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.

LEGAL AID SUFFICIENT UNLESS DETAINEE REQUESTS SPECIFIC COUNSEL

R. v. Slinger, 2006 NLTD 14

Police received an anonymous call that the driver of a truck had been drinking. A police officer located the vehicle with matching licence plate and saw it travel onto the yellow line a number of times and turn a corner without signalling. The truck was stopped and the accused had bloodshot eyes, an odour of alcohol, and failed a roadside test. He was read his *Charter* rights, the breathalyzer demand, and said he wanted to speak to a lawyer.

At the police station the officer asked the accused if he knew any lawyers, but received a negative response. The accused did not ask for a phone book or express a desire to call any particular lawyer so the officer called legal aid. The accused spoke to legal aid in private for five minutes and did not request to speak to anyone else or express dissatisfaction with the advice he received. He subsequently provided two breath samples over the legal limit and was convicted of over 80 mg% in Newfoundland Provincial Court.

The accused appealed to the Newfoundland Supreme Court arguing, in part, that his rights under s.10(b) of the *Charter* were violated. In his view the police were obligated to advise a detainee of the various options open to them if they indicated an interest in speaking to a lawyer. Justice Schwartz, however, disagreed stating:

> …I am satisfied that if a detained person requests specific counsel, or a phone book to call a particular lawyer, or seeks a lawyer specializing in a specific field such as criminal law, the police officer should accommodate that person and make all reasonable efforts to meet the request. However, when no such specific request is made a police officer has fulfilled his duty to a detained person pursuant to the Charter when he facilitates an arrangement for that person to speak to counsel through the Legal Aid toll free number. It is then incumbent upon the detained person to make a further request to speak to a specific lawyer or to convey he is not satisfied with the advice received and wishes to speak with someone else.
>
> .....
>
> Circumstances of each particular case must always be assessed. In this matter the facts indicate that after the [accused] was read his Charter Rights and Police Caution the police officer contacted the Legal Aid toll free line and made arrangements for [the accused] to speak to counsel by telephone. The [accused] did not refuse to speak to the lawyer contacted, did not indicate he wished to speak to any other particular lawyer, and after his conversation did not express a desire to obtain further advice from another lawyer. He also did not say he was dissatisfied with the information he had received.
>
> If [the accused] had expressed a desire to speak to someone else, either before or after the call was made to Legal Aid, and such a request was rejected, this could formulate a possible Charter breach. Such is not the case in this matter. [paras. 22-25]

There was no *Charter* breach and the breathalyzer certificate was admissible.

Complete case available at www.canlii.org

HIGHLIGHTS IN THIS ISSUE

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

"I'm a retired member…and am currently teaching new recruits criminal law and related topics…and have been for about two years now. I have had occasion to read your newsletter several times as it was forwarded to me by other members of the service. It is such a useful tool to try and keep current with some guiding cases. I appreciate the way you summarize the information so the substance of the decision is quite apparent. At times I have used the cases as a case study exercise in my classes. I understand that your target audience is the operational police officers across British Columbia. I was wondering if I could be added to your distribution list even though I'm an Albertan."—**Recruit Instructor, Alberta**

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"I have been receiving this newsletter from a co-worker over the last little while. It's a good read"—**Police Constable, RCMP British Columbia**

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"Thanks for all your great work on such a useful product!!"—**Special Investigations Unit**

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"Always a pleasure reading the 10-8"—**Police Sergeant, Manitoba**

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"Great newsletter. Can you put me on the e-mailing list?"—***Police Officer, Manitoba***

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"I find your publication extremely informative and practical for operational members. Thank you."—**Police Corporal, RCMP British Columbia**

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"Thank you for the recent copies of 10-8. It is greatly appreciated in the office. I like your Legal Road test feature. An excellent newsletter…"—**Crown Prosecutor, British Columbia**

'IN SERVICE' LEGAL ROAD TEST

The "In Service" Legal Road Test is a simple multiple choice quiz designed to challenge your understanding of the law. Each question is based on a case featured in this issue. See page 19 for the answers.

1. Implied licence allows the police to get from the sidewalk to a person's doorstep for the purpose of communication without violating the person's right to privacy.
   (a) true
   (b) false

2. When searching for evidence as an incident to lawful arrest the police can search for evidence related to any offence.
   (a) true
   (b) false

3. When the police enter a residence with a search warrant and arrest the occupants they are always entitled to hold off providing the arrestees access to a lawyer until the search is commenced.
   (a) true
   (b) false

4. When assessing reasonable grounds for arrest during a police operation, the individual knowledge of the arresting officer is what counts rather than the collective knowledge of all the police officers involved in the operation.
   (a) true
   (b) false

Note-able Quote

Kind words can be short and easy to speak, but their echoes are truly endless—Mother Teresa

[1] Senior officers
[2] Non-commissioned officers
[3] Constables

FAST FACTS

Police agencies policing a population of 100,000+

Locale	Prov	SOs[1]	NCOs[2]	Csts.[3]	Total
Toronto	ON	89	1,195	3,933	5,217
Montreal	QC	243	975	2,932	4,150
Peel Reg.	ON	44	287	1,292	1,623
Calgary	AB	33	338	1,140	1,511
Edmonton	AB	28	308	998	1,334
Vancouver	BC	40	174	1,071	1,285
Winnipeg	MB	23	275	908	1,206
York Reg.	ON	28	204	896	1,128
Ottawa	ON	29	241	848	1,118
Durham Reg.	ON	22	178	556	756
Hamilton Reg.	ON	17	169	555	741
Quebec	QC	57	159	478	694
Niagara Reg.	ON	16	137	520	673
Waterloo Reg.	ON	20	138	493	651
Longueuil	QC	45	118	392	555
London	ON	12	113	408	533
Halton Reg.	ON	14	88	418	520
Laval	QC	45	104	317	466
Surrey (RCMP)	BC	9	104	345	458
Windsor	ON	14	124	313	451
Halifax Reg.	NS	10	75	336	421
Saskatoon	SK	10	102	248	360
Regina	SK	10	122	206	338
Gatineau	QC	38	73	221	332
St John's	NF	14	55	182	251
Greater Sudbury	ON	6	48	176	230
Burnaby (RCMP)	BC	4	54	156	214
Thunder Bay	ON	6	33	173	212
Sherbrooke	QC	9	27	164	200
Richmond (RCMP)	BC	3	42	153	198
Abbotsford	BC	7	37	143	187
Saguenay	QC	14	22	143	179
Barrie	ON	6	36	133	175
Kingston	ON	5	27	143	175
Trois-Rivieres	QC	22	14	137	173
Cape Breton Reg.	NS	5	28	137	170
Guelph	ON	7	30	130	167
Chatham-Kent	ON	8	25	131	164
Saanich	BC	6	29	109	144
Delta	BC	5	18	118	141
Kelowna (RCMP)	BC	3	30	105	138
Codiac Reg.	NB	2	27	108	137
Levis	QC	11	26	92	129
Terrebonne	QC	7	13	106	126
Coquitlam (RCMP)	BC	3	27	92	122

Source: Police resources in Canada, 2005. Statistics Canada-Catalogue no. 85-225

APPROACH TO HOME OK TO COMMUNICATE

R. v. LeClaire, 2005 NSCA 165

Police received an anonymous tip of a possible impaired driver. A man had been seen staggering to a truck and drive away. The licence number was provided and police attended the owner's address, finding the truck parked in the driveway. The garage door was open and the officers could see a light in the door window that lead from the garage to the living area of the house. The officers went into the garage, saw a man inside the house, and knocked on the door. The accused opened the door and the officers told him they were investigating an impaired driving complaint and asked if they could come in. The accused was intoxicated, as evidenced by his physical condition, advised he could remain silent, and read his *Charter* rights. He admitted to drinking beer and then driving, that he had arrived home about 15 minutes earlier, and that he had drank some rum since. The officer read the breath demand and transported the accused to the police station, but he refused to provide a sample.

At trial in Nova Scotia Provincial Court the judge found the garage entry unreasonable to the point where the accused allowed the officers inside his home, at which point it became lawful. The judge also ruled that the officer had reasonable and probable grounds to make the breath demand. The accused was convicted of refusing to provide a breath sample under s.254(5) of the *Criminal Code*, but then appealed to the Nova Scotia Court of Appeal arguing the trial judge erred in holding that the unreasonable search was cured by the granting of permission to enter the house and that the officer had reasonable and probable grounds for the demand.

The Knock at the Door

Justice Roscoe, authoring the unanimous judgment for the appeal court, ruled that the entry into the garage to knock on the door was not an unreasonable search. The police were entitled to go through the garage and knock under the implied licence doctrine. He explained the doctrine as follows:

> There is an implied licence for all members of the public, including the police, to approach a door of a residence and knock… If the police act in accordance with this invitation, there is no intrusion upon the privacy of the occupant. The purpose of the approach to the door is determinative of whether they have operated within the implied invitation to knock. If the purpose of the police officer is to simply communicate with the occupant in a normal manner, proceeding from the street to "reach a point in relation to the house where he can conveniently" do so, is permitted within the implied licence [para. 13]

And further:

> There is an implied invitation to the public to approach a door of a house to knock on it. If the police do not exceed the extent of the implied invitation, they do not intrude upon the privacy of the occupant. If the purpose is to simply communicate with the occupant, there is no breach of the privacy right. So for example, if the police approach the door with the intent of selling tickets for a charity event, there would likely be no encroachment upon privacy rights. [para. 27]

As long as the motivation for the approach to the house is not to gather evidence (such as purposively taking a sniff), there is no s.8 violation. Approaching to communicate or ask questions to further an investigation is permissible. The Court also noted that the approach extends to the point where a person can conveniently knock on the door, not a route elsewhere on the property to obtain evidence. In concluding that the police did not conduct an unreasonable search in this case, Justice Roscoe stated:

> In this case the police officers testified that there were no lights on upstairs and that it appeared that the path to the door of the

living quarters, where they could see a light, led through the garage. By proceeding through the open garage to knock on the door leading into the residence, they progressed "to the point where a person can conveniently knock on the door." By walking through the garage they were making a "direct approach" to the door apparently used by the occupants to enter the dwelling, not conducting a "trespassory detour" elsewhere on the property to secure evidence.

[In other] cases where the suspects were followed into their garages by the police are entirely distinguishable from the facts in this case. Since [they] were personally present in their garages with the doors open, the police did not stop to knock. The police in those cases just walked right in without asking any permission. Therefore the drivers had no opportunity to choose not to answer the knock on the door or to refuse to be observed or engaged in conversation. Unlike in the present case, the police in those cases were able, by entering into the garages, to obtain relevant evidence about the condition of the drivers without first asking permission to enter. Another difference is that in both of those cases the suspects objected to the presence of the police in their garages. There was obviously no implied invitation to enter or an explicit invitation like the one extended by [the accused] in response to the knock. Any implied invitation to enter the garage in [the other cases] was clearly and expressly retracted.

Conversely, the entry into [the accused's] garage was innocuous. The open garage was like an extension of the driveway, forming part of the approach to the door. No evidence was secured by walking through the garage to knock on the door.

I therefore conclude that in the circumstances of this case, the conduct of the police did not amount to a search within the meaning of s. 8 of the Charter, because their purpose when they went onto the property of the [accused] was to investigate the commission of an offence, not to specifically gather evidence to use against the [accused]. Furthermore, on these facts, the entry through the garage in order to access a door on which to knock did not exceed the authority implied by the invitation to knock and therefore did not infringe on the [accused's] reasonable expectation of privacy. I would dismiss this ground of appeal.

Although I would dismiss this ground of appeal, I emphasize that it is for different reasons than those given by the trial judge. I do not agree that if the walk through the garage had been properly categorized as an unlawful search, the actions of [the accused] in permitting the officers to come into his home should be considered to be a waiver of his right to privacy. I would respectfully disagree with the conclusion that the evidence supports a finding that the consent to enter the home was both voluntary and informed as required by the case law on waivers…[references omitted, paras. 31-35]

Reasonable and Probable Grounds

While his intoxication was apparent to the officer at the home, the accused submitted the officer did not have reasonable and probable grounds to believe he was impaired when he drove his vehicle earlier. He argued the information about his staggering was third hand hearsay and the police were not experts in the effects of alcohol on the body, including rates of absorption and elimination.

Reasonable and probable grounds require a subjective and an objective analysis. The subjective branch relates to the officers honestly held belief while the grounds must also have an objective foundation. In this case there were ample grounds; the anonymous tip, an admission to drinking then driving, a strong smell of alcohol, unsteadiness, glossy eyes, and slurred speech. "The fact that part of the bundle of information available to the officers was hearsay arising from an anonymous tip is not material", said Justice Roscoe.

The argument that there were not sufficient grounds to believe the accused was impaired when he was driving, but may have become

impaired since drinking at home, was also rejected:

> [The trial judge] accepted that the officer was entitled to rely on his own opinion of [the accused's] sobriety at the time of talking with him as a basis for believing that he was impaired at the time of driving. Although the officer's opinion would not be sufficient evidence upon which to base a conviction for impaired driving, I agree with the trial judge that the officer is able to rely on his own judgment and past experience when determining whether he has reasonable and probable grounds. …[T]he officer is entitled to make certain assumptions based on his observations of the suspect. Although [the accused] told the officers that he had been drinking since arriving home, the officers were entitled to evaluate the validity of that statement in the context of the other evidence relating to the glasses. [para. 44]

And further:

> I am not satisfied that the trial judge in this case committed any error in concluding that the officer had reasonable and probable grounds to make the demand for a breath sample. The information giving rise to the reasonable and probable grounds included the admission by [the accused] that he had been driving a few minutes before, that he had a few beers before he drove, that he was very likely the person seen by the informant to be staggering, and the numerous physical indicia of impairment, including slurred speech, unsteadiness, glossy eyes, and a strong smell of alcohol. These factors, coupled with the officer's understanding that it takes time to get that drunk, established reasonable and probable grounds that [the accused] was impaired at the time of driving. [para. 47]

The appeal was dismissed.

Complete case available at www.canlii.org

Note-able Quote

Education is learning what you didn't even know you didn't know—Daniel J. Boorstin

HOTEL DESK DRAWER A 'PLACE' FOR BREAK-IN PURPOSES

R. v. Charron, 2005 BCCA 607

The accused was observed by a hotel operator on video surveillance looking into a hotel's pantry through a keyhole and then enter a concierge area by stepping over a latched gate. The operator called security and the accused was confronted about 10 feet from the concierge's desk. He said he was visiting a friend but there was no-one by the name he provided registered at the hotel. When told this information, the accused said he made a mistake and his friend was actually staying at another hotel nearby. After the security guard attempted to verify the accused's story, they returned to the hotel where the accused emptied his pockets on request, producing a broken cutlery knife embossed with the hotel's initial, as well as some pills which he quickly swallowed. Fresh damage to the desk drawers in the concierge area was also discovered.

At trial in British Columbia Provincial Court the accused was convicted of the *Criminal Code* offences of break and enter and commit an indictable offence (theft) as well as possession of break-in instruments (a prying knife). The trial judge concluded the concierge area was a "place" as defined in s.348(1)(b) of the *Criminal Code*. However, the judge did not make a specific finding of theft.

The accused appealed to the British Columbia Court of Appeal. Although the Crown conceded there was insufficient evidence to support a theft, Justice Low, authoring the unanimous judgment, quashed the conviction for break and enter and commit an indictable offence (theft) and substituted a conviction for break and enter with intent to commit an indictable offence. As for the possession of break-in instruments conviction the accused challenged whether the desk or drawers in the concierge area was a

"place" as defined in the *Criminal Code* and also whether the broken knife was suitable for break-ins. In upholding the trial judge's decision on these issues, Justice Low stated:

> …the trial judge had already said that the [accused] was "in a building or structure or any part thereof". This is in accord with the definition of place in s. 348(3)(b) of the *Code*. Both the desk and the drawers in it were a "place".
>
> As to the suitability of the knife as a break-in instrument, that is a matter of common knowledge…It is common experience that a knife could be used to force a gate latch or a drawer lock.
>
> The explanations given by the [accused], even if believable, merely suggest one or another reason for him being in the hotel. They do not explain his presence in a closed-off area. [references omitted, paras. 12-14]

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

APPROVED SCREENING DEVICES vs. APPROVED INSTRUMENTS

Under s.254 of the *Criminal Code* a peace officer can give two types of breath test demands. An approved screening device demand can be made under s.254(2) if a peace officer reasonably suspects a person operating or in care and control of a motor vehicle has alcohol in their body. An approved screening device is defined as "a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person and that is approved for the purposes of this section by order of the Attorney General of Canada."

Under the *Criminal Code* Regulations—Approved Screening Devices Order—the following devices, are approved for the purposes of section 254 of the *Criminal Code*:

(a) Alcolmeter S-L2;
(b) Alco-Sûr;
(c) Alcotest®7410 PA3;
(d) Alcotest® 7410 GLC;
(e) Alco-Sensor IV DWF;
(f) Alco-Sensor IV PWF; and
(g) Intoxilyzer 400D.

An approved instrument demand (aka. breathalyzer demand") can be made under s.254(3) if a peace officer has reasonable and probable grounds to believe a person has committed, by consuming alcohol, the offence of impaired driving/care or control or over 80mg%. An approved instrument is defined as "an instrument of a kind that is designed to receive and make an analysis of a sample of the breath of a person in order to measure the concentration of alcohol in the blood of that person and is approved as suitable for the purposes of section 258 by order of the Attorney General of Canada."

Under the *Criminal Code* Regulations— Approved Breath Analysis Instruments Order—the following instruments are approved as suitable for the purposes of section 258 of the *Criminal Code*:

(a) Breathalyzer ®, Model 800;
(b) Breathalyzer ®, Model 900;
(c) Breathalyzer ®, Model 900A;
(d) Intoximeter Mark IV;
(e) Alcolmeter AE-D1;
(f) Intoxilyzer 4011AS;
(g) Alcotest® 7110;
(h) Intoxilyzer ® 5000 C;
(i) Breathalyzer®, Model 900B;
(j) Intoxilyzer 1400;
(k) BAC Datamaster C;
(l) Alco-Sensor IV-RBT IV;
(m) Breathalyzer® 7410-CDN with Printer;
(n) Alco-Sensor IV/RBT IV-K; and
(o) Alcotest 7110 MKIII Dual C.

SUSPENSION OF RIGHT TO COUNSEL TOO LONG

R. v. Patterson, 2006 BCCA 24

After stopping a black Cadillac at about 1:00 pm, the police officer saw the male driver and female passenger quickly change seats. The officer had been present when the accused was served a driving prohibition a month earlier and had known him to be aggressive. He complied with an order to exit the vehicle, was arrested for driving while prohibited under British Columbia's *Motor Vehicle Act*, and patted down. A baggie containing 13.8 grms. of cocaine was found in his pants pocket. He was then arrested for possession for the purpose of trafficking and a search of the vehicle resulted in the seizure of an expandable baton in the centre of the console. The accused, along with two passengers, was arrested for possession of a prohibited weapon and given his *Charter* rights and warnings. He requested to speak to a lawyer and was transported to police cells, arriving at 1:24 pm.

The accused was not allowed to call his lawyer because the officer wanted to search his residence. He was concerned for officer safety and the destruction of evidence if the arrestees called someone before the search was completed. A warrant was obtained at 5:01 pm and the search began at 5:50 pm, ending at 7:16 pm. Drug paraphernalia, cash, and weapons were seized. The accused was offered the use of a telephone at 7:30 pm.

At trial the judge concluded that the officer had reasonable and probable grounds to arrest the accused without a warrant under s.79 of the *Motor Vehicle Act* for prohibited driving. The cocaine was found during a non-intrusive pat down search and an arrest for possession for the purpose of trafficking followed. The judge also ruled that the accused's right to counsel had not been violated until the search warrant was executed. In her view the police were entitled to get the premises under control given the officer's concern about safety and evidence preservation. However, once the search was commenced at 5:50 pm the accused should have been allowed access to counsel. The cocaine was nonetheless admitted as evidence under s.24(2) of the *Charter* and the accused was convicted of possessing cocaine for the purpose of trafficking under s.5(2) of the *Controlled Drugs and Substances Act*.

The accused appealed to the British Columbia Court of Appeal arguing, in part, that the trial judge erred in not finding a s.8 *Charter* violation regarding the search incidental to arrest and that his rights under s.10(b) were also breached when he was held "incommunicado" and denied access to a lawyer from the time he was arrested until the search was completed on his residence.

The Arrest and Search

Justice Levine, authoring the unanimous appeal court judgment agreed with the trial judge that the officer had "obvious" grounds for arrest; he was involved with the service of the accused's driving prohibition a month prior, he saw him driving a vehicle he was known to drive, he saw him move from the driver's seat to the passenger seat, knew he was aggressive and had reasonable grounds to be concerned for his safety. Justice Levine stated:

> I agree with the trial judge…that it was not reasonably necessary for the police officer to check his computer to confirm that the driving prohibition was still in effect, nor was it necessary in the circumstances for him to ask whether the prohibition had been appealed and stayed.
>
> There is no basis to find, as the [accused] alleges, that the police officer breached s. 29(2) of the *Criminal Code* by failing to advise the [accused] that he was being arrested for driving while prohibited. The [accused's]

> conduct in changing seats made it clear that he knew why he was stopped…and the officer was not required to state the grounds for the arrest before he searched the [accused].
>
> Nor is there any basis to find that [the officer] acted in bad faith. The [accused] suggests that [the officer] was "rounding up" the [accused] and the two passengers in the car for suspected drug violations. Much of the [accused's] argument regarding bad faith focused on the treatment of the two passengers, which is of course not relevant to the [accused's] claim that his *Charter* rights were breached… The trial judge made no finding with regard to bad faith. In any event, there is no basis for the claim, since the trial judge clearly found, and I agree, that [the officer] had reasonable grounds for the arrest and he believed that he had such grounds. [references omitted, paras. 20-22]

Since the arrest was properly based on reasonable grounds, the incidental search that followed was reasonable and did not contravene s.8.

Denial of Telephone Access

The accused argued that his rights under s.10(b) were violated because he was denied access to counsel until the search of his home was completed. He submitted that the evidence should be excluded under s.24(2) or a stay of proceedings should be granted under s.24(1). The Crown conceded his rights were violated when police denied access to a telephone after the search commenced, but contended there was no breach from arrest to the start of the search.

Justice Levine ruled that the trial judge erred in finding the police were justified in holding off on the accused's access to counsel until the search had commenced. The officer's concerns about safety and evidence were too general and not specific. After considering other case law, Justice Lavine noted:

> [The cases of] *Strachan*, *Schultz*, *James*, and *Kiloh* share certain characteristics not present in this case. All of them dealt with investigations in progress, involving high risk, volatile situations where firearms were known to be involved. The police had identifiable reasons for concerns about the potential for violence and a risk that evidence may disappear or be destroyed. In *Strachan*, the police encountered not only the accused, but two other unknown persons, during a search for known firearms. In *Schultz*, the accused was involved, with accomplices, in a violent armed kidnapping. In *James*, the accused and accomplices were involved in the violent murder of a security guard, and were known to be trading in firearms. In *Kiloh*, the accused were arrested in a volatile situation for armed robberies of jewellery stores where shots had been fired at civilians.
>
> In this case, the trial judge accepted that [the officer] had concerns about officer safety and the preservation of evidence. But the concerns were of a general nature; there was no evidence that the police knew there were weapons in the residence, or that the [accused] had accomplices in his drug dealings that were at large or in the residence. There was no investigation in progress until after the [accused's] arrest, which arose initially from a roadside stop for a driving prohibition. It took an unexplained three-and-a-half hours to obtain the search warrant, and another fifty minutes until the search of his home began. The "suspension" of the [accused's] right to counsel extended over a total of six-and-a-half hours.
>
> In my opinion, the [accused's] right under s. 10(b) of the *Charter* to retain and instruct counsel <u>without delay</u> was infringed when he was not allowed to use a telephone shortly after he was taken to the police detachment and charged. The police were not justified in "suspending" the [accused's] right for six-and-a-half hours. [paras. 40-42]

Despite this *Charter* breach, the evidence was admissible under s.24(2) and a stay of proceedings under s.24(1) was not justified. The appeal was dismissed.

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

REASONABLE GROUNDS BASED ON INDIVIDUAL BELIEF, NOT COLLECTIVE INTELLIGENCE

Richardson v. Vancouver, 2006 BCCA 36

The police organized a cleanup operation after homeless people were evicted from a large vacant building and some of the squatters, and their supporters, camped out on the sidewalk under the building's canopy. The plaintiff, a lawyer and executive director of the Pivot Legal Society, attempted to cross a police line set up to keep the peace and protect city workers removing tents, mattresses, and debris. The plaintiff was yelling, identified himself as a lawyer, and demanded to know the police authority for cordoning off the area.

He tried to get through the police line, but was told he could not cross. He continued to move through the line, so a police officer took him by the arm and moved him to the sidewalk, telling him if he tried again he would be arrested for obstructing a peace officer. He tried again and was arrested. He was handcuffed, searched, placed in a wagon, and transported to jail where he was held overnight and released without charge.

The plaintiff sued the City of Vancouver in British Columbia Provincial Court alleging, among other torts, that he was subject to a wrongful arrest. The trial judge ruled that the officer had reasonable grounds to arrest the plaintiff for obstructing the officer in the lawful execution of his duty. In the judge's opinion, the officer's perception of the events, when viewed objectively, would have been apparent to a reasonable person placed in the officer's position. The plaintiff had crossed a police cordon set up to keep the peace and protect city workers. He had been removed once and warned to stay behind the police line. His lawsuit was dismissed.

The plaintiff appealed to the British Columbia Court of Appeal arguing, in part, that the trial judge erred in finding the arrest lawful. He submitted that the trial judge only considered what the arresting officer saw or heard, and ignored what other police members were aware of. Since other officers at the scene knew he was a lawyer who represented protestors, that he requested to speak to the officer in charge, and that he demanded to know why the police barred access to the street, he suggested his arrest for obstruction was untenable. Justice Donald writing the opinion of the British Columbia Court of Appeal, however, disagreed. In his view the question was not whether the collective knowledge of the officers on scene provided the necessary grounds, but rather what was apparent to the arresting officer at the scene. Nor did it matter whether or not the plaintiff could have been convicted of the charge. Justice Donald stated:

> The lawfulness of arrest must depend on the subjective belief of the arresting officer and an objective assessment of that belief based on what the officer knew at the material time. It is a question related to the individual officer. I know of no authority that supports the notion of a collective intelligence, the sum of knowledge possessed by all the police in an operation, as the basis for judging the lawfulness of arrest. Here, [the arresting officer] arrived on the scene in the middle of the action and had no opportunity to learn what prior interaction the plaintiff had had with other officers. It cannot be said that he was indifferent or wilfully blind to relevant circumstances.
>
> The premise of the plaintiff's line of argument is that he was not guilty of obstructing the police and he therefore could not have been lawfully arrested. This is a theme running through the wrongful arrest claim and I think, with respect, it is wrong.
>
> The plaintiff runs together his criminal liability with the officer's civil liability (and the City's vicarious liability) for the tort of wrongful arrest. They each have a different

> set of legal rules and procedures; they must be treated separately to avoid the kind of confused thinking manifest in the plaintiff's argument. Many lawful arrests may ultimately result in an acquittal. If an acquittal were to create exposure to tort liability, the power of arrest would be radically curtailed. There is no logical relationship between the criminal and civil determinations; they are each aimed at different questions: "Did the accused obstruct?" is not the same as "Did the officer have reasonable and probable grounds to believe he did?" [paras. 18-20].

The appeal was dismissed.

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

CDSA SEARCH WARRANT PROVISION CONSTITUTIONAL

R. v. Barnhill & Barnhill, 2006 BCSC 42

Police executed a s.11 *Controlled Drugs and Substances Act* (CDSA) search warrant on the accused's residence and outbuildings for a marihuana grow operation at 11:35 pm. The accused and his two teenage daughters were sleeping when police entered the house. He was charged with marihuana production and possession for the purpose of trafficking, but applied in British Columbia Supreme Court to have s.11 of the *CDSA* declared unconstitutional because it violated s.8 of the *Charter* since it did not place any time restrictions on when a residence could be searched.

Section 11 of the CDSA allows a justice, when satisfied there are reasonable grounds, to issue a search warrant authorizing a peace officer to search "at any time". Unlike s.488 of the *Criminal Code*, which requires a justice to endorse a night time search (9 pm-6 am) under s.487 or a telewarrant under s.487.1, s.11 of the CDSA does not. Because there is no such limitation in s.11, the accused argued that a night time search conducted under s.11 was unreasonable and violated s.8 of the *Charter*.

Justice Joyce ruled that the absence of such a night time search limitation did not render s.11 unconstitutional. He stated:

> In my view the manufacture and trade in controlled substances creates special challenges for the police and requires special measures to deal with it. Manufacturing facilities for marihuana and other controlled substances, such as methamphetamine and ecstasy, are generally not found in industrial areas. Nor are they usually set up with safety in mind. They are commonly found in the basements and kitchens of ordinary homes and apartments in residential areas. They frequently involve dangerous electrical wiring. Toxic and dangerous chemicals are used in the manufacture of many of these drugs. The operations expose not only those who operate them to the risk of harm from fire, explosion and exposure to toxic chemicals but also unknowing neighbours and sometimes the innocent children and other family members of the operators. Weapons are often found at such operations or in the hands of those persons responsible for them. It is important, therefore, that when there are reasonable grounds to believe that a drug manufacturing operation exists in any place, including a residence, the police be able to act quickly to conduct a search, apprehend the operators and dismantle the operation.
>
> A number of decisions have emphasized the harm caused by illicit drug manufacture and trade and the difficulties faced by the authorities in combating it. They note that Parliament has adopted special provisions to deal with the problem…
>
> In my view s. 11(1) of the *CDSA* strikes an appropriate balance between the need to safeguard the rights of citizens against unwanted and unwarranted intrusions into their home and the interests of the state in the demands and challenges of law enforcement…

> It should be noted as well that there is nothing in s. 11(1) of the *CDSA* that purports to take away the residual discretion of the justice to refuse to issue a search warrant in appropriate circumstances even though the statutory criteria for its issuance have been met, that is required by s. 8 of the *Charter*…
>
> I therefore conclude that s. 11 of the *CDSA* does not contravene s. 8 of the *Charter* by reason of the fact that it permits a justice to issue a search warrant authorizing a peace office, at any time, to search the place specified for the things enumerated in that subsection. [references omitted, paras. 31-35]

The accused's application was dismissed.

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

'URGENT & HEIGHTENED CIRCUMSTANCES' JUSTIFY DETENTION

R. v. Mollazadeh, 2006 BCCA 35

A police officer received a priority one call of a shooting at a nightclub. He took up a containment position and heard on the police radio that a 911 caller reported persons involved were leaving the area in a black four door vehicle travelling through an intersection passing a police vehicle. At that moment the officer saw a black four door Jetta pass him. The Jetta was accelerating and passing other vehicles.

The officer followed the vehicle and once back-up arrived stopped it. The accused (driver) and his passenger were ordered out of the vehicle. They and the vehicle were then searched for weapons. In the car police found crack cocaine. At trial in British Columbia Supreme Court the accused argued that the police ignored other information available (the suspected shooter was a black male, a Corvette was of interest, six males ran into a dark four-door sedan) and therefore did not have articulable cause to detain him. The trial judge, however, found the detention justified, stating:

> The accused argues that the police ignored information that, if considered, would have alerted them to the possibility that the Jetta was not reasonably involved in the shooting. That information included the police radio broadcast concerning a black Corvette, six male occupants in a four-door sedan, and a black male suspect in a red t-shirt
>
> However, [the officer] could not recall hearing that information. He testified that, once he saw the dark four-door sedan pass him on Hornby Street and heard that the suspect vehicle was travelling north on Hornby and was passing a police vehicle at that location, he was then focussed on the task of following that vehicle.
>
> The police were responding to a high priority call, which calls for immediate response. They had a duty to check all leads. They did not have the luxury of waiting and synthesizing all the information available to them.
>
> When the police pulled over the Jetta, they knew that a shooting had recently occurred at the Urban Well. They had a description of a dark four-door sedan. They were told it was travelling north on Hornby Street. The sedan was reported to be passing a police vehicle at the very location Constable Barry was posted in his police wagon. There was a reasonable concern that the persons fleeing the scene of a shooting would have firearms in their possession
>
> In my respectful view, that information constitutes, in the urgent and heightened circumstances of this case, a combination of objectively discernible facts that justified the police detaining the occupants of the Jetta.

The accused was convicted of possession of a controlled substance for the purpose of trafficking but appealed to the British Columbia Court of Appeal arguing he was arbitrarily detained and the drugs should not have been admitted as evidence. Justice Ryan, delivering

the opinion for the Court, disagreed. In her view, the trial judge did not err in her analysis. The appeal was dismissed.

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

YOUTH SENTENCING ONUS UPHELD

R. v. K.D.T., 2006 BCCA 60

The accused, a young person under the *Youth Criminal Justice Act* (*YCJA*), was convicted of manslaughter in British Columbia Supreme Court. Since manslaughter is a "presumptive offence" under s.2 of the *YCJA*, an adult sentence is required unless the youth applies for a youth sentence and satisfies the court that a youth sentence is appropriate in the circumstances. The accused applied to be sentenced as a youth, but Crown opposed the application.

The sentencing judge then ruled that the accused's rights under s.7 of the *Charter (*the right to life, liberty, and security of the person) were breached because he bore the onus of persuading the court that he should not be sentenced as an adult. The judge ordered that Crown now needed to prove the accused should get an adult sentence. She sentenced the accused as a youth and gave him a sentence of 20 months in custody followed by 12 months supervision and a 10 year firearms ban and ordered a DNA sample. The Crown appealed the judge's ruling on the constitutionality of the sentencing provision under the *YCJA* as well as the sentence given.

Under the old *Young Offenders Act* (*YOA*) a youth charged with a serious crime could be raised to adult court. Today, however, there is a presumptive offence regime found in s.72 of the *YCJA*. If a youth 14 years or older is convicted of a presumptive offence (such as manslaughter), they are to be sentenced as an adult, unless the accused applies for an order that they be sentenced as a youth. If the Crown opposes the youth's application a hearing will be held to determine the appropriateness of a youth sentence. The *YCJA* presumptively places the onus on the youth to justify a youth sentence rather than on the Crown to justify an adult sentence.

Justice Braidwood, authoring the unanimous British Columbia Court of Appeal decision, ruled that s.72 did not violate s.7 of the *Charter*. After reviewing several cases and considering the transfer provisions under the former *Young Offenders Act*, he stated:

> The onus described in…s. 72(2) of the *YCJA* is not one that contains a requirement of proof, nor does it remove the onus on the party bringing forward contested facts to prove those facts. As in any sentencing situation, if the Crown wishes to bring forward evidence of aggravating factors, the Crown bears the burden of proving any relevant facts that are contested. Likewise, contested facts in support of mitigating factors must be proved by the offender. As in all sentencing situations, the aim of the judge is to balance the considerations raised and arrive at an appropriate sentence.
>
> It is also important to bear in mind that s. 72(2) of the *YCJA* does not mark the debut of a presumptive offence regime or a reverse onus in the Canadian youth criminal justice system. The post-1995 *YOA* contained a presumptive offence scheme as well: a young person charged with a presumptive offence had to apply to be tried in youth court, as opposed to the general court system, and satisfy the court that the change of forum was appropriate in the circumstances. Courts in several jurisdictions, including British Columbia, held that there was no constitutional breach created by the onus provision set out in the 1995 version of the *YOA*…
>
> ……
>
> …"Once guilt has been established, our fundamental principles of justice dictate a focus on the most appropriate sentence for the guilty party." By establishing the

> presumptive offence regime under the *YCJA*, Parliament has said that the appropriate sentences for serious violent crimes are adult sentences. By providing the convicted youth the opportunity to satisfy the court that an adult sentence is not appropriate in his or her circumstances, Parliament allowed an appropriate sentence to be crafted that takes both the vulnerability of young persons and the purposes of the *YCJA* into account.
>
> In summation, the onus on the applicant under s. 72(2) of the *YCJA*…does not place an onerous burden of proof on the convicted youth. While it is true that the framework in the *YCJA* is, in some respects, different from that in the *YOA*, it is not sufficiently distinct to indicate that there is a different onus being placed on the convicted youth under s. 72(2) than the onus on the accused youth at a transfer hearing. If the onus was constitutionally acceptable at the pre-trial stage, where s. 7 rights play a more significant role, then it is also constitutional at the sentencing stage. I find that s. 72(2) of the *YCJA* is not contrary to s. 7 of the *Charter*. It is not necessary therefore to address whether the provision is justified under s. 1. [references omitted, paras. 62-68]

And further he went on to conclude:

> The onus provision in s. 72(2) of the *YCJA* does not violate s. 7 of the *Charter*. The onus on the convicted youth to demonstrate that he or she should be sentenced as a youth is a legislative choice that forms part of the balancing of considerations that occurs in the sentencing procedure. It is not a heavy burden, but is consistent with the standard described by the Supreme Court of Canada… Further, it is not an onus that applies with regard to issues of guilt or innocence, nor are concerns about a fair trial raised when dealing with the sentencing process.
>
> In the context of the *YCJA*, I am not persuaded that a young person would face an unreasonable burden in a sentencing hearing under s. 72. When the tests in s. 72 are properly applied, the persons who will receive an adult sentence for a presumptive offence are those for whom a youth sentence would not provide accountability. [paras. 82-83]

As for the sentence, an adult sentence was appropriate. Justice Braidwood found a sentence of 2 years less a day with 2 years probation fit. The 10 year firearms ban and DNA sample remained in effect.

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

AMBULANCE ATTENDANTS NOT 'CONSTITUTIONAL INTERVENORS'

R. v. Brissonnet, 2006 ONCJ 31

Two ambulance attendants driving in a marked ambulance followed the accused driving erratically over three blocks. The ambulance driver, concerned there might be an accident, used emergency lights and siren to get the accused's attention while the other attendant waved him over. After a brief conversation, an attendant was satisfied there was nothing medically wrong and asked the accused for his car keys, which were surrendered. The police were called, arrived 15 minutes later, and arrested the accused for impaired operation. He was advised of his rights to counsel and read the breath demand, later providing samples of 173 mg% and 161 mg%.

At trial in the Ontario Court of Justice the accused applied to have the evidence gathered by the ambulance attendants excluded under s.24(2) of the *Charter* because they did not advise him of his s.10(b) rights. Furthermore, without their evidence, the accused argued the officer did not have reasonable grounds for the breath demand, thereby violating his right to be secure against unreasonable search and seizure. In his view, the breathalyzer readings should also be excluded.

Although the ambulance attendants were employees of a municipal government and acted

under their statutory powers under the *Highway Traffic Act* in order to stop the accused, they were not "constitutional intervenors" when they took his keys and detained him until police arrived. In ruling that it was not necessary for the ambulance attendants to provide the accused with his rights under s.10(b) of the *Charter*, Justice Harris stated;

> …the real question to be asked is whether the individual initiating the detention is a "constitutional intervenor" for the purposes of the Charter (rather than a State agent - an expression now devoid of all meaning).
>
> Extrapolating from existing case law on detention, it is submitted that the "detainor" is a constitutional intervenor and responsible for the provision of s. 10 rights if the individual satisfies one of the following two criteria:
>
> (a) The detainor initiated contact with the accused at the request or direction of the police, pursuant to an express delegation of police powers…
>
> Or,
>
> (b) The detainor initiated contact with the accused specifically and primarily for the purpose of conducting a criminal investigation within the terms of his/her employment and there has been at least partial abandonment of a police power to the private sector…
>
> In this case, the contact with [the accused] was primarily for the purpose of public safety - protecting other drivers from a head-on collision. That the ambulance attendants might ascertain that the cause of the erratic driving was due to alcohol impairment or some other medical explanation, was incidental to the purposes of the stop: They certainly were not conducting a criminal investigation. As well, their actions were entirely outside the normal terms of their employment. While they may have used the emergency equipment on the vehicle improperly and in a manner unintended by the enabling legislation, their actions can be justified as a minor provincial violation in pursuit of the preservation of human life, not unlike a police vehicle passing through a red light in pursuit of a dangerous driver. In other words, the ambulance attendants were acting in a civilian capacity notwithstanding the fact that they were employed by the (municipal) government and they briefly used, in a very minimal fashion, a statutory power they possessed to bring the defendant's vehicle to a standstill. The two criteria listed above would place the ambulance attendants outside of the application of the Charter and as well, would have the virtue of permitting government employees to intervene in their civilian capacity to preserve life and property from the tragic results of drinking and driving without the judicialization of government/civilian relations beyond the point that society could tolerate.
>
> Further, the ambulance attendants in their civilian capacity do not meet the definition of constitutional intervenors because they were neither acting under the direction of the police nor conducting a criminal investigation within the terms of their employment. They were merely civilians acting to protect the public from another civilian…
>
> Consequently, in all the circumstances, I find that the ambulance attendants were not constitutional intervenors and were not responsible for, or expected to, provide the defendant with his rights under s. 10 of the Charter. If I am wrong in the conclusion such that there was a breach of s. 10(b), I would conclude that the breach was of such a minor nature that to exclude the evidence requested would bring the administration of justice into disrepute. The attendants were acting in good faith as responsible, concerned citizens to protect the public from what was becoming a very dangerous situation. They should be encouraged to do so. Their intervention was as minimally intrusive as was required to remove the danger. Finally, the evidence (the observations of the attendants) was non-conscriptive and did not affect trial fairness; the charges were serious and the defendant had little expectation of privacy as to his manner of driving. Having ruled against the alleged s. 10(b) violation and application to

> exclude evidence, it will not be necessary to consider the Charter s. 8 argument. [references omitted, paras. 19-23]

The breathalyzer readings, however, were excluded on other grounds.

POLICY BASED ERT ENTRY UNREASONABLE

R. v. Bui & Nguyen, 2006 BCPC 47

After obtaining a search warrant for a marihuana grow operation at a residence, police used an Emergency Response Team (ERT) to serve the warrant. An officer used a bullhorn to make four announcements the police were there to serve a search warrant, the occupants were under arrest, and they should come to the door and show themselves. There was no response and the front door was rammed. Inside the house police found two adult residents who were removed from the house at gunpoint with their nightclothes on. They were arrested, handcuffed, searched, and handed over to investigators. The house was cleared, a marihuana grow operation was located, and the search warrant was left on the kitchen table.

During a *voir dire* in British Columbia Provincial Court the judge heard testimony that it was police policy to use ERT to serve warrants on residences where there was theft of hydro or marihuana grow operations. In the ERT leader's opinion, ERT was best trained to address the unknown risks associated with grow operations where weapons or explosives could be present. As well, occupants could be violent and there could be electrical hazards present. On the other hand, the officer testified he did not know of any members being injured or attacked by weapons when executing these warrants. Furthermore, the officer said an operational plan is usually developed and the residence may have been checked for history, databases may have been searched for suspects, a drive by may have been done, floor plans may have been obtained, and surveillance for updated intelligence may have been conducted. The officer, however, did not know which checks were done or the results.

The accused argued, in part, that their rights under ss.8 (search and seizure) and 9 (arbitrary detention) of the *Charter* were violated. It was suggested that the police entry and search of the residence was unreasonable and that the arrests were unlawful.

Judge Bennett agreed with the accused and ruled the police violated their rights. First, the way the police conducted their entry was unreasonable under s.8 of the *Charter*. The court held:

> Crown counsel submitted that police officers took a very measured and slow approach to entering the residence. They were in uniform and properly identified themselves. In the circumstances, to police took reasonable steps to execute the warrant.
>
> I cannot accept those submissions. The basis for the policy of using the ERT to serve warrants for hydro thefts and marijuana grow operations is based on risk of danger. However, that policy is not consistent with [the ERT leader's] seven years experience on the ERT. If there is a statistical basis for the policy, it was not be tendered into evidence.
>
> More specifically in this case, there is very little evidence of what actually was done to develop an operational plan. It could easily be inferred that because the policy was in place, regardless of the circumstances, there was no actual need to develop a realistic operational plan.
>
> The question of whether the use of force to enter a residence was reasonable was addressed in *Regina* v. *Vadon*, [2000] B.C.J. No. 2081 (B.C.S.C.). In that case, the police had a search warrant for a suspected marijuana grow operation in a house. The police officers used a battering ram on a door to gain entry to the house. Several officers rushed into the house with their guns drawn. They did this prior to

announcing that they were the police and had a search warrant. Regarding the manner of entry, Williamson J. held:

> "Here, there is no evidence of a suggestion, let alone an explanation, of a violent response at this house. Indeed, the evidence was that if the police had grounds to expect such a response, they would have utilized the services of the emergency response team. There is no evidence of any discussion by the police officers on this issue with respect to this residence. Rather, the evidence indicates it was policy. In other words, something along the lines of the carte blanche criticized by Chief Justice Dickson, a routine practice of effecting such entry without regard to the actual knowledge of the circumstances pertaining with respect to a particular incident.
>
> To attempt to justify the routine use of a battering ram to violate, unannounced, a private residence on the grounds that there have been weapons found in some homes where there have also been marijuana grow operations does not come close to meeting the onus upon the police to show why they concluded that such force and surprise were necessary in a particular entry. It is clear from the comments in Genest that the Crown must lay an evidentiary framework to show that there were grounds to be concerned about the possibility of violence in this particular case. No such evidence was led." (paras 20 and 21).

> Although the…police did make the required announcements before ramming the door of the residence, the same legal principles apply. If there were reasons for the use of the ERT at this particular residence, they are not in evidence. The evidence of policy is not sufficient. Therefore, I can only conclude that the manner of entry, in particular, was unreasonable.Enter [paras. 26-30]

As for the lawfulness of the arrest, Judge Bullar Bennett concluded there were no reasonable grounds and the accused were therefore arbitrarily detained, stating:

> The police executing the search warrant did not have arrest warrants. Their surveillance of the residence in the early morning immediately prior to their attendance at the residence did not show indications of any human life inside. Their investigation and the early morning surveillance did not link either [accused] to the residence. [The accused] were merely "found in" the residence. They were arrested before the search commenced. Then, without questioning, they were taken to the police station and held there in cells for the better part of the day. [para. 34]

And further:

> ... In the case before me, [the accused] were merely "found ins". There were no reasonable and probable grounds for believing that [they] were, had or were about to commit any crime. Therefore, the arrests were not made pursuant to Section 495(1) of the *Code*. The arrests were arbitrary and unlawful. I do conclude that both of the accused's rights under Section 9 of the *Charter* were breached. [para. 37]

The evidence, including the electrical diversion and marihuana plants, was excluded.

Complete case available at www.provincialcourts.bc.ca

SEARCH MUST BE RELATED TO REASON FOR ARREST

R. v. Mitchell, 2005 NBCA 104

Police in New Brunswick were on the look out for the accused because they had information he would be travelling to their area to sell crack, he had an undertaking to remain in Nova Scotia, and he was under investigation for obstructing justice by falsely identifying himself. They saw his car and pulled it over. The accused was driving and was unable to provide a driver's licence, registration, or insurance. He again provided a false name and was arrested for obstruction of justice and breach of undertaking. He was frisk searched and police found $1,175 in cash but no drugs. He was advised of his right to counsel and wanted to speak to a lawyer.

After informing the accused his uninsured vehicle would be towed to the police station, he

told officers there was $2,000 in the glove box. The police said they would inventory the contents of the car and it would be placed in a secure area. A further search revealed 24.6 grms of crack cocaine hidden behind the gas cap cover. He was arrested for this offence, again advised of his rights, and subsequently charged with possession for the purpose of trafficking. At no time did the police inform the accused they suspected him of possessing cocaine or that they were going to search his car for such.

The accused filed a motion in New Brunswick Provincial Court alleging his rights under s.8 of the *Charter* had been breached. The police testified that in their opinion the accused's car contained cocaine but they did not want to arrest him because he then might be able to identify the informant. As well, police said a search warrant was not obtained because they were searching incidental to arrest. The grounds the police proffered were the informant information, the large amount of money in possession of the accused, and the money found in the glove box. The accused submitted that the search was not incidental to arrest and violated his right to be secure against unreasonable search and seizure protected by s.8 of the *Charter*.

The trial judge ruled there was no unreasonable search. As long as the police had reasonable grounds (subjective/objective test) to search the car, the common law allowed them to search as an incident to arrest. The evidence was admitted and the accused was convicted.

The accused appealed the judge's ruling to the New Brunswick Court of Appeal. Justice Robertson, authoring the Court's unanimous judgment on the s.8 *Charter* issue, allowed the appeal, largely relying on the Supreme Court of Canada decision *R. v. Caslake* [1998] 1 S.C.R. 51. Although warrantless searches are *prima facie* unreasonable, a search incidental to arrest can be undertaken to secure the safety of the police and public, to protect evidence from being destroyed, and to discover evidence that can be used at trial. If the search is to find evidence related to the arrest, there must be a reasonable prospect of doing so. But this is not the same as having reasonable grounds to conduct the search. Rather, as Justice Robertson explained:

> …What is required is that the police have a reasonable basis for conducting the search, which is to be evaluated on both a subjective and objective level. The subjective element asks whether the police officer conducting the search was actually doing so for purposes related to the arrest. The objective component ensures that the police officer's belief that a valid purpose would be served by conducting the search was reasonable in the circumstances… [para. 13]

In this case, the police arrested the accused for obstruction of justice and the search was not related to that reason. Justice Robertson held:

> Applying the law…to the facts of the present case, it is clear that the police did not search the [accused's] car for purposes of finding evidence related to the reason for his arrest. The police were searching for illegal drugs. That objective is entirely unrelated to an arrest for obstruction of justice. On their own admission, the police were acting for reasons unrelated to the arrest. If follows that the search in question was not truly incidental to the arrest and, therefore, the [accused's] right to be free of unreasonable searches, under s.8 of the Charter, was violated. [reference omitted, para. 19]

Nor was the search justified as an inventory search:

> As the law presently stands, inventory searches are not authorized under the common law rule applicable to warrantless searches that are truly incidental to an arrest. At the same time, it has been held that if a vehicle is taken into custody pursuant to a regulatory duty the police may conduct an inventory search with respect to "visible property of apparent value"… In the present case, the Crown made no attempt to justify the

> warrantless search of the [accused's] vehicle on the basis of an authorized inventory search. Even if the law recognized the validity of such searches, the search of the [accused's] vehicle could not be justified as it went far beyond the itemizing of visible property of apparent value. The drugs were found concealed behind the gas cap. [reference omitted, para. 15]

The court however was divided on the admissibility of the evidence. Justices Robertson and Deschenes were of the view the police were not acting in good faith and the evidence should be excluded under s.24(2) of the *Charter*.

> …it must be determined whether the police acted in good faith. This is certainly not a case where we can hold that the search in question was the product of a reckless or deliberate disregard for the [accused's] rights. At the same time, if there were any instance in which the plea of ignorance of the law should be rejected this is the one. The rule promulgated in R. v. Caslake is unambiguous: the reason for the incidental search must be related to the reason for which the accused was arrested. Chief Justice Lamer made this clear when he drew specific attention to the rule by underlining the relevant sentence… Prior to the release of R. v. Caslake, one could have argued that the issue was unsettled despite the Ontario Court of Appeal decision in R. v. Belnavis, as that decision is not binding in this Province. One could go so far as to argue that the subsequent endorsement of Belnavis in the majority opinion in R. v. Stillman was obiter and given the deep divisions within that Court the law on car searches incident to arrest remained clouded. However, once the Supreme Court released its decision in R. v. Caslake the police could no longer plead ignorance or reasonable error. To use the words of Justice Sopinka in R. v. Kokesch, either the police knew or ought to have known what the law with respect to a vehicle search that is incidental to an arrest. Clearly the police ought to have known.
>
> In the present case, one cannot even make a credible argument that the error in question arises from "an entirely reasonable misunderstanding of the law". This is because there is nothing to misunderstand. Moreover R. v. Caslake has been on the books since January of 1998. A period of nearly eight years has passed and yet the police's only explanation for their ignorance of the law is that they were ignorant. Should a plea of good faith be accepted in these circumstances? In my opinion, the answer to that question must be no… [paras. 31-32]

Justice Richard, on the other hand, would have admitted the evidence. As a result of the majority's decision, the drugs were excluded, the conviction set aside, and a not guilty verdict was entered.

Complete case available at www.canlii.org

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **true**—see *R. v. LeClaire* (at p. 4 of this publication). Justice Roscoe stated, "There is an implied licence for all members of the public, including the police, to approach a door of a residence and knock… If the police act in accordance with this invitation, there is no intrusion upon the privacy of the occupant."
2. (b) **false**—see *R. v. Mitchell* (at p. 17 of this publication). Justices Robertson (Deschenes concurring) stated, "The rule promulgated [for searches incidental to arrest by the Supreme Court of Canada] in *R. v. Caslake* is unambiguous: the reason for the incidental search must be related to the reason for which the accused was arrested." In other words, the evidence the officer is searching for must be connected to why they made the arrest. For example, an arrest for break and enter would surely justify a search for evidence related to break and enter, such as stolen property or break-in tools. However, a search for drugs may be outside this ambit, unless of course, the break-in was related to drugs, such as a grow rip.

3. (a) **false**—see *Patterson* (at p. 8 of this publication). In this case the court concluded the officer's safety concerns were of a general nature and not specific enough to justify suspending the arrestee's right to counsel until the search began. This case, once again, reminds officers that there is no bright line rule in suspending an arrestee's right to counsel. What is reasonable in any given situation will turn on the unique facts of the case.

4. (a) **true**—see *Richardson v. Vancouver* (at p. 10 of this publication). Justice Donald stated, "The lawfulness of arrest must depend on the subjective belief of the arresting officer and an objective assessment of that belief based on what the officer knew at the material time. It is a question related to the individual officer. I know of no authority that supports the notion of a collective intelligence, the sum of knowledge possessed by all the police in an operation, as the basis for judging the lawfulness of arrest."

JUDGE NEED NOT CHECK COMMON SENSE AT DOOR

R. v. Mowry, 2006 NBCA 18

Acting on source information, the police attended a remote and uninhabited area of Crown land where they found a 175 marihuana plant grow in a clearing. The officers left and returned a few months later. The plants had grown a few feet, were dry, and their leaves were yellow. The following day the police returned and conducted surveillance. The accused, and two others, arrived and were videotaped for about 12 minutes.

In the video tape the accused could be seen moving around the plants and bending over at the waist, however his hands were not in view. The other two men were seen involved in activities such as pruning, carrying a water bucket, or holding a hose. At trial in New Brunswick Provincial Court the accused was convicted of marihuana production. "Produce" under the *Controlled Drugs and Substances Act* includes obtaining a substance by cultivating, such as doing anything to help raise the plants, like the preparation and use of the soil, the removal of weeds from the vicinity of the plants, and pruning. An appeal to the New Brunswick Court of Queen's Bench was dismissed.

The accused appealed further to the New Brunswick Court of Appeal arguing that the trial judge's verdict was unreasonable since the video did not show what he was doing with his hands. He was not seen touching the plants or handling any watering equipment. Chief Justice Drapeau, writing the unanimous opinion, dismissed the appeal. He stated:

> The trial judge was not required to check her common sense at the courtroom door. A contextual commonsensical appreciation of what [the accused] is shown doing on the videotape leads inescapably to the conclusion that he was engaged in cultivating the cannabis (marihuana) plants that are the subject of the underlying charge and the impugned conviction. It is obvious from the video that [the men] were operating as a team, each doing his part to help the plants' growth. The trial judge properly assessed [the accused's] actions in the context provided by the evidence as a whole, including the actions of his two plantation co-workers. [para. 14]

The conviction was upheld.

Complete case available at www.canlii.org

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