle or a weapon: the area in which she was arrested was known for drug trafficking, she was known to [the officer] as a trafficker, and he had arrested many females in possession of weapons. In fact, when the female officer arrived she found a knife and an unsheathed razor blade in [the accused's] jacket pocket. [The accused] was also carrying a crack pipe.
>
> The search was also carried out reasonably. The officers' use of force was necessitated by [the accused's] struggles to avoid being frisked. [The civilian witness] described the police as calm, trying to do their job and diffuse the situation, while [the accused] was loud, twisting and kicking, hostile and combative. The officers restricted the search to the area of her clothing [the accused] could reach while handcuffed and did not search her private areas. Although she may have wished or thought she should only be searched by a female officer, that is not the law. A frisk or pat down search of a detainee for weapons performed by an officer of the opposite sex does not constitute an unreasonable search. [The accused's] personal reason for not wanting to be searched by a man may be relevant to sentence, but it does not make the search unreasonable nor provide a defence.
>
> For these reasons, I find [the officer] conducted a cursory frisk or pat down search of [the accused], a search for weapons incidental to her arrest that involved a minimal invasion of her privacy and personal integrity. It was not a strip search subject to the limits imposed in *Golden v. the Queen.* [paras. 8-11]

Thus, the officer was acting in the lawful execution of his duty when he searched the accused and she was convicted of assaulting a peace officer.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

The nice thing about teamwork is that you always have others on your side—Margaret Carty

DISMISSED TICKET DOES NOT NEGATE OBSTRUCTION CHARGE

R. v. Lord, 2005 BCCA 165

A railway police officer was monitoring a stop sign and observed the accused fail to come to a stop. He pulled the accused over and asked for his driver's licence and registration. Some documents were provided and the accused exited his vehicle. The officer asked the accused to either get back in his vehicle or move to the side, off the traveled portion of the road, while he examined the documents and prepared a ticket.

The accused was very agitated, called the officer "fucking pig" and "asshole", and told the officer he had no jurisdiction to deal with him nor any right to require him to get back in his vehicle or move off the road. The accused ignored the officer's direction and he was charged with and convicted of obstructing a peace officer in the execution of his duty under s.129(a) of the *Criminal Code* in British Columbia Provincial Court.

The accused appealed to the Supreme Court of British Columbia[4] arguing that he did not have to follow the officer's directions. Justice Baker affirmed the verdict of the Provincial Court. In her view, the accused was obstructing the police officer when he refused to comply with the officer's direction. She stated:

> In those circumstances, with the officer being unable to convince [the accused] to follow his direction to get back into his vehicle or to go to the side of the road, the officer had a reasonable perception that if he returned to his own vehicle while [the accused] remained on the roadway, [the accused] would be posing a risk to himself and possibly to other motorists who might come by on the roadway and might either veer to avoid him or be startled by him. I conclude it is also reasonable that in his assessment of the risk that [the accused] was creating a hazard, the officer was entitled to take into account the fact that [the accused] was very agitated and was behaving in an unusual fashion by using insulting and derogatory language to the peace officer. [para. 7]

In addressing the three elements required for a successful obstruction charge 1) an obstruction, 2) the obstruction affected the officer in the execution of his duty, and 3) the accused obstructed willfully, Justice Baker held:

> In this case, the learned trial judge referred to s. 123 of the *Motor Vehicle Act*, which provides that if a peace officer reasonably considers it necessary to prevent injury or damage to persons or property, he may direct traffic, and that includes pedestrian traffic, according to his or her discretion, and everyone must obey his or her direction.
>
> I have already said that the peace officer, in my view, could reasonably consider it necessary to have [the accused] leave his position on the roadway in order to prevent injury or damage to persons or property, and he did give that direction and it was mandatory for [the accused] to comply. Clearly, [the accused] did not comply. The officer's concerns about [the accused's] safety and that of other persons prevented the officer from carrying out his intended duties of returning to his vehicle to deal with the information he had obtained and the preparing of a citation, and accordingly, the second element is made out.
>
> The final element is whether or not [the accused] was shown beyond a reasonable doubt to have been obstructing the officer wilfully. In my view, the learned trial judge had evidence on which he could reach that conclusion, given [the accused's] evidence at trial and the evidence of the police officer as to [the accused's] statements and behaviour, and his adamant refusal after attempts at coaxing him to remove himself from the roadway. [paras. 23-25]

[4] See R. v. Lord, 2004 BCSC 1794 for details of the offence.

The accused then sought leave to appeal before the British Columbia Court of Appeal arguing, among other grounds, that the dismissal of the traffic ticket issued to him for not stopping (apparently because the officer did not attend the traffic court hearing) demonstrated that the officer had no basis to stop him, direct him to move, or charge him with obstruction when he didn't move. In dismissing leave to appeal, Justice Saunders, in chambers, stated:

> This new fact, that the traffic ticket was dismissed, would not alter the result, in my view…. The issue before the trial judge was whether [the accused] had wilfully obstructed a police officer in the execution of his duty. This required a consideration of the wilfulness of [the accused's] actions, the question whether his actions amounted to obstruction and the question whether the police officer was acting in the execution of his duty. The fact that the traffic ticket was dismissed does not negate the conclusion that the officer, in stopping [the accused], was acting in the execution of his duty, or more importantly for this case, that his attempt to have [the accused] move was not in the execution of his duty: s. 123, *Motor Vehicle Act*. [references omitted, para. 12]

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

KNOCK & NOTICE RULE VIOLATED BUT EVIDENCE ADMISSIBLE

R. v. Vukelic, 2005 BCPC 0156

The police obtained a search warrant to search the accused's residence. The warrant was executed by an Emergency Response Team (ERT) smashing down the front door without first making announcement. Inside, police found the accused and his girlfriend and 385 growing marihuana plants. During a *voir dire* in British Columbia Provincial Court, the accused argued, in part, that the search was unreasonable under s.8 of the *Charter* and that the evidence should be excluded because of the way police carried the search out without announcement.

Justice Chen agreed that the police violated the common law requirement of the "knock/notice" rule when they smashed down the door. However, in his view the evidence should not be excluded. The police action was not dictated by policy which deliberately ignored the common law requirements. Rather, ERT was used because police had received information that there were or could be firearms in the residence, which was a reasonable belief. Justice Chen stated:

> I find that the presence of firearms in such a context as a marihuana grow operation does present a potential danger to police conducting a search and that the police are not unreasonable in taking measures to address such a potential danger. [para. 38]

Since the police were acting in the interests of their safety given the circumstances of the case, the seriousness of the *Charter* breach in not announcing was reduced and the exclusion of the conscriptive evidence would bring the administration of justice into disrepute more than by admitting it. The accused's application to exclude the evidence was dismissed.

Complete case available at www.provincialcourt.bc.ca

HUNCH NOT ENOUGH FOR INVESTIGATIVE DETENTION

R. v. Peardon, 2005 BCPC 0117

The accused was stopped by police on the Trans Canada Highway. The police concluded he might be impaired because he was driving 15 km/h below the speed limit, had his window rolled down partway, and was traveling along the fog line. The vehicle was a rental car and the officer noticed fast-food wrappers, coffee cups, a cell phone and personal luggage. The accused was the sole occupant and appeared nervous. The officer

quickly realized the accused was not impaired, but was suspicious that he might be hauling contraband.

The officer conducted a computer check and learned the accused had no warrants, but had a criminal record that included a marihuana cultivation conviction and a firearms prohibition. As a result of the officer's observation, training, and experience, he decided to continue with an investigative detention under the *Controlled Drugs and Substances Act.* The accused was asked to exit his vehicle, advised he was being detained, handcuffed, and read his rights to a lawyer. He said he wanted to talk to a lawyer, but was not given the opportunity at that time.

A drug sniffing police dog was deployed to search the vehicle, but instead sat near the right leg of the accused. The accused was then arrested and searched and a large number of $20 bills were found, but no drugs. The dog moved to the vehicle where he sat at the back of the trunk. The trunk was opened and a smell of fresh marihuana was detected. A substantial amount of marihuana was subsequently seized and the accused was charged with possession of marihuana for the purpose of trafficking.

During a *voir dire* in British Columbia Provincial Court the accused submitted he had been arbitrarily detained, subject to an unreasonable search and seizure, had his right to counsel breached and that the evidence should have been excluded under s.24(2) of the *Charter*. In determining whether the accused's *Charter* rights had been violated, Justice Overend first examined the police power to detain for investigative purposes.

An investigative detention will be justified at common law if an officer has reasonable grounds to detain (or articulable cause). This requires "a constellation of objectively discernible facts which gives the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation." In finding the officer did not have the necessary grounds to detain the accused, Justice Overend stated:

> In this case, approximately eleven minutes after concluding that the accused could not be detained based on the officer's initial suspicion that he might be an impaired driver, his informal detention was continued until 10:30, when he was formally detained under the Controlled Drugs and Substances Act. The reasonable grounds offered by the officer were the presence in the vehicle of food wrappers, coffee cups, a cellphone and personal luggage. Additionally, the accused was very nervous, had a conviction of unspecified date for cultivation of marihuana, and was subject to a firearms prohibition. These objectively discernible facts do not give rise to reasonable grounds to suspect criminal activity under the Controlled Drugs and Substances Act. The facts do not point to the commission of a <u>particular</u> crime…, and I underline the wor[d] particular. It was conceded by the officer that the presence in the vehicle of the items mentioned was common among persons not involved in criminal activity, and had it not been conceded, I would have taken judicial notice of that fact. [para. 16]

And further

> Subjectively, the police officer, based in part on his training and experience, suspected that the accused might be involved in transporting contraband. Training and experience, however, does not provide the reasonable grounds for a subjective belief or suspicion. Objectively speaking, this was nothing more than a hunch, largely based on the officer's experience dealing with investigations of drug offences. In order to determine whether objectively speaking the police officer had reasonable grounds for his suspicion, it is necessary to ask whether a reasonable person, apprised of the facts known to [the officer], would have had a suspicion that the accused was in possession of contraband, contrary to the Controlled Drugs and Substances Act.
>
> The answer must clearly be no. While a suspicion may have arisen as to the reason for the nervousness of the accused, it is much more than a reasonable leap to conclude that the nervousness is connected to an offence

> under that Act. All that differentiates the reaction of the police officer to these facts, and the reaction of anyone else, was his experience. Based on that experience, he acted on a hunch that the accused might be in possession of contraband. I am satisfied that the detention was not only unlawful but also arbitrary. [para. 18-19]

Other problems the Court had with the detention included its length (21 minutes before the arrest), its manner (handcuffed for 10 minutes on the side of the highway), and its purpose (to discover evidence to justify a hunch).

As for the search, it was warrantless and therefore presumed to be unreasonable unless it could be justified under statute or common law (incidental to arrest or investigative detention). Since the detention was arbitrary and unlawful, there was no lawful right to search the accused. The search was therefore unreasonable under s.8 of the *Charter*. However, had Justice Overend found the detention lawful, he would have had no problem with the sniff searches. He stated:

> A warrantless search is *prima facie*, but not conclusively, unreasonable. The Charter is designed to protect legitimate privacy interests. [The police dog's] search in this case revealed, and could only reveal, the presence of illicit drugs on the person of the accused. No other personal information about the accused was revealed to the police officer when the dog sat by [the accused's] leg. Citizens do not have a legitimate privacy interest in the possession of contraband drugs. While there was some evidence that a sniffing dog can be wrong, the evidence in this case did not lead me to the conclusion that this dog was wrong. [para. 29]

The accused's s.10(b) *Charter* right was also breached:

> In this case, I have found breaches of the [accused's] Charter of Rights with respect to the investigative detention and the search. Because it was an arbitrary and unlawful detention, there was no lawful right to search. Finally, the accused was not afforded an opportunity to consult with counsel as required by Section 10(b). This is significant as, at best, it shows an insensitivity by the police to the importance of the rights of the accused under the Charter. The police officer did not provide access to counsel because they did not intend to question the accused before he had had an opportunity to speak to a lawyer. Without delay means without delay, given all the circumstances of the detention or arrest, including the necessity to secure a crime scene, preserve evidence, and ensure the safety of the police officer, the accused and members of the public, if any.
>
> It also must take into consideration the availability of a phone or other means of communication with counsel. None of those factors would have prevented prompt access in this case. Phone access could have been made available within minutes of the defendant being stopped. The police were able to make phone contact with Crown counsel from the side of the highway. That could have been made available to [the accused]. It was approaching two hours before he got his phone call, despite his having requested immediate access. [para. 34-35]

In light of all the *Charter* violations the evidence was excluded.

Complete case available at www.provincialcourt.bc.ca

INVESTIGATIVE DETENTION ARBITRARY: EVIDENCE EXCLUDED

R. v. Schuhknecht, 2005 BCPC 0161

Two members of a city wide enforcement team—a team set up to monitor Vancouver's downtown east side and deter crime—entered a high crime hotel as part of a routine walk through. In the first floor hallway they saw the accused pushing a bicycle and carrying a large backpack. Upon seeing the

officers, the accused lowered his head and looked away to avoid eye contact. He was ordered several times to stop but ignored the commands and continued walking towards the officers, passing by them. The officers followed him and he eventually stopped by the exit door. He was asked his name and date of birth several times but refused to answer. Reluctantly, he provided the information and a computer check revealed he was on probation—not to possess tools outside his residence or any instrument capable of breaking into motor vehicles.

When asked if he had any tools the accused reached into his pocket and placed a knife with a flat end on the ground. He was arrested for breach of probation, searched, and read his *Charter* rights. During a *voir dire* in British Columbia Provincial Court the arresting officer testified the existence of the probation order provided him with the legal right to search the accused to ensure he was complying with its terms.

The accused argued that his rights were violated because:

- he was arbitrarily detained when he was ordered to stop and that the police did not have a reasonable suspicion he was involved in criminal activity;
- he was not told why he was detained and was not advised of his right to counsel, both *Charter* violations under s.10; and
- the production of the knife was in response to the officer's questions and amounted to an unreasonable search under s.8.

The Crown, on the other hand, argued the following:

- the police had not detained the accused until he was questioned about the tools. Up until that point, the officers were establishing his identity;
- the police had articulable cause to detain the accused because of his suspicious behaviour, the high crime area, and the fact the accused was on probation;
- the production of the knife was not related to the s.10 breaches and had not been obtained from a search, but was voluntarily produced which then provided reasonable grounds for the arrest; and
- the evidence should be admitted under s.24(2) because the detention was short, the accused's rights were minimally interfered with, the evidence was non-conscriptive, and the officers acted in good faith.

Detention

In determining whether the accused's rights had been breached, Justice Bruce first concluded that the accused had been detained. She stated:

> The common law authority of a peace officer to detain persons for investigative purposes is based, fundamentally, upon a reasonable suspicion that the person sought to be detained is implicated in some criminal activity under investigation…
>
> Thus where a person is detained other than in connection with the investigation of a criminal offence, there can be no articulable cause for the detention and it is thus necessarily arbitrary.
>
> In the case at hand, the officers were not investigating the commission of a criminal offence, either ongoing or recent. They stopped the accused because he was a suspicious person in a hotel associated with a high crime rate. His detention was thus arbitrary and contrary to Section 9 of the Charter…[references omitted, paras. 23-25]

And further:

> In this case the evidence supports a conclusion, on the balance of probabilities, that both the officers and the accused believed he was detained. First, [the officer] testified that the accused was not free to

> leave and would have been stopped if he had tried to walk away. Second, although the accused was very reluctant to answer [the officer's] demands that he provide his name and birth date, he remained in the hallway and did not try to leave. This is particularly significant because it was apparent to the officers from the outset that the accused had not stopped willingly. Indeed, at first he ignored their commands and walked passed them. In my view the accused's actions in this regard evidence a belief that he would not be permitted to leave. Finally, the accused was accosted in the hallway of a hotel by two uniformed officers. The stop was not on a public street where the accused could have easily walked away from the police or ignored their inquiries. [para. 28]

Since there was a detention, the accused was entitled to be advised of its reason (s.10(a) *Charter*) and of the right to counsel (s.10(b) *Charter*), but was denied these rights. As noted, the detention was arbitrary and the knife would not have not been found but for the unlawful detention. Hence, the subsequent arrest and search incidental thereto violated s.8 and s.9 of the *Charter*.

Admissibility

In determining whether the evidence should be admitted under s.24(2), Justice Bruce considered a number of factors including the good faith of the police. In this case she found the officers were not acting in good faith:

> Moreover, it cannot be said that the officers were acting in good faith. Their actions demonstrated a woefully inadequate understanding of the law in regard to the accused's rights under the Charter. I accept that the officers did not have the benefit of the *Mann* decision, which was issued after the accused's detention on July 31, 2004; however, the Supreme Court only clarified the law concerning the power to search incidental to an investigative detention. The grounds for a lawful investigative detention were well settled at the time and there is no excuse for the officers' failure to appreciate the need for a constellation of objectively discernable facts implicating the accused in a particular offence.
>
> In my view the officers acted in complete disregard for the rights of the accused and, in particular, his right not to be arbitrarily detained. As members of the City wide enforcement team the officers had a clear duty to protect law abiding members of the down town east side community from criminal activity in the neighbourhood. Nevertheless, the police cannot be so intent upon accomplishing this objective that they fail to accord the proper respect for an individual's right to liberty. [references omitted, paras. 37-38]

The evidence was excluded.

Complete case available at www.provincialcourt.bc.ca

KNOWINGLY CONDUCTING UNLAWFUL SEARCH AMOUNTS TO BAD FAITH

R. v. Nguyen, 2005 BCPC 0226

A police officer suspected a drug transaction involving a van and stopped it. The accused was told to get out, advised he was being detained for investigation of trafficking in a controlled substance, and given his right to counsel and the police warning. The officer did not believe he had reasonable grounds to arrest the accused nor to believe a crime had been committed. He then searched the accused and his van for weapons and evidence of crime. The police found cash and a cell phone on the accused and cocaine in his van.

During the *voir dire* in British Columbia Provincial Court, the officer testified he knew that his search for evidence was prohibited by the *Charter*. The Crown conceded the searches violated the accused's s.8 *Charter* right protecting him against unreasonable search and seizure, but argued the evidence should be admitted under s.24(2).

In determining whether the evidence should be admitted, Justice Saunderson examined whether the officer acted in good or bad faith. In concluding that the officer acted in bad faith, Justice Saunderson stated.

> My findings and decision are therefore as follows. [The officer] had reasonable grounds to detain the defendant. [The officer] was justified in conducting a pat-down search for weapons(counsel did not argue the point, and the police officer was, after all, dealing with a suspected drug dealer). There is no factual basis in evidence from which I can conclude it was reasonable for [the officer] to proceed beyond the pat-down search for officer safety purposes. Indeed, the constable himself said that he was looking for evidence of drug trafficking. The search of the [accused's] person and of his van, in respect of both of which there was a reasonable expectation of privacy, was not justified on the facts of this case, as conceded by Crown counsel. That there were objectively reasonable and probable grounds for [the officer] to believe the defendant had just trafficked in drugs, such as to, for example, justify his arrest, cannot assist the Crown where the subjective belief did not exist, nor can it logically affect the issue of good faith when assessing whether the evidence ought to be admitted or excluded.
>
> Knowing that his searches for evidence violated the highest law of the land, and proceeding with the searches in spite of that knowledge, amounted to bad faith on his part.
>
> .....
>
> This was no trifling breach of the Charter. It goes right to the heart of the rule of law. For the police to be able to knowingly break the law to obtain evidence, secure in the knowledge that it can be used in court, is not likely to find favour with reasonable Canadians who are reasonably well informed. To admit the product of these searches in evidence would bring the administration of justice into disrepute…[paras. 19-22]

The evidence was excluded.

Complete case available at www.provincialcourt.bc.ca

POLICE NOT REQUIRED TO READ DETAINEE's MIND

R. v. Atkinson, 2005 BCPC 241

After a silent alarm was sounded at a ski shop, a police officer set up a roadblock to check all vehicles leaving the mountain. Shortly after, the accused pulled up to the roadblock and as a result of his observations and conversation—smell of liquor, fumbling to retrieve driver's licence, red, watery and glassy eyes, slurred speech, a slow and tilted walk, and an admission of consuming a beer—the officer formed reasonable and probable grounds to make a breath demand. After being read his right to a lawyer, the accused said "I would like to contact a lawyer," but did not ask or specify that he wished to contact any particular lawyer.

When the officer arrived at the police station he placed a call to legal aid and the accused had a four minute conversation with counsel. After he was finished, the officer asked the accused, "Are you satisfied with your call to a lawyer", to which the accused responded, "Yes, I am." Two breath samples of 180mg% were subsequently obtained.

During a *voir dire* in British Columbia Provincial Court the accused argued that his right under s.10(b) of the *Charter* had been violated because he was not asked if he had a specific lawyer in mind to call thereby denying him of his right to call the lawyer of his choice. Rather, in the accused's opinion, a call was placed to legal aid without further consultation with him and a judicial stay of proceedings or exclusion of the breathalyzer certificate was an appropriate remedy.

Justice Moss rejected the accused's submission. In the judge's view there was no *Charter* breach:

> [W]e have the officer directly asking the detainee after the phone call to Legal Aid of some four minutes duration whether or not he

was satisfied with his discussion "with the lawyer". [The accused] responded "Yes". In my view, the officer can place reliance upon this assertion by [the accused]. It is not for the officer to read the accused's mind. The *Charter of Rights* informational component was appropriately provided to the accused. In order to effectively implement the *Charter of Rights* informational component there is an onus upon the accused to express a desire to speak to a lawyer of his choice other than Legal Aid Duty Counsel if that is the case. [The accused] did not at any time say he wished to contact any particular lawyer. Unless he says something about so doing versus discussing the matter with freely available Legal Aid Duty Counsel 24 hours a day, he cannot later claim that his rights to counsel of his choice were somehow abridged or short-circuited as a result of the officer, in good faith, placing a phone call on his behalf to the Legal Aid Duty Counsel.

It is trite law to say a detainee must exercise reasonable diligence in exercising the implementation portion of his *Charter* right to counsel of his choice. I find the standard police recitation of section 10(b) *Charter* rights by [the officer] was clear and unequivocal. The accused confirmed he understood his rights to counsel of his choice or free 24-hour Legal Aid Duty Counsel legal advice. He did not provide any indication whatsoever of a desire to access a phone book or complain about any inability to call the lawyer of his choice nor did he turn down the telephone call to Legal Aid. To the contrary, he talked some four minutes to the Legal Aid Duty Counsel, and afterwards expressed satisfaction with the contents of that call and proceeded thereafter to provide the sought-for-breath samples.

On the evidence, I find [the accused] was not foreclosed of his legal rights to counsel of his choice. If the police, by default, place a call to Legal Aid Duty Counsel for a detainee in circumstances such as existed here, it can hardly be said they somehow violated his *Charter* 10(b) rights to counsel of his choice. He was not deprived of a reasonable opportunity to exercise his right to counsel of his choice. He never exerted it!... [references omitted, paras. 8-10]

Complete case available at www.provincialcourt.bc.ca

POTENTIALLY INNOCUOUS OBJECT MAY BE DANGEROUS: PROTECTIVE SEARCH OK

R. v. Tran, 2005 BCPC 255

Two police officers were flagged down by a woman and told that there were two men doing drugs in the lane behind her home. The officers drove into the lane and saw two men squatting on a private driveway and leaning against a concrete wall beside the gate to the underground parking lot. They each had a crack pipe in their hands. They didn't answer when asked what was going on, but the accused gave his name and birth date without identification. An officer asked the accused if he had any needles, knives or anything sharp—things people in the officer's area commonly carry.

The officer conducted a cursory pat down search for weapons, needles or knives and felt a small object under the accused's jacket pocket seam. When asked twice what it was, the accused did not answer. Concerned that the object could be an exacto knife blade, razor blade or needles in a container, the officer reached into the accused's pocket and removed a plastic vial containing four rocks of cocaine. The accused was arrested, handcuffed and searched further. Tweezers, exacto knife blades, push sticks, screw drivers and other crack pipes were found.

The accused brought an application to the British Columbia Provincial Court to exclude the cocaine because his rights against arbitrary detention (s.9 *Charter*) and unreasonable search (s.8 *Charter*) had been breached. Justice A. Rounthwaite, however, disagreed.

The police can detain a person for investigative detention if, in all of the circumstances, there

are reasonable grounds to suspect the person is connected to a particular crime and the detention is necessary. In this case, the accused was with another man at the location reported and had a crack pipe in his possession. The officer also subjectively had the necessary suspicion for the detention. Justice Rounthwaite concluded that "a brief detention for questioning was necessary for the officers to investigate the recent offence reported to them." The detention was not arbitrary and therefore s.9 of the *Charter* was not violated.

As for the search, police officers are entitled to conduct a protective pat down search of a detained person if there are reasonable grounds to believe their or others' safety is at risk. Here, the search was reasonable and was not a breach of the accused's s.8 *Charter* rights:

> [The officer] believed on reasonable grounds that her safety and that of her partner was at risk. [The accused] was in a lane in the downtown eastside, holding a crack pipe. When asked if he had needles, knives or anything sharp he did not reply. It is common for people in that district to carry such items. The officer had not had time to check CPIC for [the accused's] history. The evidence establishes both subjective and objective grounds for concern about officer safety. As a result, [the officer] was entitled to conduct a cursory pat down search for weapons, needles or knives that could harm her or her partner during the investigative detention.
>
> On feeling a solid object in the lining of [the accused's] jacket, [the officer] asked twice what it was and got no response. Thinking it could be an exacto knife blade, razor blade, or needles in a container, she removed the object and examined it. When she did this she still believed that officer safety was at risk. The evidence establishes her belief was reasonable. The fact that the object might have been innocuous does not affect the fact that it might also have been dangerous. [paras. 8-9]

Complete case available at www.provincialcourt.bc.ca

ABSENT DETENTION NO RIGHT TO COUNSEL

R. v. Thomas, 2005 QCCA 628

The accused walked into a police station in Jamaica and confessed to murdering a person in Canada. He told two Jamaican police officers that he had to tell someone about the murder because it was haunting him and he was having nightmares and flashbacks. At first, the Jamaican officers thought the accused was insane, but changed their minds since he spoke fluently, intelligibly and provided a coherent statement. The accused was not offered the opportunity to speak with a lawyer but was advised of his right to remain silent.

After his oral confession, the police took a complete confession from the accused in the form of a written statement and he signed it. After the confession the accused was arrested and detained. He was returned to Canada and was charged with the murder. During a *voir dire* in Quebec Superior Court the trial judge found the confession admissible because it was obtained in accordance with Jamaican law. The Jamaican police officers were not acting on behalf of Canada and were therefore not bound by the *Charter*. Furthermore, it was freely and voluntarily given and was the product of an operating mind. Even though the accused felt compelled to make the statement, the compulsion did not result from the actions of the authorities but rather was self induced.

He was convicted by a jury of first degree murder in Quebec Superior Court, but appealed to the Quebec Court of Appeal arguing, in part, that his statement was made without being offered or afforded the opportunity to contact counsel.

Justice Doydon, writing the unanimous Quebec Court of Appeal judgment ruled that even if this statement had been taken in Canada there would

have been no *Charter* breach. Since the accused was not detained when the confession was obtained, s.10(b) of the *Charter* would not apply. Jamaican law aside, even under Canadian law the statement was validly obtained and was admissible.

Complete case available at www.canlii.org

POLICE NOT OBLIGED TO ADVISE ARRESTEE OF DEFENCES

R. v. Norman, 2004 NBCA 33

The accused was arrested after he turned himself into police following the sexual assault of a 15 year old girl he had driven to a secluded and wooded area. He had consulted with a lawyer and told police he was not allowed to give a statement, even though he wanted to. The following morning the accused was taken to a hospital because he was complaining of chest pains; he suffered an anxiety attack. Later that day, he agreed to a police interview and was again advised of his right to counsel and told a legal aid lawyer was available. He was also given the police warning about his right to silence and that his statement might be used against him. The accused agreed to a videotaped interview and admitted to taking the girl hostage and sexually assaulting her.

The accused was charged with sexual assault and forcible confinement. During a *voir dire* in the New Brunswick Court of Queen's Bench, the trial judge ruled the statement admissible. The accused then brought an appeal before the New Brunswick Court of Appeal arguing, among other grounds, that he mistakenly believed he committed "statutory rape", to which consent is not a defence, and therefore did not make an informed statement to police. In rejecting this ground of appeal, Justice Richard, authoring the unanimous appeal court judgment, agreed with the trial judge when the trial judge said:

> In my opinion, the argument of counsel for the accused with respect to the age of consent issue is without merit. The duty of the police when conducting an interview of an accused is to ensure that the accused has been advised of his or her right to counsel and has been issued the standard police warning and secondary caution and then to conduct the interview in a professional, non-oppressive manner without inducement, trickery or deceit.
>
> In my opinion, it should not be the obligation of the police to advise an accused of any available defences or legal issues relating to the crime being investigated. In my view, those legal issues are the responsibility of the lawyer contacted by the accused. [para 18]

The appeal was dismissed.

Complete case available at www.canlii.org.

2006 POLICE LEADERSHIP CONFERENCE APRIL 10-12, 2006

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

This conference will emphasize leadership as an activity, not a position, and provide an opportunity for participants of all ranks from police agencies across Canada, the United States, and beyond to engage with a carefully chosen list of first class speakers. For more information, visit the JIBC Police Academy website at:

www.jibc.bc.ca

DID YOU KNOW…

…that Statistics Canada recently released its 2004 crime statistics for Canada's 27 Census Metropolitan Areas (CMAs). The top 10 in each category are:

2004 CMA Top Ten Crime Rates (per 100,000 residents)	
Regina	15,430
Saskatoon	13,767
Abbotsford	13,252
Winnipeg	12,167
Vancouver	11,814
Edmonton	11,332
Victoria	10,309
Halifax	9,924
Thunder Bay	9,226
Montreal	8,173
Canada	**8,051**

2004 CMA Top Ten Homicide Rates (per 100,000 residents)	
Regina	5.0
Winnipeg	4.9
Abbotsford	4.4
Edmonton	3.4
Saskatoon	3.3
Vancouver	2.6
Halifax	2.4
Calgary	1.9
Toronto	1.8
Montreal	1.7
Canada	**1.9**

2004 CMA Top Ten Motor Vehicle Theft Rates (per 100,000 residents)	
Winnipeg	1,932
Abbotsford	1,529
Regina	1,351
Vancouver	1,104
Edmonton	1,018
Montreal	663
London	611
Saskatoon	590
Hamilton	540
Halifax	540
Canada	**531**

2004 CMA Top Ten Break-in Rates (per 100,000 residents)	
Regina	2,112
Saskatoon	1,797
Abbotsford	1,390
Vancouver	1,325
St. John's	1,149
Edmonton	1,129
Winnipeg	1,124
Halifax	957
Victoria	935
Gatineau	928
Canada	**860**

2004 CMA Top Ten Robbery Rates (per 100,000 residents)	
Winnipeg	229
Regina	211
Saskatoon	209
Halifax	161
Montreal	150
Vancouver	148
Edmonton	141
Toronto	103
Abbotsford	97
Calgary	91
Canada	**86**

For a complete copy of Statistic's Canada report, see The Daily, Thursday July 21, 2005, available online at www.statcan.ca

PRIVATE ARREST NOT SUBJECT TO THE *CHARTER*

R. v. Skier, 2005 NSCA 86

The accused was arrested by a private security guard for theft after wheeling a shopping cart out of a store in the company of a woman without paying for the items it contained. The guard advised the accused about his right to a lawyer, but it was inadequate because it did not inform of access to duty counsel. He then made an incriminating statement to the guard and was turned over to the police.

During a *voir dire* in Nova Scotia Provincial Court the trial judge concluded that the security guard was not subject to the *Charter*. The statement,

which proved the accused knew there had been no payment for the goods, was admitted. He was convicted of theft under $5,000 and breach of probation, for failing to keep the peace and be of good behaviour. He then appealed directly to the Nova Scotia Court of Appeal arguing, in part, that the trial judge erred in ruling that s.10(b) of the *Charter* was not triggered by an arrest under s.494 of the *Criminal Code*.

Justice Fichaud first examined the application of the *Charter*. He noted that the *Charter* will apply to persons in two ways:

- activities of the government, whether or not they can be classified as private, or
- a private entity implementing a specific government policy or program or a private individual acting as an agent of the state or the police.

The accused submitted that the security guard was implementing a governmental policy in the field of criminal law when he was arrested under s.494 of the *Criminal Code* and was handed over to the police. Justice Fichaud, however, rejected this argument for the unanimous appeal court. In his view, the security guard did not act as a state or police agent. Nor did s.494 expressly delegate or abandon the police arrest function. Unlike the implementation of specific governmental policy which would engage the *Charter*, mere action for a public purpose, as in this case, does not. The arrest by the security guard was not subject to the *Charter* and the appeal was dismissed.

Complete case available at www.canlii.org

Note-able Quote

Even the casual observer to this contest could not fail to note the profound irony of [the accused], having violated the privacy of Mr. Hodge in the most egregious fashion [by a break-in], now seeking Charter relief from this Court on the basis of police entry into a hotel room he has rented in the name of Mr. Hodge by the use of the credit card that he took from the home of Mr. Hodge—Justice Gage (R. v. Millar, 2005 ONCJ 61)

GENERALIZED ASSERTIONS TO SEAL WARRANT NOT ENOUGH

Ontario v. Toronto Star Newspapers Ltd. et al, 2005 SCC 41

Six search warrants were issued to the Ministry of Natural Resources under the Ontario *Provincial Offences Act* for violations related to the slaughter of cattle. The investigation garnered widespread media coverage and the police commenced a fraud investigation into the business of the meat packing operation involved. The Crown brought an *exparte* application before the Ontario Court of Justice requesting the search warrants, the information to obtain, and related documents be sealed. The Crown claimed public disclosure of materials could identify a confidential informant and interfere with the ongoing criminal investigation.

The warrants, informations, and affidavit in support of the application were ordered sealed for three months, but the Toronto Star Newspapers Ltd. and other media outlets were successful in having the sealing order quashed in the Ontario Superior Court of Justice. The Justice ordered the documents public except for any contents that could identify the confidential informant.

The Crown appealed to the Ontario Court of Appeal, but was unsuccessful. Justice Doherty concluded that the Crown had not displaced the presumption that judicial proceedings are open and public. He did, however, recognize that the materials had to be edited to protect the confidential informant. The Crown appealed to the Supreme Court of Canada, which determined the test for delaying public access to search warrant materials.

Justice Fish, writing the unanimous Supreme Court of Canada judgment, first noted that

"once a search warrant is executed, the warrant and information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public access would subvert the ends of justice." Before a search warrant is executed, this presumption of openness is rebutted. After execution of the warrant, however, openness is presumptively favoured, including openness in the pre-charge, investigative, or pre-trial stages of judicial proceedings. The onus then shifts to the party seeking to deny public access to prove disclosure would subvert the ends of justice.

The grounds required to seal warrant materials "must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperiled." Generalized assertions that publicity could compromise investigative efficacy is not enough. The test, however, must be flexible and a contextual one. The appeal was dismissed.

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

NO PRIVACY IN FRAUDULENTLY RENTED HOTEL ROOM

R. v. Millar, 2005 ONCJ 61

The accused broke into a home and stole a wallet with identification and credit cards as well as the victim's car keys and car. The victim's VISA card was used at 3 am to rent a hotel room and to pay for an escort agency. VISA security alerted the victim and police attended the hotel. Police found the victim's car in the hotel parking lot and learned from the front desk that room 211 was rented in the victim's name.

The police were given an access card to room 211 and they unlocked and opened the door but the security latch engaged. The police then knocked and the occupant disengaged the security latch. The accused was then arrested and searched. In his pocket the police located the keys to the victim's vehicle. While searching the room police found the victim's wallet, identification, and credit cards under the mattress and the hotel VISA receipt in the garbage can.

At trial in the Ontario Court of Justice the accused argued the police violated his s.8 *Charter* right when they entered his hotel room, arrested him, and searched. In noting "the profound irony" in the accused seeking *Charter* relief on the basis of police entry into a room rented with a credit card taken from the victim's home where the victim's privacy was violated in the most egregious manner, Justice Gage ruled that the accused had no reasonable expectation of privacy which would trigger s.8 *Charter* protection.

> In this case it is my view that the [accused] has not demonstrated a reasonable expectation of privacy in Room 211…at the relevant time. He was present at the time of the search, he was in possession of the room and he had the ability to regulate access by means of the security latch. He was neither the owner nor a legitimate lessee of the space. Moreover he had obtained possession and control of the room under false pretences and he had tendered fraudulent payment for the rental of the space. Since he did not give evidence we do not know what his subjective expectation was. In this case his subjective expectation would have had limited impact since it is my view that viewed from an objective perspective he could not have held any reasonable expectation of privacy. Indeed the only reasonable expectation that he could have had in the circumstances was that his fraud and impersonation would be discovered and that he would be summarily removed from the room and that is in fact what occurred. I therefore find that his section 8 rights were not breached. [para. 21]

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