POLICE ACADEMY
715 McBride Blvd. New Westminster B.C. V3L 5T4

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On November 13, 2006 50-year-old Ontario Provincial Police (OPP) Constable David Mounsey died in hospital as a result of injuries he sustained in an on-duty collision on October 14th, 2006. Constable Mounsey was a dedicated officer who was well liked and respected by his peers and members of the community. He began his career with the Royal Air Force in Britain, before joining the OPP and being posted to the Haldimand-Norfolk OPP Detachment. He then later accepted his present posting at the Huron County Detachment. He served eight years with the OPP and showed his pride as a committed member of the West Region Ceremonial Unit. He was also a volunteer firefighter with the Blyth and District Fire Department. He is survived by his wife and 3 children.

"They are our heroes, We shall not forget them"[1]

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

DETENTION BASED ON REASONABLE SUSPICION LAWFUL

R. v. Beladjat, 2006 QCCA 588

A citizen called police after seeing two black men leave a vehicle while the driver remained inside. The men were dressed in black, one wearing a ski mask and the other a cap. They went towards a house and retuned a few minutes later, leaving in the vehicle. A few minutes later the police intercepted a vehicle traveling in the reported direction about 500 m from incident. It was occupied by three men; two black and one white (the accused). The accused was wearing a black coat and false collar and was recognized as a member of a street gang. He was searched for safety reasons and police found a telescopic baton in his coat pocket. He was subsequently convicted of possessing a prohibited weapon.

The accused appealed his conviction to the Quebec Court of Appeal submitting his arrest and search were unlawful. The Court of Appeal disagreed and upheld the accused's conviction. The police had reasonable grounds to suspect he was implicated in a crime which justified the stopping of the vehicle and detention of the three men for investigation for a short period. The search, for safety purposes, was also lawful.

Complete case available at www.canlii.org

www.10-8.ca

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

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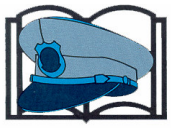
'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"I had one of your publications forwarded to me and found it educational and very easy to read (nice when your brain is mush after 12 hours on shift!)"—**RCMP Constable, British Columbia**

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"I have been reading [the 10-8 Newsletter] for a while now and find it very interesting and useful"—**RCMP Constable, British Columbia**

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"Enjoy reading each article. Fabulous newsletter"—**Police Academy Instructor, Prince Edward Island**

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"I find the biggest challenge trying to keep up on case law, as I think that is an essential part of the job. Figured…10-8 is an awesome resource for the contents of the case law and then could read the entire case if applicable"—**Detective Constable, British Columbia**

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"We have recently started reading [10-8] at work, and since we deal with so many impaired driving and warrant files, we find the case reviews very helpful! Thanks a lot!"—**Canada Border Services Officer, British Columbia**

****

"Our recruits are made aware of your newsletter and often ask me questions about the cases you have highlighted in class. Kind of wets their appetites with respect to becoming criminal investigators."—**Police Academy Instructor, Alberta**

****

"Could I trouble you to place me on your electronic distribution list? It is a great resource that I have often used for discussions in our briefings. Normally I just locate one printed out in our office but it's time that I subscribe myself! Thanks."—**RCMP Corporal, 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 22 for the answers.

1. A conclusory statement of electrical theft by a Hydro employee may be sufficient to justify a warrant to search for an electrical bypass.
   (a) True
   (b) False

2. A police officer who bends over and sniffs a bag on a luggage trolley at a bus depot does not 'search' the bag as defined in s.8 *Charter* jurisprudence.
   (a) True
   (b) False

3. A Hydro employee's observations after entering onto property to check electrical usage for Hydro purposes cannot be used by police to support a search warrant because the employee acts as an agent of the state when they go onto the property to check the meter.
   (a) True
   (b) False

4. A statutorily compelled statement from the driver of a motor vehicle by police while investigating a traffic accident can be used by police in an impaired driving/over 80mg% trial?
   (a) True
   (b) False

Note-able Quote

When faced with a challenge, look for a way, not a way out—David L. Weatherford

BULLET POINTS

BC's Top Municipal Crime Rates (2005)	
Municipality	Crime Rate[2]
Smithers	301
Williams Lake	252
Quesnel	237
Fort St. John	228
Merritt	228
Dawson Creek	225
Port Alberni	210
Terrace	206
Prince Rupert	204
Squamish	204
Whistler	202

Source: Municipal Crime Rate Report, Police Services Division, Ministry of Public Safety and Solicitor General—July 2006 www.pssg.gov.bc.ca/police_services/publications/crime_rates_burdens/MunCrimeRate_2001-2005.pdf

EVIDENCE ADMISSIBLE DESPITE UNLAWFUL DETENTION

R. v. Calder, 2006 ABCA 307

A police officer patrolling a summer festival event attended by several hundred people saw the accused hand money to another man and return his cupped hand to his pocket. The officer suspected a drug deal and, along with his partner, approached the men. The accused was told he was under investigative detention for trafficking and was patted down for weapons. In his pocket the officer felt a long, hard object which turned out to be a knife. He continued the pat-down and felt a bulge in the accused's right pant pocket. He searched inside the pocket and removed two spitballs of cocaine. The accused was arrested and a further search located a loaded, sawed off 22 calibre rifle in his backpack, additional cocaine, bear spray, empty baggies, and a digital scale. The

[2] Criminal Code offences per 1,000 Population

accused was charged with possession for the purpose of trafficking and several weapons offences.

At trial in Alberta Provincial Court the judge found the officer did not have reasonable grounds to detain the accused and the search that followed was unreasonable. Furthermore, given the size of the spit balls the officer could not have believed in good faith that the bulge in the pants was a weapon. The seizure of the drugs, rifle, and other items was therefore unlawful. However, under s.24(2) the trial judge admitted the evidence. The search was non-conscriptive, unobtrusive, and no force was used. Moreover, having a loaded rifle in a public area favoured admission. The evidence was ruled admissible and the accused was convicted.

He then appealed to the Alberta Court of Appeal arguing the trial judge erred in excluding the evidence. In his view, the trial judge did not give proper consideration to her finding the police lacked good faith in conducting the search and also erred in holding that the public's outrage against crime, particularly gun crime, mitigated that bad faith.

In a 2:1 decision, the Alberta Court of Appeal upheld the admission of the evidence. Although the trial judge found serious misconduct on the part of the police, she properly considered the three-step inquiry required for the admissibility of evidence:

1) trial fairness;
2) seriousness of police conduct; and
3) the effects of excluding the evidence on the administration of justice.

First, the evidence was non-conscriptive and admission would not affect trial fairness. As for the second step, assessing the seriousness of police conduct, the majority stated:

> The trial judge…found that [the officer] did not have reasonable grounds to suspect the [accused] had been involved in a drug transaction. Further, the search that led to the arrest of the [accused] was a pat-down search incidental to an investigative detention. Such a search is lawful only if the officer believes on reasonable grounds that his or her own safety, or the safety of others, is at risk. The trial judge found that [the officer] could not have had such reasonable grounds to search the [accused's] pant pocket. That finding was reasonable, having regard to the evidence of the size of the items discovered in that pocket. The lack of reasonable grounds led the trial judge to conclude the search was not committed in good faith, a finding that indicates a relatively serious breach of the [accused's] rights. Balanced against this finding is the trial judge's conclusion that the search was not obtrusive.

Finally, admission of the evidence would not bring the administration of justice into disrepute. The drugs and rifle were essential to the Crown's case. The offences were serious and aggravated by the circumstances; possession of a loaded firearm in a very public place during an event attended by hundreds of people. "Public concerns regarding the increasing threat to public safety which arises from the use and possession of firearms in the commission of offences is a factor which must be given serious consideration and in appropriate circumstances such as found here can override a finding of police misconduct," said the majority. "Our conclusion would have been different if there had been no loaded weapon, or if the circumstances had not involved such an evident and immediate threat to public safety."

Justice Berger, the lone dissent of the court, came to a different conclusion. He first noted that the trial judge found the police arbitrarily detained the accused. The trial judge concluded the officer did not have reasonable grounds to suspect the accused was involved in a drug transaction and that the officer could not have subjectively believed the pocket bulge was a weapon because of its size. As a result, the officer did not have reasonable grounds to believe his safety or that of others was at risk

and the search and seizure that resulted was unlawful and unreasonable.

In Justice Berger's view the *Charter* breaches were "wilful and flagrant. The police significantly overstepped the bounds of proper police conduct" and acted in bad faith. Furthermore, the officer's testimony was "unworthy of belief." Although the reliable evidence seized in this case was essential to the Crown's case for a serious criminal charge, the admission of the evidence would "exact too heavy a toll on the long term integrity of the administration of justice." Justice Berger would have excluded the impugned evidence, overturned the convictions, and entered acquittals on all charges.

Complete case available at www.albertacourts.ab.ca

DRIVEWAY INVESTIGATION DOES NOT EXCEED LIMITS OF IMPLIED INVITATION

R. v. Lotozky,
(2006) Docket:C43322 (OntCA)

At about 1:00 am two police officers responded to a suspected impaired driver call. It was reported that the driver of a vehicle at a fast food drive through window was too intoxicated to order. A general vehicle description was provided along with a license plate number. The licence plate was queried by computer and the officers attended the registered owner's address. The officers parked in front of the address and a car turned on to the street. The car was being driven very slowly and stopped on the street, flashing its high beams. The car moved again, stopped a second time, and then made a slow turn into the driveway of the registered owner's address. After the vehicle stopped the officer's approached the driver's window.

The officers watched the accused fumble with a fast food bag. One officer knocked on the window and the accused got out of the car and leaned against the door. The officer asked to see his licence, ownership documents and insurance. He fumbled with the documents and had to be asked again to provide them. He had difficulty maintaining his balance, his eyes were watery, he looked disheveled, and there was a smell of alcohol on his breath. When asked how much he had to drink he said one beer. An officer formed the opinion the accused's ability to drive was impaired by alcohol, he was arrested, and his vehicle towed. He subsequently provided two samples over the legal limit.

At trial in the Ontario Court of Justice the judge found the police had violated the accused's rights under s.8 of the *Charter* because they entered onto the driveway to investigate a criminal offence. Under these circumstances the police were not entitled to walk up the driveway attached to a dwelling house to investigate the suspected impaired driving. The fruits of the investigation, the breath samples, were inadmissible and charges of impaired driving and over 80mg% were dismissed.

The Crown unsuccessfully appealed to the Ontario Superior Court of Justice. The superior court judge found the accused had a reasonable expectation of privacy on his driveway. Further, the police exceeded the bounds of the implied licence doctrine when they entered to investigate a suspected criminal offence. By entering onto the driveway, the police were conducting a warrantless search which was *prima facie* unreasonable. Since the Crown did not rebut the presumption, the search was unreasonable and the Crown's appeal was dismissed.

The Crown then appealed to the Ontario Court of Appeal arguing, in part, that the accused did not have a reasonable expectation of privacy in the driveway and s.8 of the *Charter* was therefore not triggered. Further, even if there was a reasonable expectation of privacy in the

driveway, entrance onto it was lawful, in part, under the implied licence doctrine.

Justice Rosenberg divided the police conduct into four separate elements:

1) walking onto the driveway;
2) tapping on the window to get the accused's attention;
3) questioning the accused about his licence, ownership, and insurance; and
4) making the breathalyzer demand.

Unlike the fourth element which was clearly a search and seizure the first three were not. Justice Rosenberg stated:

> …despite the breadth of the notion of search and seizure, merely walking on to a driveway, even with an intent to conduct an investigation involving the owner, does not, in my view, constitute a sufficient intrusion to be considered a search. There must be something more, as in the perimeter search cases, peering in windows of the home and trying to detect odours from within. Put another way, not every trespass on to private property by police can constitute a search. I would not place a possible trespass on to a driveway open to public view in the category of a search or seizure.
>
> As regards the other two aspects of the police conduct, I tend to think that merely tapping on the window, like peering into a window with a flashlight, does not involve a search. Asking routine questions of a motorist about licence, ownership and insurance similarly would not seem to be the type of questioning that would lead to a finding of a sufficient intrusion into a reasonable expectation of privacy… Finally, cases concerning questioning of motorists in drinking and driving situations have turned on issues such as right to counsel and detention; not search and seizure… Obviously, the fact that the courts have not dealt with this element of the drinking and driving paradigm as a search issue is not determinative, but it does suggest to me that in most cases the search and seizure threshold is not crossed until the breathalyser demand is made…[references omitted, paras. 18-19]

However, even though walking onto the driveway, tapping on the window and asking for documents was not a search, the breath demand was. Hence, if the police were trespassers when they made the demand the police conduct was unlawful.

In this case, Justice Rosenberg examined the police conduct under the implied licence doctrine. This common law doctrine recognizes that an occupier of a dwelling gives implied licence to any member of the public on legitimate business, including the police, to enter onto the property. This invitation waives the privacy interest that an occupant may otherwise have in the approach to the door of their home provided the police enter onto the property for the specific purpose of communicating with the occupant. If the police, however, enter onto the property to secure evidence against the occupant by engaging in a search they have exceeded the boundaries of implied licence. If the occupant tells the police to leave, the licence is withdrawn and the police must leave unless they have acquired reasonable grounds to make an arrest before that time. Justice Rosenberg noted that this case was different than other cases involving police knocking on a door:

> In my view, there is a fundamental difference between the police conduct of knocking on the door of a dwelling house to investigate the occupants…and merely entering on to a driveway. The latter does not involve an investigation of persons in their own home. A driveway is not a dwelling house; it is a place where people drive and park their vehicles. It is an open area that is visible to the public. The scope of the implied invitation must be analyzed in that context. [para. 32]

Justice Rosenberg continued:

> The fact that the police officer intends to pursue an investigation on the driveway, at least if the investigation relates to a motor vehicle, does not in my view exceed the bounds of the implied invitation, provided that the

officer has a legitimate basis for entering on the driveway. Interpreting the common law in this way is, in my view, consistent with the broader principle…that licences may arise by implication from the nature of the use to which the owner puts the property. As I have said, the use to which this property is put is to park motor vehicles and it is an area of the property that is open to public view.

The officers in this case had a legitimate basis for entering on the driveway. They had received a report that the driver of the car associated with the address was apparently impaired. The driver drove the vehicle in an unusual fashion as he approached the driveway. The officers would have been entitled to stop the vehicle on the street under s. 48(1) of the *Highway Traffic Act*. For reasons of safety, they waited until the motorist had brought the vehicle safely to a stop. This was a reasonable decision to make. It makes no sense that because the officers exercised a reasonable degree of caution their actions should be characterized as illegitimate.

There are other reasons for viewing the officers' actions as legitimately within the scope of the implied licence. It would not be good policy to interpret the law as encouraging motorists to avoid the reach of legitimate traffic investigations by heading for home and thus encouraging a high-speed police chase. Further, until the impaired driving complaint was investigated there was a risk that an impaired driver would re-enter the vehicle and drive while impaired. It is not reasonable to expect the police to devote resources to waiting outside the motorist's house until he or she returns to the street. [references omitted, paras. 35-37]

Thus, the police were lawfully on the driveway in accordance with an implied invitation. The police were not asked to leave the property before reasonable grounds for arrest and the breath demand were formed. There was no s.8 breach. The Crown's appeal was allowed, the accused's acquittal set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

BC's RCMP/Independent Municipal Forces population > 15,000 Cost per Capita (2005)

Police Department/Detachment	Cost per Capita ($)
Victoria	329
Vancouver	291
New Westminster	276
Port Alberni (RCMP)	249
Langley City (RCMP)	237
West Vancouver	222
Fort St John (RCMP)	213
Delta	205
Port Moody	203
Prince George (RCMP)	201
Abbotsford	199
Oak Bay	194
North Vancouver City (RCMP)	186
Mission (RCMP)	183
Nanaimo (RCMP)	183
Kamloops (RCMP)	181
Central Saanich	181
Saanich	176
Campbell River (RCMP)	173
Langley Township (RCMP)	168
Surrey (RCMP)	167
Vernon (RCMP)	165
Burnaby (RCMP)	160
White Rock (RCMP)	160
Cranbrook (RCMP)	159
Langford (RCMP)	156
Chilliwack (RCMP)	154
Penticton (RCMP)	154
Maple Ridge (RCMP)	152
Richmond (RCMP)	152
Kelowna (RCMP)	149
Courtenay (RCMP)	147
Coquitlam (RCMP)	139
North Vancouver District (RCMP)	133
Port Coquitlam (RCMP)	133
North Cowichan (RCMP)	127
Salmon Arm (RCMP)	104

Source: Police Services, Ministry of Public Safety and Solicitor General, August 2006 available at www.pssg.gov.bc.ca/police_services/publications/other/MUNSUM2005.pdf [accessed, September 18, 2006]

CONCLUSORY STATEMENT BY HYDRO SUFFICIENT FOR REASONABLE GROUNDS

R. v. Le & Nguyen, R. v. Tran, 2006 BCCA 298

A police officer swore an information to obtain a search warrant for the purpose of investigating the theft of electricity under s.326(1)(a) of the *Criminal Code*. The grounds, in part, included information received by facsimile from a BC Hydro employee. Along with the employees' qualifications, the information stated that there was a pre-meter theft of electricity occurring at the residence based upon the measured electrical consumption going to the property compared with the timed meter consumption. A search warrant was issued allowing police to search for an electrical bypass and documents related to residency. The warrant was executed and the accused were charged with production, possession for the purpose of trafficking, and theft of electricity.

At trial in British Columbia Provincial Court the accused argued their rights under s.8 of the *Charter* had been violated and the evidence should have been excluded under s.24(2). The judge agreed, holding that the information to obtain was insufficient and the grounds were lacking. The information provided by BC Hydro merely stated a conclusion without any basis or factual foundation for reaching the conclusion. As a result, the statements from BC Hydro were not sufficient to provide reasonable grounds for the warrant, the evidence was excluded, and the accused were acquitted.

The Crown appealed to the British Columbia Court of Appeal arguing the trial judge erred in ruling the BC Hydro reports could not provide reasonable grounds for the warrant. The standard for issuing a warrant is whether the information to obtain contains sufficient information to give rise to reasonable grounds for believing that a crime has been committed. Justice Kirkpatrick, authoring the opinion of the Court, described reasonable grounds as follows:

> The standard is "reasonable probability", not "proof beyond a reasonable doubt" or "prima facie case"…A belief will be founded on reasonable grounds "where there is an objective basis for the belief which is based on compelling and credible information"… [references omitted, para. 15]

In this case, the information received from BC Hydro that its qualified employees had compared the electricity going to the house with the meter would be enough to support the warrant. The information before the justice issuing the warrant was from persons with specialized skill and training employed by the entity complaining about the theft of its services. The source of the information was reliable and there was no complexity about the calculation of the measurements. Justice Kirkpatrick stated:

> The authorizing judicial officer had before her information that demonstrated that on two occasions qualified B.C. Hydro technicians trained in detecting the theft of the company's property attended at the dwelling house. [One] measured the total electricity going to the dwelling. [The other] measured the amount of electricity recorded by the dwelling's meter. The measurements disclosed that more electricity was being used than was being recorded by the meter for billing purposes. Based on that discrepancy, [the technicians] stated that they believed that pre-metered theft was taking place. [para. 21]

And further:

> In each of the cases at bar, the authorizing judicial officer had a report from the alleged victim of a crime that, by the check of its own equipment, had determined that its property was being stolen. Based on such information from a credible source, the authorizing judicial officer could have been satisfied that there was an objective basis to believe that a crime was probably being committed. Although I think that the use of the word "theft" in the

> Information to Obtain was unnecessary and suggests a legal conclusion, it is clear from all of the circumstances that, based on the measurements conducted, there were more than sufficient reasonable grounds to believe a "suspected theft" was occurring. [para. 23]

The Court concluded that the BC Hydro reports were sufficient to support reasonable grounds to believe that a crime had occurred. The warrant was validly authorized and the appeal was allowed, the acquittals set aside, and new trials were ordered.

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

COP SNIFF NOT A SEARCH

R. v. Rajaratnam, 2006 ABCA 333

Two plain clothed officers who were part of a Jetway Unit were watching passengers disembark from a bus at a Calgary Greyhound depot. The Jetway Unit targets criminal activity by looking for suspicious behaviour. As the accused disembarked from a bus, he and an officer "locked eyes." The accused walked over to a bag, unlocked it, looked through it, closed it, and then locked it. The bag was left beside the bus with other luggage and the accused continued into the terminal. The officer went over to the bag and noted it was tagged for Montreal.

He then located the accused seated on the curb outside the terminal, showed him his badge and said, "I'm a police officer out here at the bus depot. You're not in any sort of trouble and you're free to go at any time. We just talk to people as they are traveling." The officer began to speak with the accused, requesting to see his ticket and identification, enquiring into his travel plans, and asking whether he was carry drugs or large quantities of money. As a result of their interaction with the accused the police noted the following:

- he purchased his ticket in a false name with cash at the last minute;
- he could not provide a credible explanation regarding the timing and duration of his trip. He said he was going to Montreal to visit his brother even though his ticket was valid for seven days, with six of those days involving travel;
- he became nervous when the police noted his identification and the name on his ticket did not match;

Another officer located the accused's bag, which was tagged with a false name and had been loaded onto a trolley. He bent over and sniffed it at the seam and zipper, noting a strong odour of Bounce fabric softener. In the officer's training and experience, fabric softner sheets, like coffee and bleach, are used as camouflage agents to mask the odour of drugs. The accused was then arrested for possession and trafficking in drugs. A key for the bag was located in the accused's carry-on bag, the bag unlocked, and two bricks of cocaine and four sheets of bounce where found in the bag.

At trial in the Alberta Court of Queen's Bench the accused was convicted of possessing cocaine for the purpose of trafficking. The trial judge concluded that he had not been detained or subject to a search prior to his arrest and the when the police did arrest him they had reasonable grounds to do so. The search of his bag was incidental to arrest and there were no *Charter* breaches to the accused's rights. The accused then appealed to the Alberta Court of Appeal arguing he was detained when the police began to talk with him, that they did not have reasonable grounds to arrest him, and that sniffing his baggage was a search protected under s.8 of the *Charter*.

The Detention

The Alberta Court of Appeal ruled that the trial judge did not err in concluding the accused was

not detained within the meaning of the *Charter*. The accused was clearly not physically detained nor was he psychologically detained in the sense that he did not have a reasonable perception that his freedom of choice was suspended. The Court stated:

> [N]ot every conversation with the police is a detention. There must be something more: a deprivation of liberty. The law has not yet reached a point that a compulsion to comply will be inferred whenever a police officer requests information, for that would mean police could never ask questions. [para. 13]

Deciding whether someone is detained or not involves a highly fact-dependent analysis and involves an examination of the totality of the circumstances including:

- the language used by police;
- the stage of investigation;
- whether the police had reasonable grounds an offence was being committed at the time of the conversation;
- the nature of the questioning;
- the person's subjective belief as to whether they felt detained; and
- the person's personal experiences that might affect their perceptions of the questioning.

In this case, although the police were suspicious of the accused they did not have grounds to believe he was committing an offence. He was told he was not in any trouble and free to go at any time. The conversation was polite, friendly, and voluntary.

The "Sniff"

Section 8 of the *Charter* protects a person against police investigative techniques only if those techniques intrude upon a person's reasonable expectation of privacy. Although the accused had a reasonable expectation of privacy in the bag itself, he did not have a constitutionally protected interest in the air space around the bag. The Court wrote:

> …Arguably, there may be some nexus between the sniff and the contents, because a sniff may provide information about what is inside a bag. In the same way, visual observation of a soft bag that conforms to the shape of an interior object, such as a sharp pointed item, may provide information about the contents of a bag. But neither a visual nor an olfactory human observation can be equated categorically to a search of the contents in these circumstances. [para. 37]

And further:

> The place where the alleged search took place is an important factor in this case. The bag was in an area where the traveling public (but not the general public) and Greyhound employees were permitted, although [the accused] was not aware that the general public would not have access. It was not in a locker, or being carried on [the accused's] person. It was checked baggage, first handled by Greyhound employees, then stored with other bags in the underbelly of a bus, then removed by other Greyhound employees and left out in the open, in the midst of luggage that would be handled by other passengers. The trial judge made a critical finding that odour emanating from the bag could have been detected by third parties, such as baggage handlers and fellow passengers, and was not subject to an obligation of confidentiality…
>
> [The accused] attacks this finding, claiming that the sniff is a search of the contents of the bag, the privacy interest attaches to the contents and police cannot search the contents of luggage unless they have a warrant based on reasonable grounds.
>
> This argument ignores the fact that the odour of the Bounce sheets escaped into the public air space, something a reasonable person would realize. In fact, the very reason the Bounce sheets were placed in the bag was to allow the pungent odour to escape and mask the smell of drugs. While the officers confirmed the presence of Bounce sheets by sniffing quite close to the bag, a reasonable person in these circumstances would foresee that others, including baggage handlers and fellow

> passengers, would come close enough to the bag to detect the odour. [paras. 42-44]

The search was not intrusive nor did it expose any intimate details of the accused's lifestyle, offer insight into his private life, affect his dignity, integrity, or autonomy, or provide information of a biographical nature:

> The final consideration is whether the sniff exposed any intimate details about [the accused's] private life, or information of a biographical nature, or affected his dignity, integrity and autonomy. The smell of Bounce did not provide any biographical information. It mayhave permitted inferences about [the accused's] lifestyle, in the sense that he was a drug courier, but only when considered in light of the officers' other observations and their training in detecting camouflage agents.
>
> Of course, a sniff could reveal other personal information, such as perfume, or salami or body odour, if the bag contained sneakers or dirty clothes. Undoubtedly, some odours reveal intimate details or information of a biographical nature. However…this fact alone does not make a search unreasonable: it is but one factor to be weighed and balanced with the other relevant factors. Here, a reasonable person would know that strong odours commonly escape from bags, and that passengers and baggage handlers will be in close enough proximity to the bags to detect these odours. Thus, even if a sniff can expose personal information, there could be no objectively reasonable expectation of privacy in these circumstances. [references omitted, paras. 50-51]

Since there was no privacy interest engaged, s.8 was not triggered.

The Arrest

The police may arrest a person if they have reasonable grounds to believe the person is committing an indictable offence. This requires a subjective belief based on objective grounds. These objective grounds are not to be viewed in isolation but rather viewed as a whole. In assessing whether grounds exist a police officer's training and experience is relevant in determining objective reasonableness. Even where objects may appear innocent to the general public they may have a different meaning to an experienced drug officer.

Here, the officer testified that Bounce, although not a prohibited substance and used commonly by the general population, is also a common drug-camouflage agent. But it was not this fact alone that provided reasonable grounds for the arrest. Rather, it was combined with other factors. "An odour of fabric softener or other known camouflage agent will not always provide reasonable grounds for arrest, or even articulable cause to detain," said the Court. "Similarly, the presence of a common household item will not always be dismissed as a neutral factor and ignored in the reasonable grounds calculus. Context and circumstances are key." The accused's appeal was dismissed and his conviction upheld.

Complete case available at www.albertacourts.ab.ca

ROBBERY VIOLENCE NEED NOT BE EXPLICIT

R. v. Arsenault,
(2006) Docket:C44608 (OntCA)

The accused walked into a bank fully disguised. His head was wrapped with gauze bandages with only his eyes exposed and he was wearing a baseball cap. He handed the teller a note demanding money, refused to use his voice, and answered questions of the teller only by nodding or shaking his head. The teller was very nervous and wanted to make sure she did everything right so no one would be hurt. The accused received $5000 and left.

At trial in the Ontario Court of Justice the accused conceded that a theft occurred, but argued it was not a robbery: there being no

threat of violence. The trial judge, however, concluded there were threats of violence.

Subjectively, the accused acted with the specific intent of causing fear in the teller. He disguised himself, didn't speak, and didn't run when he got the money. Instead, he sat and waited until the teller complied with his intended purpose. Objectively, "the totality of [the accused's] acts created the threat of violence to cause to effect his purpose of obtaining money from [the teller]." The accused was convicted of robbery under s.343(a) of the *Criminal Code*.

The accused appealed to the Ontario Court of Appeal arguing, in part, that he should have only been convicted of theft. The Ontario Court of Appeal, however, disagreed in a unanimous endorsement. The Court found "the threat of violence was implicit in the location of the crime and in the [accused's] conduct, including his disguise." The trial judge's findings were supported by the evidence and the accused's conviction appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

HYDRO EMPLOYEE NOT A STATE AGENT WHEN CHECKING ELECTRICAL CONSUMPTION

R. v. Wallis, 2006 BCCA 481

An employee contracted to BC Hydro to investigate hydro theft received a call from a police officer reporting an anonymous tip that there was a marihuana grow operation at the accused's residence. There was a police policy in place to contact Hydro when a tip about a possible grow operation was received and the officer expected Hydro would investigate his tip. The Hydro employee (who was also an ex-police officer) checked the records and found that had the residence been set up as a grow op it was possible that there was an electrical bypass. He then attended the residence and did a "stick-check" of the electricity meter using an ammeter. The electrical consumption recorded on the meter was compared to the amount of electricity actually being consumed in the residence. If the two measurements do not match then a theft is taking place.

The employee then faxed the police officer stating there was a theft of electricity at the residence. The officer did not yet have sufficient grounds to obtain a search warrant for the suspected marihuana grow-operation, so obtained a general warrant for the theft of hydro which was granted. Police executed the search warrant and found an electrical bypass in the attic and a marihuana grow operation in the basement.

At trial in British Columbia Provincial Court the accused argued that the Hydro employee was acting as an agent of the police. He submitted that the police had hydro do by the "back-door" what the police could not do through the "front door." Thus, he contended that when the Hydro employee went onto the accused's property to check the meter they were conducting a warrantless search thereby violating s.8 of the *Charter*. The information obtained by this action should therefore be expunged from supporting the search warrant and the resulting evidence obtained inadmissible under s.24(2).

The trial judge, however, ruled that even though the officer had more than one motive in contacting hydro (theft of electricity/possible fire hazard and furthering his own marihuana grow investigation), his actions were lawful. The police gave no instructions or directions to the Hydro employee and he was not acting as an agent despite the fact the officer expected Hydro would investigate the tip. He was fulfilling his contractual right of access to the property under the *BC Hydro and Power Authority Electric Tariff* by checking on electricity usage. The accused's application was dismissed and he

was convicted of unlawful production of marihuana.

The accused appealed to the British Columbia Court of Appeal arguing the trial judge erred in finding the Hydro employee was not acting as an agent of the police. Justice Prowse, authoring the unanimous opinion of the court, held that the question concerning whether the Hydro employee was acting as an agent is largely one of fact. In this case, the trial judge's decision was supported by the evidence.

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

TRAFFIC ARREST POWER REQUIRES COMPLIANCE WITH STATUTE

R. v. Plummer,
(2006) Docket:C41634 (OntCA)

A police officer stopped the accused, a taxi driver, for not wearing his seatbelt. After twice requesting a driver's licence, ownership papers and vehicle insurance without receiving them and warning of arrest for failing to identify, the accused was arrested under Ontario's *Highway Traffic Act* (*HTA*). A scuffle ensued and the accused was subdued with the help of a citizen. He was charged with assaulting a peace officer in the execution of his duty and assault with intent to resist arrest.

At trial in the Ontario Court of Justice the accused was convicted of resisting arrest while the assault police officer was stayed do to the *Kienapple* principle. The accused then unsuccessfully appealed to the Ontario Superior Court of Justice arguing the elements of the arrestable offence under s.33 of the *HTA* had not been satisfied. The appeal judge rejected this claim, ruling the arrest lawful since the officer had demanded a licence twice and warned the accused he would be arrested for failing to identify. Furthermore, the appeal court held that even if the arrest was not lawful the accused should not have resisted arrest. Rather, he should have complied and sought a remedy in civil or criminal court or through the police complaints bureau.

The accused then again appealed to the Ontario Court of Appeal. In a 2:1 judgment the Ontario Court of Appeal found the arrest unlawful and acquitted the accused. Section 217(2) of the *HTA* provides limited powers of arrest for a police officer:

s.217(2) *Highway Traffic Act*
Any police officer who, on reasonable and probable grounds, believes that a contravention of any of the provisions of…subsection 33 (3)…has been committed, may arrest, without warrant, the person he or she believes committed the contravention

Section 33 of the *HTA* imposes two duties on drivers. First, a driver must carry their licence with them while in charge of a motor vehicle. Second, a driver must surrender their licence for reasonable inspection upon the demand of a police officer:

s.33 *Highway Traffic Act*
(1) Every driver of a motor vehicle or street car shall carry his or her licence with him or her at all times while he or she is in charge of a motor vehicle or street car and shall surrender the licence for reasonable inspection upon the demand of a police officer or officer appointed for carrying out the provisions of this Act.
(2) Every accompanying driver, as defined under section 57.1, shall carry his or her licence and shall surrender the licence for reasonable inspection upon the demand of a police officer or officer appointed for carrying out the provisions of this Act.
(3) Every person who is unable or refuses to surrender his or her licence in accordance with subsection (1) or (2) shall, when requested by a police officer or officer appointed for carrying out the provisions of this Act, give reasonable identification of himself or herself and, for the purposes of this subsection, the correct name and address of the person shall be deemed to be reasonable identification.

If the driver is unable or refuses to surrender their licence they may be required to provide some other form of reasonable identification, which includes giving one's correct name and

address. Using the rules of statutory interpretation, Justice Rosenberg, authoring the majority judgement, interpreted this section to mean that "the obligation to provide alternative identification arises only when an officer makes a separate and specific demand for alternative identification." In other words, the police officer must do something other than make a further demand for a driver's licence under s.33(1) to trigger s.33(3). A separate request for alternative identification is needed to trigger the arrest power under s.217(2) for this offence. Justice Rosenberg concluded:

> In my view, the proper interpretation of s. 33(3) requires that the officer must make a specific request for identification other than a driver's licence. Until that request for alternative identification has been made and the person has refused to comply, there is no contravention of the subsection. It follows that there can be no power to arrest without a warrant until the officer has made the request for alternative identification. [para. 43]

In this case, the officer only asked the accused to provide his licence. Although he did this repeatedly, he did not ask for some other reasonable identification. The s.33(1) duty was triggered, however the s.33(3) was not. Since the accused did not contravene s.33(3) of the HTA, the officer did not have reasonable and probable grounds to make the arrest. The arrest was therefore unlawful and the officer was not in the execution of his duty. Thus the offence of assaulting a peace officer in the execution of his duty was not made out. The accused's appeal was allowed and the charges were dismissed.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

Man cannot discover new oceans unless he has the courage to lose sight of the shore—Andre Gide

REASONABLE GROUNDS REQUIRES OBJECTIVE BASIS

Kirk v. Canada, 2006 ABCA 227

A veteran Drug Control Section police officer received information that a male, travelling under a false name, went to Europe to acquire narcotics and would be transporting them back to Canada. The officer confirmed a passenger under the false name would be arriving at the airport on a flight from Hungary via Amsterdam. The plaintiff's name appeared on the flight manifest as this male's companion. Canada Customs were informed by police that the plaintiff and her male companion would be transporting drugs. The police had decided to arrest and search the plaintiff before her plane arrived.

The two passengers were read their *Charter* rights by Customs Officers when they arrived at the airport and their luggage was searched. No illicit drugs were found in the plaintiff's luggage. The plaintiff spoke to a lawyer and was strip searched, but no drugs were found. The plaintiff was arrested and taken to the hospital where stomach x-rays were performed. There was nothing to suggest ingestion of drugs but medications were ordered to induce vomiting. This was negative and enemas were ordered. This too was negative and a body cavity search was done. Like the other procedures nothing further was revealed and the plaintiff was released.

The plaintiff sued both the police and medical staff for battery, unlawful search, and false imprisonment. The judge found the evidence of the officers unreliable. Investigation notes had been destroyed and the Police Service could not locate a report. The plaintiff was awarded $150,000 for general damages (to be shared by the officer in charge and the physician), $30,000 for unlawful search and false

imprisonment against the officer in charge, and $50,000 for exemplary and punitive damages against the officer in charge.

The officer in charge of the Drug Control Section appealed the trial judge's findings to the Alberta Court of Appeal, arguing, in part, that he erred when he found the police did not have reasonable and probable grounds to search the plaintiff, including the strip search. However, Justice Ritter, authoring the unanimous decision, upheld the trial judge's findings.

The informant never mentioned the plaintiff. She was only targeted by the police when she was identified in the flight manifest as the suspected drug transporter's companion. Since the plaintiff was not identified by the informant, the only grounds remaining were the observations of the plaintiff made by airport Customs officers and items found in her checked luggage. The plaintiff was described by Customs officers as nervous, leaning on the counter, wearing dark sunglasses, and having a bloated appearance. In her luggage three cans of deodorant and a package of condoms were found. The plaintiff explained she had the condoms from a fear of contracting AIDS. Justice Ritter stated:

> None of these supposed indicators that [the plaintiff] was carrying drugs provide reasonable and probable grounds. Moreover, reports from Customs officers disclose that [the police officers] made it clear they intended to arrest [the plaintiff and her companion] regardless of what was observed at the airport. The observations at the airport only became important to them when [the defendant] was sued. They had decided to arrest and search [the plaintiff] before she arrived in Edmonton.
>
> This leaves practically nothing to support the existence of reasonable and probable grounds. Although [the officer in charge] argues that the law relating to reasonable and probable grounds has developed since this event, and that he need only meet the standard that existed at the time, reasonable and probable grounds have never consisted of police feelings or hunches. Further, the law has been clear for years that the more intrusive the search, the more cogent must be the evidence to support the grounds.
>
> ……
>
> The test here involves both a subjective and an objective element… That is, the officers had to subjectively believe that they had the reasonable and probable grounds; and, looked at objectively, those grounds must exist. Although the trial judge misstated the test in concluding that "neither [police officer] could have objectively formed the opinion that they had reasonable and probable grounds to effect the searches and arrest of [the plaintiff]" …, it is nevertheless obvious that he concluded the objective element of the test was missing.
>
> Although it might be argued that this search was incidental to the arrest of [the plaintiff], the officers nevertheless required reasonable and probable grounds to arrest her in the first place. Again, the police are unable to establish, on an objective basis, that they had those grounds. Absent a legal arrest, a search incidental to arrest is also illegal. [references omitted, paras. 39-44]

The officer in charge's appeal from a finding of liability was dismissed.

Complete case available at www.albertacourts.ab.ca

THE ELEVEN COMPONENTS OF FITNESS!

By Kelly Keith

Suspect: Male, 6'2", 250 lbs, large build
Police Officer: Female, 5'7", 120lbs, slender build

If the suspect attacks the police officer, what factors determine who wins this altercation?

- Spontaneous Attack
- Weapon Readiness
- Winning Mindset
- Number of Officers
- Tactics

- Fitness
- Strength
- Fighting Ability - Control Tactics

How can we best train police officers in fitness and strength, which will ultimately enhance fighting ability/control tactics?

If the above-mentioned police officer trained with weights everyday is it possible that she would be able to match the strength of the suspect?

As police trainers with a limited amount of time, are we getting the best return for our time by getting our recruits/officers into the gym on weights and/or running?

Does this type of fitness training turn out the officers that are going to defend themselves better and will there be fitter officers at the end of training?

Training with weights and running are absolutely great ways to build foundations, but as police trainers we need to enhance the other fitness components, which will enable the officer to win!

A simple example is rotary power. Rotary power will address how hard you can swing your baton, punch, kick and/or throw a suspect to the ground. Rotary power is also needed in most escapes from the ground. Officers can increase rotary power just as easily as building bigger biceps!

There will always be strength differences. It is obviously not possible to always be stronger or in better shape than all of our suspects, however by understanding our strengths and addressing our weaknesses police trainers need to enhance the eleven components of fitness for each officer not just aerobic power and strength.

The Eleven Components

Many fitness factors have to be considered to optimize a police officers fitness and ability to defend themselves.

Muscular Power / Speed Strength

This is the ability to produce force in a brief amount of time. In other words the product of force and velocity. Should a police officer possess strength, but cannot apply this strength rapidly, the amount of strength they have is irrelevant if it cannot be applied in time.

Thus to develop Power you must apply speed to the desired movement or specific tactical situation.

This is an imperative factor for a police officer, as the ability to produce force in a brief amount of time is vital in any physical confrontation. There are many very strong police officers that are not able to transition this strength into "speed strength" which is more beneficial to police officers.

Muscular Strength

This is considered the ability to produce maximal force. Strength is vital to optimize muscular power but is different in the Speed that the force is exerted. Research indicates that most people can perform about 10 repetitions with 75 % of their one rep maximum. Thus if someone can bench press 100 pounds for one repetition they are most likely able to perform about 10 repetitions with 75 pounds.

Fast twitch muscles – generally low endurance – higher power but less endurance thus less than 10 repetitions with 75 % of one rep maximum.

Slow twitch muscles – generally high endurance can perform more than 10 repetitions with 75 % of one rep maximum.

Research shows that previously untrained men and women gain about two to four pounds of muscle and 40 to 60 % more strength after two months of regular strength training – it then slows down but typically continues for several months.

Gender: Men typically have more muscle than women – muscle is positively influenced by the presence of testosterone (male sex hormone).

Generally larger muscles are stronger muscles (one to two kilograms of force per square centimeter of cross sectional area). Simply speaking, men generally have more muscle than women and thus generally men are stronger than women.

Muscular Endurance

This is the ability to perform repeated muscular actions, which can be very important in any physical confrontation that lasts longer than approximately 15 seconds. In any altercation the addition of Muscular Endurance will lengthen the time period you can physically perform optimally under stressful metabolic conditions.

Muscular endurance is an important aspect of a police officers training program. The principle of specificity applies, which means that muscular endurance is activity specific. A marathon runner, although having muscular endurance in their legs would not mean that they can skate the same distance. By simply running, police officers should not believe they could grapple on the ground longer than a subject that trains for this stimulus.

Flexibility

This is the ability to move the joints through a range of motion. In weight training it is *vital* to exercise both sides of a joint so as to not limit joint flexibility. Benefits of Flexibility include:

- Less energy to move a joint through a range of motion
- Decreased risk of injury
- Increased blood supply and nutrients to joint structures
- Increased neuromuscular coordination / opposing muscle groups work in a more synergistic or coordinated fashion.
- Improved muscular balance and postural awareness
- Decreased risk of lower back pain
- Reduced stress – stretching promotes muscle relaxation.

Balance

This is the ability to maintain the center of body mass over a base of support. This is another very important factor for a police officer as the officer's ability to be stable when the body is in motion is a crucial element in a physical confrontation.

Body Composition

Age, height, gender, body type, body mass, muscle fiber type etc. This can greatly affect a police officer. However, there are many of these components an officer cannot do anything about (age, gender, etc). Each officer brings their genetic inheritance into the mix. However, how they train, how they use available strategies, and how they integrate these strategies in performance dictates the degree of success.

Cardiorespiratory Fitness/Aerobic Endurance

This is the ability to persist or sustain activity for a prolonged period of time. For best results strive for 50 to 85 % of maximal oxygen uptake to get optimal cardiorespiratory results. Duration will vary depending on intensity. Generally, police officers with greater Cardiorespiratory Fitness have more stamina, less fatigue, and fewer risks of injuries.

Agility

Agility is sometimes thought of as the culmination of nearly all the physical abilities that a person possesses. It is the ability to stop and change direction quickly. There are few, if any, confrontational situations that require speed in only a straight-line movement. Agility is composed of:

- Coordination
- Stabilization
- Biomechanics

- Speed
- Strength (stabilizing / propulsive)
- Energy system development
- Elasticity
- Power
- Dynamic Balance
- Mobility

There are studies that show a tennis player has greater agility when they have a tennis racquet in their hand then when they do not. Thus, training agility is optimized when the implement you wish agility to be utilized is used when training (eg. baton, sidearm, empty-handed etc.

Agility is often overlooked as an aspect of fitness but is an extremely important one for a police officer. One of the most important qualities of control tactics is for the officer to get off the line of attack. Most police attacks are spontaneous. Whether a fist, knife, or bullet, an officer able to get off the line of attack is far more likely to win the confrontation.

Quickness / Reaction time

This is reaction time and movement time in response to a specific stimulus. This fitness aspect is very important to policing as well. How fast can the officer get to their equipment when the stimulus is presented to the officer – draw sidearm, baton, etc. If this aspect is enhanced the police officer can enhance their chances of success in a confrontation.

Quickness allows a small officer to prosper in a big "man's" game and gives a large officer another way to improve their tactics.

Speed

This is basically how fast a person can move from point "A" to point "B" forward, backward or laterally. Pure speed can give a police officer an advantage in getting to cover, tactically re-positioning, getting to the aid of a victim, or catching a suspect in a short foot chase.

Coordination

Coordination can reflect how well joints manage the muscular firing patterns between or among them. It is crucial in the hand-eye relationship needed in policing.

Coordination is prominent in transition exercises – eg. baton to sidearm. It is also important in shooting, and many other firearm activities.

In future articles I will break down each fitness component and show you ways to improve each!

(reference: Bill Foran; High Performance Sports Conditioning)

TRAVELLER NOT DETAINED DURING ROUTINE SEARCH AT BORDER

U.S. v. Reda, 2006 QCCA 1254

The applicant, a Canadian citizen, was subject to a routine search of his vehicle by Canada Customs while entering from the United States. His vehicle had been entered as a lookout on the customs computer indicating "proceed of crime" and he was referred to secondary. In his vehicle customs officers found a telephone bill and a small amount of amphetamines. He was asked to remove his jacket and it felt unusually heavy. He was escorted to a detention room where his jacket was searched and a sum of $151,137.25 USD was found in 16 pockets of his jacket. He was arrested for drug smuggling and cautioned, read the secondary warning, and his rights to legal counsel were explained. He was then frisk searched and subjected to a strip search.

It was learned that he did not declare this money to US Customs before leaving the US. A copy of the telephone bill was transmitted to the US Bureau of Immigration and Customs Enforcement (BICE). As a result of a BICE

investigation, the US was seeking to extradite the accused on drug and possession charges.

The accused sought various forms of *Charter* relief in Quebec Superior Court including the exclusion of evidence from the extradition proceeding gathered by Canada Customs, an order forbidding Canadian authorities from providing the evidence to the US, and an order staying the proceedings. He argued, in part, that the search of his person and vehicle violated s.8 of the *Charter* and that his rights under s.10(b) were breached.

The extradition judge found the applicants *Charter* rights were not breached. Under s.98 of the *Customs Act* a customs officer only need suspect on reasonable grounds that a person has prohibited material secreted on or about their person to conduct a search. The same standard applies to vehicle searches under s.99. In this case, the officer had reasonable grounds to suspect the applicant's car may be importing a large amount of currency. She then found the telephone bill in the van and the money in his jacket. The search of the car and request for the jacket was a routine search of baggage and a pat or frisk of outer clothing as described by the Supreme Court of Canada as falling in the first category of border searches. The applicant was therefore not detained in the constitutional sense at this point. The telephone bill and the finding of the money was admissible as proof for the extradition hearing.

The applicant then appealed the judgment to the Quebec Court of Appeal. In a unanimous opinion, the Court dismissed the appeal and ordered the applicant surrender to the authorities within 48 hours. The Court stated:

> The fact that there was a "look out" in the customs system when the appellant approached the Canadian border that was acted on by the customs authorities does not mean, in the circumstances revealed by the testimony of the three customs officers, that the appellant was detained when the elements of proof that he sought to have excluded by the extradition judge were uncovered. Unlike the facts described in *Jacoy*, [1988] 2 S.C.R. 548, they were not exercising their authority as customs officers in the pursuit of an active police investigation. [para. 2]

Complete case available at www.canlii.org

INJURIES TOO REMOTE TO HOLD POLICE LIABLE

Rhora v. Ontario,
(2006) Docket:C42091 (OntCA)

The plaintiff was diagnosed with bipolar disorder and placed on a lithium regime. He had stopped taking his medication and one day, while intoxicated, hit his head and fell unconscious. He went to the hospital for treatment and was released. Five days later he called the police and asked them to come and arrest him for growing marijuana. He said he was afraid that some people would take his plants and hurt or kill him. When the police arrived, they found him armed with a knife and a pellet gun and with broken glass in his pockets; his room had been trashed and he reported that he had been taking heroin. The police charged him with possession of weapons and took him into custody. They noted that he was acting strangely, but that he was calm. Although they considered using s. 11 of Ontario's *Mental Health Act* to take him to a hospital, they decided that by arresting him any danger to him or others would be addressed.

The plaintiff was kept overnight at the police station and then transferred to a detention centre. While in custody, the police learned from the plaintiff's ex-wife that he suffered from a chemical imbalance and had been prescribed lithium. The police, however, did not pass this information on to the detention centre. The detention centre did learn from the plaintiff's relatives that he had a six-year psychiatric history where he exhibited strange behaviour.

He also acted aggressively during a visit from his brothers. He was subsequently placed in the psychiatric unit in a cell with two other men. He later fought with the two other men, killing one of them.

He was taken to the hospital for his injuries and saw a staff psychiatrist at the detention centre the next day. No medication was prescribed and he subsequently injured himself in his cell by banging his head against the wall. He was tried for murdering his cell-mate but was found not guilty by reason of mental disorder. He was held on a warrant of committal and released into the community eight years later on medication.

The plaintiff and his family sued the police, among others, for failing to immediately apply s.11 of the *Mental Health Act* and send him for a psychiatric assessment. This negligence, it was suggested, resulted in the plaintiff killing his cell-mate, receiving an eight-year committal, and suffering significant head injury.

Section 11 of the *Mental Health Act* reads:

s. 11 *Mental Health Act*
Where a constable or other peace officer observes a person who acts in a manner that in a normal person would be disorderly and has reasonable cause to believe that the person
(a) has threatened or attempted or is threatening or attempting to cause bodily harm to himself;
(b) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him; or
(c) has shown or is showing a lack of competence to care for himself,
and in addition the constable or other peace officer is of the opinion that the person is apparently suffering from mental disorder of a nature or quality that likely will result in,
(d) serious bodily harm to the person;
(e) serious bodily harm to another person; or
(f) imminent and serious physical impairment of the person,
and that it would be dangerous to proceed under s. 10 [bringing information on oath before a justice of the peace for an order for assessment by a physician], the constable or other peace officer may take the person in custody to an appropriate place for assessment by a physician.

At trial in the Ontario Superior Court of Justice the trial judge dismissed the action. The trial judge found that neither the police nor the detention centre fell below the standard of care required of them and even if they did, the damages the plaintiff suffered were not foreseeable and were too remote. Nor was there any systemic negligence. Further, the head injury probably resulted from his earlier fall at home when he struck his head. He also held that the police may take into account neighbourhood factor's and its residents when deciding what is "normal" under s.11 and that the police need not revisit a decision not to seek an assessment.

The plaintiff appealed the findings of the trial court denying liability to the Ontario Court of Appeal. Writing the opinion of the court, Justice Feldman dismissed the appeal. The police did not breach their duty of care. And even if the defendants did not meet the standard of care required of them, the action or inaction of the defendants did not cause the damages. The failure of the police to communicate information about the plaintiff's mental illness to the detention centre was not a proximate cause of the killing or of any further injury to the plaintiff and any damages he suffered were too remote.

Justice Feldman, however, did note that the trial judge erred in his interpretation of what is "normal" under s.11 of the *Mental Health Act* by allowing the police to consider factors relating to the nature of the plaintiff's neighbourhood and its residents (someone living in one of the city's toughest neighbourhoods and involved with drugs). He stated:

> This type of analysis could well result in a hands-off approach by the police to people who may be in dire need of psychiatric help. This would further disadvantage those who are already living on the fringes of society. On the other hand, the police were entitled to consider the fact that the appellant told them he had been taking heroin when they assessed whether his behaviour was "disorderly" as compared to a "normal" person, in the context of s. 11. [para. 18]

Despite this error, the officers involved did consider him acting very strangely. However, they determined he did not meet the other criteria under s.11 and decided not to seek an assessment. The plaintiff's admission he took heroin would affect his judgment and perceptions. He was calm and compliant. The police did not err in their decision.

The trial judge also erred in holding that the police need not revisit a decision not to seek an assessment under s.11 if they learn new relevant information. If the police decide not to seek an assessment but new relevant information is learned, they should revisit their decision under s.11. But once again, the police saw no signs of violence in the plaintiff's behaviour and were not negligent in not referring the plaintiff for assessment after learning of his mental illness.

Training

Justice Feldman commented on the desirability of specialized training for police officers to assist them in dealing as effectively as possible with mentally ill prisoners. Although he noted that police officers are not psychiatric professionals, "it is apparent from many aspects of this case, including the initial arrest of the [plaintiff], that it would be helpful for the police to have more training in evaluating abnormal behaviour, so that they are able to make the best judgment possible to apply the criteria of the Act in the interests of the individual and of society."

Complete case available at www.ontariocourts.on.ca

DELAYED POLICE ARRIVAL EXPLAINED BY BUSY NIGHT

R. v. Carey,
(2006) Docket:C43623 (OntCA)

A witness telephoned 911 in the early morning hours to report a motor vehicle accident when a car left the roadway and struck a light standard. The caller did not indicate that alcohol might be involved. About an hour later an officer, who saw the call was still outstanding, arrived on scene and arrested the accused for impaired driving. He was taken to the police station where two samples of his breath were taken, both over the legal limit. The first sample was taken one hour an forty minutes after the accident.

At trial in the Ontario Court of Justice the accused argued that the Crown had failed to prove the breath samples were taken as soon as practicable after the accident as required by the *Criminal Code*. The trial judge, however, found the delay could be explained because the police did not arrive and start their investigation until some one hour and ten minutes after the accident. The accused was convicted of over 80mg% and the impaired charge was stayed.

The accused successfully appealed to the Ontario Superior Court of Justice. The appeal judge held the trial judge erred in considering only the delay from police arrival until the tests were taken. In his view, the Crown failed to reasonably explain the delay in attending the accident. It wasn't enough for the officer to say they were busy that night. The Crown failed to prove the breath samples were taken as soon as practicable, the accused's appeal was allowed, and his conviction quashed.

A further appeal by the Crown to the Ontario Court of Appeal was successful. Justice Juriansz, writing the judgment of the Court, agreed that the trial judge applied the wrong legal standard when he considered only the time between the officer's arrival and the taking of the breath samples. However, this was not a case where a delay occurred after the driver had been detained and the breath demand had already been made. Rather, the delay that required explanation in this case occurred before the grounds for the demand developed. Justice Juriansz stated:

> In my view, the arresting officer's testimony that it was a busy night and that other calls were waiting coupled with the fact that there had been no suggestion in the initial call that alcohol might have been involved in the accident was capable of supporting a finding that the delayed police arrival was reasonable in the circumstances. It was unnecessary for the Crown to call a senior officer from the detachment or the dispatcher on duty to explain how the police were deployed to the various patrol areas or to provide details about what other calls occupied the police that night. In my respectful view, the other possible inferences suggested by the appeal judge, for example that there might have been fourteen murders in town that night, were speculative. [para. 16]

A new trial was ordered.

Complete case available at www.ontariocourts.on.ca

HAIRCUT DISCRIMINATION COMPLAINT DISMISSED

Mosher v. West Vancouver Police Department & others, 2006 BCHRT 86

A police officer filed a complaint with the BC Human Rights Tribunal alleging that his department, police chief, and inspector discriminated against him on the basis of sex, contrary to s.13 of the *Human Rights Code*, because there were different grooming standards for male and female hair length. In his view, these different standards were discriminatory and the same standard should apply to both genders.

After reviewing the purposes of the *Human Rights Code*, Tribunal Member Barbara Humphreys dismissed the officer's complaint. She stated:

> In my view, a different hair grooming standard for female and male officers does not constitute an impediment to [the officer's] ability to participate fully in the economic, social, political or cultural life of British Columbia nor does it impact on his dignity. Given the substance and context of this complaint, and its *de minimus* nature, it would not, in my opinion, further the purposes of the *Code* to proceed with the complaint …[para. 10]

Complete case available at www.bchrt.bc.ca

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **True** —see *R. v. Le & Nguyen, R. v. Tran* (at p. 7 of this publication).
2. (a) **True**—see *R. v. Rajaratnam* (at p. 8 of this publication).
3. (b) **False**—see *R. v. Wallis* (at p. 11 of this publication).
4. (b) **False**—see *R. v. Powers* (at p. 24 of this publication).

WITNESS TO POLICE MISCONDUCT NOT A PERSON 'DIRECTLY AFFECTED'

Canadian Civil Liberties and Rolfe v. Ontario Civilian Commission on Police Services, (2006) Docket:C45104 (OntCA)

A witness (Rolfe) believed he saw police misconduct. He said he saw a police officer escorting a handcuffed woman from a store and suddenly slam her to the ground, causing her to strike her head on the pavement. He was "stunned" by the officer's actions and found the incident to be very disturbing, causing him anxiety and loss of sleep. One year later Rolfe filed a formal complaint under Ontario's *Police Services Act* relating to the officer's conduct. The Police Chief advised Rolfe his complaint would not be treated as a

formal complaint because he had not been "directly affected" by the alleged conduct, as required by s.59 of the *Act*. The police would not disclose any information to Rolfe about an internal investigation that resulted from his allegations nor its conclusions. Rolfe asked the Ontario Civilian Commission on Police Services to review the Police Chief's decision, but they agreed with it.

A judicial review was then undertaken in Divisional Court of the Ontario Superior Court of Justice to determine whether Rolfe was a person "directly affected" by the police conduct. Section 57(1) of the *Police Services Act* states that "a complaint may be made by a member of the public only if the complainant was directly affected by the…conduct that is the subject of the complaint," while s.59(5) states that "the chief of police shall not deal with any complaint made by a member of the public if he or she decides that the complainant was not directly affected by the…conduct that is the subject of the complaint."

Justice Molloy, with Justice Lane concurring, concluded that a person "directly affected" is someone more than merely "affected" and requires "some direct link between the person filing the complaint and the police conduct which is the subject of the complaint, something that distinguishes the complainant's interest from that of any other member of the community." Requiring a person to be injured by the police was far too restrictive of an interpretation of "directly affected" while allowing anyone unhappy with the police to complain would be too broad. In holding Rolfe a person "directly affected", Justice Molloy wrote:

> He was actually present at the time of the alleged assault. He witnessed at close range the assault and its aftermath. He spoke to the police officer. He was disturbed by what he saw and shaken by it even after the event. In other words, he was directly affected by what he witnessed, even though he was not physically struck by the police. His position goes beyond that of a concerned citizen as part of the general community; his experience was firsthand.

Associate Chief Justice Cunningham disagreed with the majority. In his view Rolfe was not a person "directly affected" but merely a witness. He stated:

> It would be unreasonable to conclude that the Legislature intended each and every witness to alleged misconduct could interject themselves into the process of resolving public complaints, including becoming a party to any hearing and having rights of appeal from any decision taken. Moreover, no useful purpose would be served by having this matter designated as a public complaint since the matter has been fully investigated and dealt with by the Chief of Police. Treating this as a public complaint would allow Rolfe to obtain personal information concerning the alleged victim and to make decisions about the processing of the complaint. Indeed, I see no utility in having Rolfe's complaint designated as a public complaint. In fact mischievous results could arise from doing so. [para. 4]

And further:

> There can be little doubt that Rolfe was "affected" by the impugned conduct. However, that is not enough. He has no personal interest in the matter. If the Legislature intended to include anyone "affected" by police conduct, it would not have included the word "directly" in the legislation. By including the word "directly", the Legislature clearly sought to carefully circumscribe the right of complaint. By including the word "directly" as an adverb, the Legislature must have intended there to be a degree of proximity before a person "affected" would be able to lodge a complaint. [para. 15]

The majority allowed the application for judicial review, set aside the Commission's decision, and Rolfe's complaint was sent back to the Police Chief to be treated as a formal complaint as a person "directly affected" by the alleged police conduct.

The Commission then appealed the Divisional Court's decision to the Ontario Court of Appeal. In a unanimous endorsement, the appeal court found the majority's interpretation of "directly affected" wrong. "Directly affected" requires the person have a personal and individual interest rather than just a general interest that pertains to the whole community. In this case, Rolfe could not provide the necessary link that he was "directly affected." The appeal was allowed.

Complete case available at www.ontariocourts.on.ca

STATUTORILY COMPELLED STATEMENT AT ACCIDENT SCENE INADMISSIBLE

R. v. Powers, 2006 BCCA 454

The accused clipped the back of another vehicle on a highway and ended up in the ditch. A police officer arrived on scene and both the accused and the other driver were present. The officer asked, "Who is the driver of the car in the ditch." The accused said he was. The officer noted the accused had red eyes and his breath smelled of alcohol. The approved screening device demand was given and he failed. A breathalyzer demand was made and the accused subsequently provided samples of his breath in excess of 80mg%.

At trial in British Columbia Provincial Court the judge ruled that the accused's admission he was driving was inadmissible under s.24(1) of the *Charter*. He thought he was required to answer the officer's question and report the accident to police. Without the admission, the officer did not have the reasonable suspicion required that there was alcohol in the body of a person operating a vehicle. The fail reading on the approved screening device, therefore, could not be used to support grounds for the breath demand. Accordingly the officer did not have reasonable grounds to make the demand in terms of identifying the accused as the driver of the vehicle in the ditch. He was acquitted of driving over 80mg%. A Crown appeal to the British Columbia Supreme Court was unsuccessful. The Crown further appealed to the British Columbia Court of appeal.

Justice Saunders, authoring the unanimous opinion of the appeal court, dismissed the appeal. Section 7 of the *Charter* guarantees that everyone has the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice, which includes the principle against self-incrimination induced by statutorily compelled information. Section 67 of British Columbia's *Motor Vehicle Act* requires the driver of a motor vehicle involved in an accident to report the accident to police and provide information about the accident as required by the police.

Although the question posed by the officer was no more than a preliminary exchange expected in a situation like this and was no more than what might be asked by an interested bystander, the officer was starting to mentally complete the accident investigation report and the accused felt obligated to answer. The statement made by the accused was self-incriminatory and its admission into the trial would contravene s.7 of the *Charter*.

Nor was the statement admissible for the limited purpose of establishing reasonable grounds for making a breath demand under s.254 of the *Criminal Code*. The trial judge did not err in ruling the statement admissible under s.24(1) of the *Charter*.

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

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