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.

24 PLUS HOUR DETENTION DOES NOT WARRANT STAY

R. v. Malhi, 2006 QCCA 338

The accused was arrested for extortion at 9:00 am, taken to the police station at 10:00 am and interviewed until 12:30 pm. He was a full time bank account manager with a wife and children and had no prior record. He also promised the investigator that he would appear before a judge on any conditions. The investigator was unable to complete the paperwork necessary to have formal charges laid until it was too late to have the accused appear before a judge that day. In Quebec, all criminal charges must be authorized by a prosecutor. The accused was then detained where he appeared before a judge at 3:00 pm the next day.

At trial in the Court of Quebec the accused brought an application for a stay of proceedings under s.24(1) of the *Charter* because he was not brought before a judge within 24 hours of arrest as required by s.503(1) of the *Criminal Code*. This, he argued, violated his rights under ss.9 (arbitrary detention) and 11(e) (unreasonable bail) of the *Charter*. The trial judge denied the accused's application and he was convicted of attempted fraud, but acquitted of extortion and criminal harassment.

The accused appealed to the Quebec Court of Appeal contending the trial judge erred by failing to grant the stay of proceedings. In his view, the police investigator should have released him on conditions under s.503(2) of the *Criminal Code* (promise to appear or recognizance). By not releasing him while knowing his background, the accused submitted his continued detention by police was arbitrary and he was denied reasonable bail without just cause. A stay of proceedings, he suggested, was an appropriate remedy.

The Quebec Court of Appeal dismissed the accused's appeal. The police investigator was concerned about the gravity of the offence. Extortion carries a possible life sentence. The officer also felt the accused may have been involved in other similar attempts to extort money from banking clients. As well, the victim in this case appeared extremely nervous of the situation and his home telephone number was found in the accused's briefcase when arrested. In the officer's view, it was preferable for a judge to determine the accused's release conditions.

The Quebec Court of Appeal, however, made it clear that it was not endorsing a practice or system that would see an accused in similar circumstances not being brought before a judge without unreasonable delay and within 24 hours of their arrest as section 503(1) of the *Criminal Code* requires. Rather, a stay of proceedings is a "draconian remedy…reserved for the most egregious violations of the rights of an accused, and then only if two conditions are satisfied: first, that the prejudice caused by the abuse of the accused's rights would be perpetuated or aggravated by the continuation of the trial or its result; and, second, that no other recourse would adequately remedy the resulting prejudice," said the Court. Assuming the accused's *Charter* rights were violated in this case, a stay would not be an appropriate remedy. The appeal was dismissed.

Complete case available at www.canlii.org

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. Nor are the opinions expressed herein 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.ca

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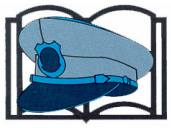

"The articles that I have read that you publish are very interesting and informative, it is challenging to try and keep up with case law in this work, and articles such as yours help. Keep up the good work"—**K-9 Officer, New Brunswick**

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"I recently received a copy of your publication and found the up to date case law a good read"—**Police Detective, Ontario**

****

"I have recently come into possession of a few of your electronic newsletters. They are first rate. I have also learned of some internet sites with respect to the courts that I was not aware of"—**Assistant Crown Attorney, Ontario**

****

" I have read your publication for at least two years and utilized the recent case law for discussion on parade. It is always relevant and worthy of round table discussion stimulating lively discussion"—**Police Sergeant, Alberta**

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"I just read your July/August 2006 In Service: 10-8 newsletter. It was an easy and very informative read."—**Staff Sergeant, Ontario**

****

"Thank you for sending me the March/April and May/June editions of In Service: 10-8. As the Training Sergeant…I appreciate your time and dedication that you devote to the continuous learning and improvement of front line officers…"—**Police Sergeant, Ontario**

****

"Please add me to your distribution list…I am an officer…in Ontario and love reading your publication"—**Police Officer, Ontario**

POLICE ONLY NEED REASONABLE GROUNDS DEVICE WORKING PROPERLY

R. v. Topaltsis,
(2006) Docket:C44298 (OntCA)

A police officer noticed that the roadside screening device he was going to use had not been calibrated within the department's guidelines before administering a roadside test. The device had not been calibrated for 26 days, even though it was the department's practice to calibrate the device every two weeks. However, the officer had spoken to the manufacturer's representative at a trade show and was told the devices only needed calibration every six months. The officer also checked the device to ensure it properly registered no alcohol before administering the test. The accused failed the roadside screening and subsequently provided a breath sample over 80mg%.

At trial in the Ontario Court of Justice the judge concluded the officer did not objectively have reasonable and probable grounds for making the breath demand because, in part, the device had not been calibrated within the department's policy. The accused was acquitted on a charge of over 80mg%. The Ontario Superior Court of Justice dismissed the Crown's appeal, holding that the fail reading did not provide reasonable grounds because the device had not been calibrated within police guidelines. The Crown then appealed to the Ontario Court of Appeal arguing the judge applied the wrong analysis in assessing whether the officer had reasonable and probable grounds.

In a unanimous endorsement, the Ontario Court of Appeal set aside the acquittal. The proper test was to simply determine whether the officer had reasonable and probable grounds to believe the screening device was in proper working order. The test was not, as the trial judge required, for the Crown to prove the device was in fact in good working order. Because the trial judge applied the wrong test a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

DOG SNIFF OF PACKAGE NOT A SEARCH

R. v. Taylor, 2006 NLCA 41

Police received information from a proven and reliable source that a package containing marihuana in the name of "Jaimie Taylor" would be in a FedEx office. Police attended FedEx and an officer examined the exterior of the suspect package with FedEx's consent and noted the name of "Jamie Taylor" with an undeliverable address. A police dog was brought to FedEx and the package was placed, with others, at the rear of the warehouse. The dog twice indicated there were drugs in the package.

Based on the informer information and the sniffer dog hit, the police obtained a search warrant and opened the package, finding a computer concealing three pounds of marihuana. The marihuana was removed, the package put back together, and the accused was arrested after he arrived at FedEx, picked up the package, and placed it in his trunk.

At trial in Newfoundland Provincial Court the accused argued the dog sniff was a warrantless search and that it could not be used as grounds to obtain the search warrant. The trial judge, however, rejected this submission and ruled the dog sniff was not a search under s.8 of the *Charter*. The warrant was properly obtained and the marihuana found was admissible. The accused then appealed to the Newfoundland Court of Appeal again arguing the dog sniff was a search and the evidence should be excluded under s.24(2) of the *Charter*.

Justice Rowe, authoring the unanimous opinion of the Newfoundland Court of Appeal, first reviewed search and seizure jurisprudence. Section 8 of the *Charter* protects people from unreasonable searches and seizures. However, not every police examination is a "search" for constitutional purposes. Only examinations that intrude upon a person's reasonable expectation of privacy are s.8 searches. In this light, a court will look at the totality of circumstances in deciding whether there was a reasonable expectation of privacy.

Although there may be a reasonable expectation of privacy relating to the viewing of a package's contents, such as by opening it or by using an x-ray to view inside, there was no reasonable expectation of privacy relating to the smell of the package. Justice Rowe stated:

> The contents of a package may reveal some insight into the individual's "biographical core of personal information", whose disclosure could affect their "dignity, integrity and autonomy"…Such information could be disclosed by opening the package to view its contents.
>
> Could such personal information be disclosed by the dog sniffing the package? No, because unlike opening the package (which would allow police to see whatever is in it), a dog sniffing for drugs can tell us only one thing: are there drugs in the package. There can be no reasonable expectation of privacy in that fact alone. [references omitted, paras. 21-22]

Rowe also noted that this case was not one where the police conducted a "speculative sweep." In other words they were not conducting a random search of all packages at the FedEx warehouse. Rather, the police were acting on the information of an informant which provided a bona fide basis for investigation, even though the source information may not have provided sufficient grounds to obtain a search warrant by itself.

In the circumstances, the Newfoundland Court of Appeal ruled the trial judge did not err in holding that the dog sniff was not a search under s.8 of the *Charter* and the accused's appeal was dismissed.

Complete case available at www.canlii.org

CANINE ODOUR DETECTION AT BUS TERMINAL OK

R. v. Brown, 2006 ABCA 199

A three member plain clothes police team, along with a sniffer dog, was patrolling a Greyhound bus terminal as part of a Jetway project, a program which monitors the public for drugs, weapons, proceeds of crime, or other contraband at airports, bus depots, or train stations. The accused was observed disembark from an over-night train carrying a bag high over his shoulder. This behaviour drew the officer's attention and he entered into a conversation with the accused.

While the officer conversed with the accused, he signalled for a police dog handler to bring over a dog trained in detecting illegal drug odours. The dog immediately indicated the presence of drugs in the bag, which had been placed on the ground. The accused was arrested and 17 ounces of cocaine was found in the bag and a small amount of heroin in his clothing.

At trial in the Alberta Court of Queen's Bench the accused sought exclusion of the evidence under s.24(2) of the *Charter* because, he argued, the police violated his right, among others, to be secure against unreasonable search and seizure. He submitted that the dog sniff was a warrantless search and was therefore unreasonable. The trial judge concluded that the odour emanating from the bag voluntarily brought into a public transportation facility was not information in which he had a reasonable expectation of privacy. The accused then appealed to the Alberta Court of Appeal arguing

the actions of the police dog amounted to a search protected under the *Charter*.

Justice Cote, authoring the majority opinion of the Court, first discussed the meaning of a search under s.8 of the *Charter*. For the purposes of s.8 a search occurs when the government interferes with a person's reasonable expectation of privacy. However, not every government examination will intrude upon this reasonable expectation and therefore will not always be a search. Referring to the Supreme Court of Canada decision R. v. Tessling, a case dealing with the police use of FLIR, Justice Cote noted that there are hierarchies of privacy expectations and not all information gleaned by the police in a public place about contents of a private place is a search.

In holding that the trial judge did not err in finding there was no *Charter* violation respecting the dog sniff, Justice Cote wrote:

> The privacy interests to be assessed and protected under s. 8 of the Charter are not, of course, confined to the particular activity or type of activity detected in the prosecution at hand. Finding drugs does not retroactively make any "search" disappear. The relevant question is not whether counterfeiters or fences or drug smugglers have a reasonable expectation of privacy for the tools, merchandise or fruits of their trade. The first question is whether the ordinary citizen who has committed no offence has a reasonable expectation of privacy which would be significantly invaded by the police action in question here. The danger of the police rifling through homes or suitcases is not so much their finding illegal items like guns, but their seeing legal intimate or personal items. So here one must first ask whether there would have been a "search" under s. 8 if [the accused] had had no illegal narcotics in his luggage.
>
> In my view (and that of the trial judge) there would not. The dog could detect 9 types of illegal drugs, and nothing else. Had [the accused] had none of the 9 illegal drugs, the dog sniff would have had no effect. Innocent items such as medicine, food, or perfume, even illegal money or burglary tools or smuggled cigarettes or guns, would have gone undetected. Non-drug odors are a red herring here, in my view. [paras. 47-48]

And further,

> …No home was involved, the police were in a purely public place (not the yard of a home), the dog only yielded a crude piece of information (yes or no to the presence of an unknown quantity of an unknown illegal drug), no intimate details of private lives could possibly be revealed, the odors came out passively, and they were detected by something similar to (but more sensitive than) an ordinary human nose. There was no reasonable expectation of privacy for that limited information in that public place.
>
> An obvious loud noise or obvious strong smell coming from luggage or from a locker in a bus depot can be noted and used by police, as defence counsel here properly conceded. All that is different here is the use of a dog with a nose keener than human noses. But the Supreme Court of Canada in Tessling says that that is not enough to turn this into a " search" under s. 8…
>
> So I would conclude here that there was no search, and no unreasonable search.
>
> I do not intend to begin compiling a catalogue myself, as the Supreme Court of Canada says not to do that. So I am not ruling on all dog sniffs at all times and all places and in all manners. What would be the situation if the dog were detecting some odor or sound from a person, or the dog were trained to give more information, or the dog climbed up onto the owner of the luggage, or the dog sniffed or listened outside a home or hotel room, or the dog poked its nose into someone's pocket. I leave for another day and another case. [paras. 52-55]

Furthermore, even if the dog sniff was a search, Justice Cote ruled the evidence would be admissible under s.24(2). The majority dismissed the accused's appeal and his conviction was affirmed.

A Different Opinion

Justice Paperny, on the other hand, disagreed with the majority. In her dissenting opinion she concluded that the police did violate the accused's rights under s.8. "Odour often reveals intensely personal details of lifestyle and biographical data that individuals prefer to keep to themselves," said Justice Paperny. "This is evidenced by the enormous industry aimed at producing and marketing products to mask odour on the person, on our effects, and in our homes." She further stated:

> The dog sniff was also intrusive in a physical sense. Many people are afraid of dogs. The use of dogs has an historical connotation that cannot be ignored. Dogs can and often are intended to be intimidating and their proximity to an individual can be highly invasive. So too can their enhanced olfactory sense, as any person who has been sniffed by a dog, friendly or otherwise, can attest. The target of the intrusiveness here is the personal luggage and its odour; the police dog sniff permits highly accurate identification of particular contents of the bag which are not on display for all to see.
>
> The objective unreasonableness of the use of the technique is driven by the nature and quality of the information that the technique is able to produce…. A dog sniff in the context of the special training evidenced in this case, in contrast to FLIR technology, provides nearly definitive information about the contents of luggage, and can reveal private information concerning the activities of its owner.
>
> Unlike the heat images produced by FLIR technology, the contents and odour of one's personal luggage can reveal intimate details of one's lifestyle and individual personal choices and thus constitute protected biographical core personal information. Further, it cannot be disputed that the reason the police wanted the information from the dog sniff was to ascertain details about [the accused's] personal lifestyle - that is, his involvement in illegal drug activity.
>
> In summary, [the accused] had a reasonable expectation of privacy in his luggage and the odour emanating from it and the dog sniff was a search.
>
> There was no warrant here. Warrantless searches are prima facie unreasonable, absent exigent circumstances…. The Crown did not establish exigent circumstances, and in any case, any exigencies would have been revealed only after the unauthorized search occurred. On the facts, the R.C.M.P. did not have reasonable and probable grounds to believe evidence of criminal activity existed (a precondition to a genuine belief that such evidence maybe lost, removed, destroyed, or would disappear absent the unauthorized search) until the dog gave the positive indication after sniffing the bag. The dog sniff led immediately to the arrest, and in turn [the accused's] bag was physically searched to confirm the existence of the narcotics indicated by the dog. [paras. 135-139]

Justice Paperny would have excluded the evidence under s.24(2) and entered an acquittal.

Complete case available at www.albertacourts.ab.ca

CONVICTED SEX OFFENDER MUST DEMONSTRATE SOIRA ORDER DISPROPORTIONATE

R. v. Redhead & R. v. McIntyre, 2006 ABCA 84

In *R. v. Redhead*, the defendant plead guilty to sexual assault for forcing a 28 year old female with the mental capacity of a 7 year old to twice have sexual intercourse with him. He was sentenced to 30 months in custody, but the trial judge refused to order he register under the *Sex Offender Information Registry Act* (*SOIRA*) because he was drunk at the time, was not a pedophile, and was not likely to re-offend.

In *R. v. McIntyre*, the defendant was convicted of sexual assault with a weapon after he picked up a prostitute, held a screwdriver to her neck,

and had oral sex and sexual intercourse with her. He received four years in prison, but the trial judge refused to grant a *SOIRA* order because the victim was not a child and the accused had no prior related record.

Crown appealed both cases to the Alberta Court of Appeal arguing, in part, that the trial judges erred in not granting *SOIRA* orders under s.490.012 of the *Criminal Code*. This provision requires a person convicted of a "designated offence" to comply with *SOIRA* unless a court is satisfied the impact of the order on the guilty person, including their privacy and liberty, would be grossly disproportionate to the public interest in protecting society. A person under a *SOIRA* order must provide information concerning their identity and whereabouts and report to police on an annual basis. This information is entered into a national database for convicted sex offenders and assists police in investigating sex crimes.

The Alberta Court of Appeal allowed the Crown's appeal. Under s.490.012(4) a court may exempt a convicted sex offender from a *SOIRA* order only after assessing the impact on the offender and finding it disproportionate to the public interest. However, "the offender bears the evidentiary burden of establishing that the impact of a *SOIRA* order on him or her would outweigh the public interest in protecting society by investigating crimes of a sexual nature." The Court stated:

> The assessment of how reporting obligations might disproportionally impact an offender requires an evidentiary foundation. The focus of that inquiry must be on the offender's present and possible future circumstances, and not on the offence itself.
>
> Different evidence is required to assess the extent to which the offender will require monitoring, which will necessarily include an examination of the nature of the particular circumstances of the offence and record of the offender. But that evidence is irrelevant to the determination of the impact of the registration and reporting on the offender.
>
> Thus, the analysis under s. 490.012(4) is restricted to the impact of a *SOIRA* order on the offender. Nevertheless, that subsection clearly contemplates that factors other than the offender's privacy and liberty interests may be considered, as it requires the court to consider the impact on an offender, including any impact on the offender's privacy and security interests.
>
> Other factors might include unique individual circumstances such as a personal handicap, whereby the offender requires assistance to report… Courts have also considered the intangible effects of the legislation, including stigma, even if only in the offender's mind; the undermining of rehabilitation and reintegration in the community; and whether such an order might result in police harassment as opposed to police tracking… [paras 28-31]

The Court also rejected McIntyre's argument that the impact of the order is self evident given the onerous obligations on the offender, such as the mandatory reporting requirements which could go on for years. The Court stated:

> However, given the onus on the offender to demonstrate why the impact of such an order would be disproportional to the public interest, it appears there is no presumption of impact in the legislation arising from the length of reporting obligations alone. Patently, the impact on anyone who is subject to the reporting requirements of a SOIRA order is considerable. But absent disproportional impact, the legislation mandates that anyone convicted of a prescribed offence is subject to the prescribed reporting period. [para 33]

In both of these cases, the lower courts overlooked the lack of evidence on the impact of the *SOIRA* orders on the offenders. The Alberta Court of Appeal allowed the Crown's appeals and required both offenders to comply with *SOIRA* orders for 20 years.

Complete case available at www.albertacourts.ab.ca

CUMULATIVE FACTORS PROVIDE REASONABLE GROUNDS

R. v Johnson,
(2006) Docket:C42377 (OntCA)

Two uniformed patrol officers saw a known crack addict pacing back and forth outside a subway station. The accused was observed walking towards the addict from an alleyway, nod his head to the addict, look around, reach into his pants pocket, and briefly extend his open palm to the addict. After the addict looked at the accused's palm, he closed it, put it back in his pocket, and they walked away together for a while, then went in separate directions. The officers did not hear anything said or see what was in the accused's hand.

He was called over by the officers and was arrested for possession of crack cocaine for the purpose of trafficking. He was searched and the police found individually wrapped packages of crack cocaine, a knife with residue, and two cell phones. At trial in the Ontario Superior Court of Justice, the trial judge found the police had reasonable grounds to arrest the accused and he was convicted of possessing cocaine for the purpose of trafficking.

The accused appealed to the Ontario Court of Appeal arguing, in part, that the trial judge erred in finding the police had reasonable grounds to arrest him. He suggested the police had neither the subjective nor the objective foundation upon which to base the arrest.

The Ontario Court of Appeal, however, dismissed the appeal. "For an arrest to be lawful, there must be both subjective and objective reasonable and probable grounds to believe that an offence has been committed," stated Court. Here, the officer had the required subjective belief. As well, the grounds were justifiable from an objective point of view.

The reasonable person standing in the shoes of the officers would know the particular area involved and that the particular location within that area was frequently used for drug trafficking. The officers also knew the addict was a crack user. Furthermore, the addict was pacing in a location known for crack cocaine trafficking and there was the guarded mode of acknowledgment between the addict and the accused, typical of drug transactions. The accused also showed the addict a small item in his cupped hands, typical of drug deals, and both men walked off together. The trial judge did not err in finding the police had reasonable and probable grounds, on both a subjective and objective basis, to arrest.

Complete case available at www.ontariocourts.on.ca

STAY NOT PROPER IN 24 PLUS HOUR HOLD

R. v. Mangat,
(2006) Docket:C40544 (OntCA)

The accused was arrested for robbery at 7:10 am where he was detained at a police station. At 3:00 pm the police obtained an inculpatory statement from the accused and he was detained until he was transported to court for a bail hearing at 8:40 am the following morning.

At his trial in the Ontario Court of Justice the judge stayed the proceedings against the accused under s.24(1) of the *Charter* because she found the police did not comply with s.503 of the *Criminal Code*, thereby breaching the accused's s.9 *Charter* right (arbitrary detention). The judge found the police could have accessed a justice of the peace within the first 10 hours of the accused's detention. Since they did not, his detention did not comply with s.503 and was unlawful.

The Crown appealed the stay to the Ontario Court of Appeal arguing, in part, that it was not

warranted. The Court of Appeal agreed with the Crown. A stay of proceedings is a drastic remedy reserved for the "clearest of cases" and will only be appropriate when the prejudice caused by the *Charter* breach will be manifested, perpetuated or aggravated through the conduct of the trial or its outcome and there is no other remedy reasonably capable of removing the prejudice.

The issue before the court was not one of punishing the police, but rather whether the prejudice caused by the arbitrary detention could be adequately addressed by a remedy short of a stay. In this case, the Ontario Court of Appeal held that excluding the inculpatory statement under s.24(2) was an adequate remedy to address the prejudice arising from the accused's *Charter* breach. The Crown's appeal was allowed, the stay of proceedings set aside, and a new trial ordered with the accused's statement to police excluded.

Complete case available at www.ontariocourts.on.ca

POLICE NEED NOT PROVE COMMUNICATION IN PROCESS FOR CELLPHONE CHARGE

R. v. Aisthorpe, 2006 NCLA 40

A police officer saw the accused driving with a cellphone on his shoulder and his head leaning against it to hold it in place. The officer did not know if the accused was talking on the phone, but stopped him and charged him under Newfoundland law with operating a motor vehicle while using a cellphone.

Under s.176.1 of Newfoundland's *Highway Traffic Act* it is an offence for a person to use a hand-held cellular telephone while driving a motor vehicle on a highway. This is a strict liability offence where the Crown must prove the *actus reus* beyond a reasonable doubt. A "cellular telephone" is defined as "an apparatus which can send and receive a 2 way voice communication…" Further, a "hand-held cellular phone" is defined as "a cellular phone the use of which requires being placed in the proximity to the mouth and ear by being held in the hand or by another means that uses one or more parts of the body."

At trial in Newfoundland Provincial Court the accused testified he was waiting for a call and was "pretty sure" he was not talking to anyone. He also claimed that if his phone had rung he would have pulled over to answer it. The trial judge nonetheless convicted the accused. In the judge's view, the test was not whether someone was actually talking or listening on the phone, but whether it was useable or in use. The fact it was up to the accused's ear was sufficient to establish a prima facie case.

The accused appealed to the Newfoundland Supreme Court which overturned the conviction. In the appeal court judge's view, the accused was not using the cellphone because there was no evidence that he was sending or receiving a communication as required by the definition of a cell phone under the legislation.

The Crown's appeal to the Newfoundland Court of Appeal was successful. Justice Rowe, authoring the unanimous judgment, ruled that a person having a hand-held cell phone turned on and held between their shoulder and ear while operating a motor vehicle was using the cell phone contrary to the *Highway Traffic Act*.

In granting the appeal and reinstating the conviction, Justice Rowe examined several areas.

1) the word "use", as defined in the dictionary, would suggest utilizing a cell phone for "any purpose";

2) the purpose of banning cell phone use is to prevent drivers from being distracted while driving;

3) if the definition of use was restricted to sending and receiving a communication,

actions such as looking up a number in the cell phone's directory, dialling a number, or reviewing numbers of persons who had called would not be use, even though these actions all give rise to the driver looking away from the road and being distracted from driving; and

4) the definition of "hand-held cellular phone" describes the manner of use—having the cell phone in proximity to a person's mouth and ear—which points to a meaning that is wider than "sending and receiving a communication".

In concluding that the accused was using the cell phone, Justice Rowe stated:

> …I am satisfied that "use" in s. 176.1(2) has a wider meaning than that given to it by the summary conviction appeal judge ("sending and receiving a communication"). I would hold that "use" in s. 176.1(2) encompasses a variety of operations of a hand-held cellular telephone that could result in the driver being distracted, including [the accused's] actions as charged….[para. 32]

The Court of Appeal also rejected the accused's argument that Newfoundland's cell phone legislation violated s.7 of the *Charter* because it was unconstitutionally vague.

Complete case available at www.canlii.org

PURPOSE DETERMINES APPLICATION OF IMPLIED LICENCE DOCTRINE

R. v. Fowler, 2006 NBCA 90

Two police officers responded to reports that the accused drove his truck into a vehicle parked at his estranged wife's residence, left the scene, was heading to his parent's home, and was possibly impaired. The officers proceeded to the accused's parent's home and saw a truck parked in the driveway that had been recently running, as evidenced by heat emanating from its underside and an engine ticking sound. The house was in total darkness but some windows were wide open.

Wanting to speak with the occupants of the house to further their investigation, the officers knocked on both the front and rear doors but received no response. While returning to their vehicle the officers heard a voice from inside the house state, "Don't answer the door. I've been home all night. I've been home all night." The officers returned to the back door and knocked again.

The accused answered the door, but was dressed only in his underwear. He had a strong odour of liquor on his breath, his eyes were red and glassy, and he was unsteady on his feet. One of the officers told the accused he had reasonable and probable grounds to believe he left the scene of an accident and was impaired. The accused replied he had been home all night and closed and locked the door.

While the officer discussed the matter with a supervisor, the accused exited the house and approached the officers. He was cautioned, advised of his right to silence, and breath samples were demanded. Two breath samples subsequently obtained revealed a blood alcohol level of 150mg%. The accused was charged with impaired operation of a motor vehicle and operating a motor vehicle with a blood alcohol content over 80mg%.

At trial in New Brunswick Provincial Court the accused argued the certificate of analysis was inadmissible because the police violated his right to be secure against unreasonable search and seizure under s.8 of the *Charter*. In the accused's view, the police could not attend at his home and knock without a search warrant. Because there was no warrant, the observations made by the police during the unreasonable search tainted the certificate of analysis. The Crown, on the other hand, submitted that the police had the right to enter onto the property to communicate with its occupants under the

implied licence doctrine. The observations, therefore, did not constitute an unreasonable search and the certificate should be admitted.

The trial judge ruled the police attended the house to communicate with the occupants, not to obtain incriminating evidence against the occupant. Accordingly, the accused's *Charter* rights were not breached and the certificate was admitted. The accused was convicted of the over 80mg% charge and the impaired driving charge was stayed.

The accused's appeal to the New Brunswick Supreme Court was allowed and his conviction was overturned. The appeal court judge found that one of the police purposes for knocking at the door was to obtain evidence the accused was impaired. The police, therefore, exceeded their authority under implied invitation to knock and violated the accused's *Charter* rights in the process. The breathalyzer results should have been excluded under s.24(2) and a new trial was ordered. The Crown then appealed to the New Brunswick Court of Appeal.

Under the common law there is a long-standing principle that people, including police officers, have implied licence to approach and knock on someone's door for the purpose of convenient communication with the occupant(s). If the police purpose is to communicate with the occupant(s) there is no search for constitutional purposes. However, if the police approach the residence to secure evidence against the occupant then a search has taken place and a reasonableness enquiry will be undertaken under s.8. If the police have a dual purpose in mind (eg. to communicate with the occupant and secure evidence against the occupant) the police conduct will constitute a search and s.8 is engaged.

In this case the trial judge rejected the accused's position that the police attended the residence to obtain incriminating evidence and held their purpose was to communicate with the occupant(s). This finding was unassailable based on the facts and the appeal court judge exceeded her authority when she determined that one of the police purposes was to obtain evidence against the accused. The Crown's appeal was allowed and the accused's conviction was restored.

Complete case available at www.canlii.org

BALANCE

By Kelly Keith

Balance is defined as the ability to maintain the center of mass over a base of support and is sometimes referred to as the relationship between the ears and the hips. A body's center of gravity is an inch or two above or below the navel.

Why is balance important to a police officer? If a police officer loses their balance when attacked they are likely to be in a ground fight.

However, a police officer on the ground does NOT mean they are losing the battle, but it does have some disadvantages such as:

- the police officer is more susceptible to injury;
- a psychological / physical disadvantage for the officer;
- a psychological / physical advantage for the suspect;
- increased danger from multiple attackers;
- disarming chances increased;
- extremely exhausting to the officer;
- poor delivery system for the officer's striking techniques and intermediate weapons; and
- immediate disengagement from the subject cannot be achieved.

Trainers generally train officers to fight to their feet or, in the case of an officer's physical dominance, to a cuffing position. Statistics show that the three most common ways officers end up on the ground are:

1. the officer is pushed to the ground;
2. the officer is pulled to the ground; or

3. the officer is tackled to the ground.

Hopefully, officers are trained or take it upon themselves to know what to do once on the ground. But if they understand and train on "balance" they may not have to deal with going to the ground at all!

The most stable support for an officer is having their feet just wider than shoulder width apart. This is not always possible during confrontations. However, by understanding this concept and attempting to keep a wide stance (or base of support) an officer is less likely to be taken to the ground. A stable base of support allows an officer to change direction easily. Too wide of a stance, such as the "horse stance" with a very wide base of support, will not allow a change of direction quickly, which is not a good trade off. Lowering one's center of gravity also adds stability. But again, if one's body is too low they will sacrifice the ability to change direction quickly.

Understanding the importance of balance and how to stay in balance is not enough. One must train "off balance". But how does one train this way?

- By simply making the base of support smaller (standing on one foot or having feet close together) a person's balance is challenged. A great example to increase balance and stimulate muscle fibers that would generally not be stimulated, is by standing on one foot while doing some exercises. For example, when doing 3 sets of dumbbell curls do the first 2 sets on both feet and then the third set by alternating standing on one foot for the first 5 repetitions and the opposite foot for the remaining 5. This can be done with almost any exercise when standing, such as presses, side raises, tricep pushdowns, etc.
- Use Balance training tools such as Bosu Balls, Balance Boards, or Bongo Boards. For example, try doing squats while attempting to maintain balance. Squats on Physio balls are not recommended because a fall can easily mean a torn ACL – Always look at whether the risk is worth the benefit? This does not mean giving up power or strength training, but simply adding an element to training, which in the end will give the user more strength and power in an unstable environment.
- Visual systems have a great deal to do with balance. Postural sway will increase 20 – 70 % simply by closing one's eyes and standing up. Stressing one's balance can be accomplished by activities, such as closing eyes during safe standing stretches, easy slow kicks to a bag, etc.
- There is dynamic balance training, such as rag doll drills where each person has a good quality Judo Gi on. They stand within arms reach and grab onto the collars. DO NOT try to torque a partner down to the ground. This may cause injury. Rather, simply try to displace an opponent's balance while they try same. Once the person's balance is displaced (ie. one foot off the ground) start again. This is enhanced if the interview stance is used to do these drills, which makes it more job specific training!
- CORE strength (Butt and Gut) is of the utmost importance in keeping balance and should be utilized during all balance training. Using medicine balls and physio balls are great ways to have dynamic and functional core strength exercises.
- Using Physio balls for dumbbell chest presses instead of a flat secure bench is a great way to address functional strength and balance (use light weights and/or a spotter first). Think about the benefits of adding balance challenging exercises into every routine!

Start varying routines to address balance and great results in both balance and strength will occur. Utilize the above principles by varying base support (feet) and use your imagination (safely) to work with these principles.

SEVERAL FACTORS DETERMINE WHETHER DETENTION OCCURS

R. v. Grant,
(2006) Docket:C43132 (OntCA)

Two plainclothes officers, engaged in proactive policing in a neighbourhood school hot spot, asked a uniformed officer to stop the accused and chat with him after they saw him walk by in a "suspicious" manner. He had "stared" at the officers in an unusual manner and "fidgeted" with his pants and coat which looked suspicious. The uniformed officer stood in the accused's path, told him to keep his hands in front of him, and began to question him. The two plainclothes officers arrived and stood behind the uniformed officer. The accused was initially only asked for identification, but then he was asked if he had ever been arrested and whether he had anything on him he shouldn't. Although initially saying "no," he did say he had a small amount of marihuana and, when asked if there was anything else, admitted to having a loaded revolver. The accused was arrested, his revolver seized from his waist pouch, and he was charged with five firearms offences.

At trial in the Ontario Court of Justice the accused's motion to exclude the gun from evidence because his rights under ss. 8, 9 and 10(b) of the *Charter* had been violated was dismissed. The trial judge found there was no detention. He ruled that the conversation between the uniformed officer and the accused was merely "chit chat", while the officer's statement for the accused to keep his hands in front of him was a "request", not a direction or demand." Finally, the accused could have simply walked around the officers and kept going. He was convicted on all counts and sentenced to 18 months imprisonment.

The accused appealed to the Ontario Court of Appeal arguing, in part, that he was detained and that the police questioning amounted to a search. Further, if his rights were violated the accused submitted the revolver should have been excluded as evidence.

The Detention

Section 9 of the *Charter* guarantees that everyone has the right not to be arbitrarily detained. If the police have reasonable grounds to detain for an investigative purpose the detention will not be arbitrary. However, in this case the Crown conceded the police did not have reasonable grounds to detain. Rather the Crown's position was that there was no detention at all.

Justice Laskin, authoring the unanimous appeal court judgment, first reviewed what constitutes a detention for *Charter* purposes. A detention under the *Charter* can occur in two ways: physical or "psychological." A psychological detention can occur when a police officer gives a direction or demand to a citizen in which the citizen feels (reasonably believes) they have no choice but to obey (and submits or acquiesces to the direction or demand), even if there is no legal authority for the demand or direction and thus no offence committed for failing to comply. Justice Laskin noted:

> The definition of "psychological detention" reflects a judicial balance between competing values. On the one hand, the police have the duty and the authority to investigate and prevent crime in order to keep our community safe. In carrying out their duty, they must interact daily with ordinary citizens. Not every such encounter between the police and a citizen amounts to a constitutional "detention." This court and other courts have recognized that police must be able to speak to a citizen without triggering that citizen's *Charter* rights.
>
> … … …
>
> On the other hand, ordinary citizens must have the right to move freely about their community. Thus, the police cannot detain a citizen for questioning unless they are authorized by law to do so… [paras. 10-12]

In describing the criteria for a psychological detention, Justice Laskin stated:

> …a "psychological" detention includes three elements: a police direction or demand to an individual; the individual's voluntary compliance with the direction or demand, resulting in a deprivation of liberty or other serious legal consequences; and the individual's reasonable belief that there is no choice but to comply.

The accused sought "bright-line" rules governing whether or not a police-citizen encounter amounted to a detention, suggesting that merely asking questions about identity would not be "psychological detention", while questions about personal possessions or inviting incriminating responses would. Justice Laskin rejected this submission, recognizing that police-citizen encounters take on such a myriad of circumstances and contexts that bright–line rules were not desirable. Rather, a fact-specific and context sensitive inquiry must be made into whether a police-citizen encounter gives rise to a detention.

In this case, Justin Laskin ruled the accused was psychologically detained, although it was a difficult and close case, because of the following:

- [The uniformed officer's] initial demand: Early in the encounter, [the uniformed officer] stood in front of the [accused], blocked his path on the sidewalk, and told him to keep his hands in front of him where [the uniformed officer] could see them. …[T]hese words coming from a uniformed officer standing three feet away, amounted to a demand, which the [accused] was not free to ignore. From the outset, then, [the uniformed officer] effectively took control of the [accused's] physical movements. Equally important, the demand, coming at the beginning of the encounter, established the atmosphere for the remainder of it.
- The actions of [the plainclothes officers]: These two plainclothes officers did not stay in their car, which would have mitigated the intimidating nature of the encounter. Instead they got out of their car, showed the [accused] their police badges, and stood behind [the uniformed officer].
- The positions of the three officers: [the uniformed officer] stood in his interview stance, three feet away from the [accused]. Every time the [accused] moved, [the uniformed officer] moved, in order to maintain their relative positions. [The plainclothes officers] stood behind [the uniformed officer], four to five feet away from the [accused]. These three officers – each bigger then the [accused] – effectively formed a small phalanx blocking the path in which the [accused] was walking. In doing so, the officers exerted control over the [accused's] movements throughout the encounter.
- [The uniformed officer's] questions: [The uniformed officer's] questions went well beyond a mere request for identification or other non-incriminating information. Questions about whether the [accused] had ever been arrested or was carry something illegal invited inculpatory answers. The officers frankly acknowledged that they were looking for answers that would give them grounds to arrest or search the [accused]. These questions, coming after [the uniformed officer's] initial demand, amounted to further "demands".
- The [accused's] answers: The [accused] acquiesced to all the officers' demands. He put his hands in front of him, and then he gave incriminating answers, leading to his arrest, the police's search, and the ultimate deprivation of his liberty.
- The [accused's] manner of answering the police's questions: Although the [accused] did not testify on the motion, his failure to do so is not fatal to his claim because the standard for establishing compulsion is objective. The question the court must decide is whether the [accused] reasonably believed that he was detained… In my view the court can reasonably infer compulsion from the [accused's] manner of answering the police's questions and from the answers themselves. The [accused] paced nervously and hesitated before answering [the uniformed officer's] questions. Although he did not testify, I infer from his manner of responding to the police's questions that he did not believe he had the right to walk away and end the conversation, but rather believed that he had no choice but to answer their questions. Moreover it seems to me that the [accused's] belief was objectively reasonable.

> In the light of his answers, the suggestion that the [accused] knew he had the right not to incriminate himself seems unreasonable. I note that at no time during the encounter did the officers tell the [accused] that he was free to go or free not to respond to their questions.

- The [accused's] age: The [accused] was not a sophisticated adult. The [accused] was an 18-year-old youth, facing three police officers standing a few feet away from him in his path on the sidewalk.
- The duration of the encounter: The entire encounter, from the time [the uniformed officer's] stopped the [accused] until his arrest, lasted about seven minutes. This was not a long encounter, but it was not so short that it could not give rise to a detention.

Since the accused was detained and the Crown conceded the police did not have reasonable grounds to detain him, the detention was arbitrary and a violation of s.9 of the *Charter*.

The Search

The accused argued the police questioning amounted to a search that began when they asked him whether he had anything he shouldn't. Justice Laskin, however, disagreed. He stated:

> The divide between questions that begin a search and questions that do not is sometimes not easy to draw. In this case, I am not persuaded that the police's question to the [accused] "if he had anything that he shouldn't" began a search. In my view, the search began, at the earliest, after the [accused] admitted to possession of marijuana. At that point, however, the police had reasonable and probable grounds to arrest the [accused]. Then, when in answer to [the uniformed officer's] follow-up question "is that it", the [accused] admitted to carrying the revolver, the police had the right to search the [accused], incident to arresting him. Indeed they had that right even if they did not arrest him…[reference omitted, para. 33]

The question was general in nature and the police had not already formed the intention to conduct a search. The question was unlike other cases, where accused persons were asked to empty their pockets, asked what was in their open gym bag, or asked what was in their pocket after the police had touched it and felt a hard lump. Although those questions amounted to a search, the nature of the officer's question in this case did not. They were asked in a different context. Since there was no search, there was no violation under s.8 of the *Charter*.

Evidence

Although the accused's s.9 of the *Charter* right had been breached, the evidence was nonetheless admissible under s.24(2). Even though the revolver was "derivative evidence" that arose from the accused's answers (which were "conscriptive evidence", he had a lesser expectation of privacy in a public area, the detention was brief, the questioning minimally intrusive, the police did not physically restrain the accused until they arrested him, and they acted in good faith. Furthermore, possession of a loaded firearm in public is very serious, the accused was near several schools, the evidence was crucial to the Crown's case, and the evidence was entirely reliable. Therefore, admitting the evidence would not bring the administration of justice into disrepute.

The accused's conviction appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

WHOLE PICTURE PROVIDES REASONABLE GROUNDS

R. v. Mohammadi, 2006 QCCA 930

Officers received information that a significant cache of drugs was to be found in an unidentified unit within an apartment building and that the accused made use of this facility. A briefing was held later that afternoon where the accused's and another suspect's photograph were distributed along with the description of

the vehicle the accused used, a Yukon, including its licence plate.

The building was placed under surveillance and about an hour later a vehicle resembling the accused's arrived on the scene. It was parked in front of but across the street from the apartment building. Within a very short time, another vehicle arrived and parked parallel to the accused's vehicle. Both drivers appeared to talk to each other and the other vehicle then departed.

The accused then emerged from the parked vehicle, crossed the street, and entered the apartment building using a key. Within a few minutes, he was seen exiting the building carrying a black plastic bag. He appeared nervous and kept looking behind him and in all directions. He entered the parked vehicle but precipitously left the vehicle when he saw the police arriving to intercept him. He was seen throwing the black plastic bag and the car keys onto the street, but his attempt to flee failed and he was arrested not far away. The black plastic bag subsequently was found to contain approximately two kilograms of heroin. His vehicle was searched and $5,000 cash and 107.2 grams of hashish were also uncovered.

At his trial in Quebec Superior Court on charges of possessing heroin and hashish for the purpose of trafficking the accused presented a motion to have his arrest declared illegal and to exclude the evidence obtained thereafter. In his view, there was an insufficient basis to proceed with the arrest under s.495 of the *Criminal Code*. The judge, however, found the arrest lawful. The accused was known to the police, he had a prior drug trafficking criminal record, he had previously been under surveillance for possible trafficking of drugs with his cousin, the police had information that he would be present at a location that was a cornerstone of trafficking in heroin and his conduct in leaving the building with a plastic bag after entering without a bag was suspicious, as was his demeanour when he left the building to cross the road to reach his parked vehicle, which they had received information earlier in the day.

The accused was found guilty by a jury. He was sentenced to 11 years and seven months in prison. The drugs were ordered destroyed, the $5,000 cash confiscated as well as a pager and a cellular telephone, and he was prohibited from weapons for 10 years.

The accused appealed to the Quebec Court of Appeal arguing, among other grounds, that the trial judge erred in failing to find his arrest illegal and to exclude the evidence obtained incidental to a search. Although the timing of the accused's motion to exclude the evidence at trial was not proper, the Quebec Court of Appeal nonetheless commented on the merits of it. Justice Hilton stated:

> …[the accused] argues that the information on which the police acted on the afternoon in question was insufficient to justify his arrest. This information, however, included the specific identity of [the accused], his photograph, a description of the vehicle he would be driving with the licence plate, along with the location of the building in which the drugs were said to be found. In my view, this constituted an adequate basis to proceed to his arrest without a warrant in light of his conduct as it was observed by the police when he arrived on the scene…. Not the least of these factors was his attempt to flee after he had taken his position at the wheel in the Yukon when the vehicle was intercepted, after which he was seen throwing the plastic bag onto the middle of Queen Mary Road.
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> As far as the items seized subsequent to the arrest are concerned, this issue was not raised before the trial judge. Since there is no judgment of the trial judge on the subject, there is nothing for this Court to review…. In any event, having abandoned the plastic bag in which the heroin was found by throwing it onto Queen Mary Road, [the accused] can no longer contend for a privacy interest with respect to the contents of the bag. [references omitted, para. 54-55]

The appeal was dismissed.

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