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

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

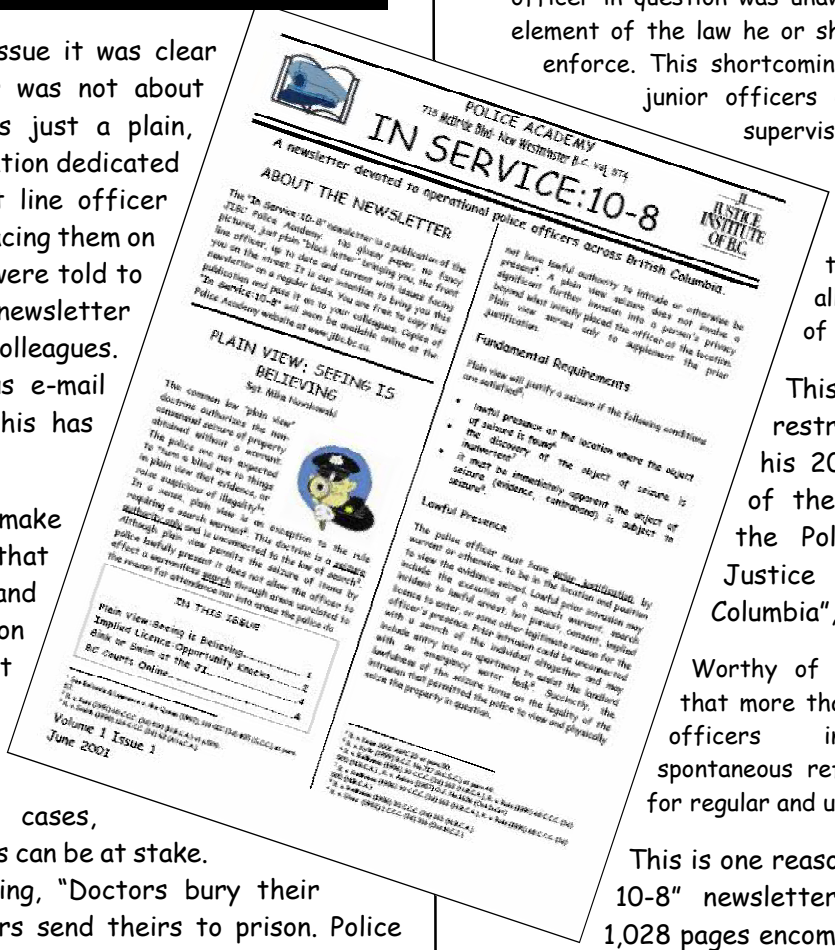
A newsletter devoted to operational police officers across British Columbia.

'IN SERVICE: 10-8' NOW IN 7th YEAR

The Justice Institute of British Columbia Police Academy's "Peer Read Publication" has entered its seventh year of printing. Back issues are available from 2001 on the "In Service: 10-8" website at:

www.10-8.ca

From the inaugural issue it was clear that this newsletter was not about flare. Rather, it was just a plain, content based publication dedicated to keeping the front line officer current with issues facing them on the street. Readers were told to feel free to copy the newsletter and pass it on to colleagues. From our tremendous e-mail response, we know this has happened.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IN SERVICE:10-8

A newsletter devoted to operational police officers across British Columbia.

ABOUT THE NEWSLETTER

PLAIN VIEW: SEEING IS BELIEVING

Sgt. Mike Nowakowski

Volume 1 Issue 1
June 2001

Police officers make decisions every day that require careful and prudent deliberation that will impact people's lives, in some cases forever. Errors can be costly. If the cops screw up, cases, careers, and even lives can be at stake. There is an old saying, "Doctors bury their mistakes while lawyers send theirs to prison. Police officers do a little of both".

In its 1997-1998 Annual Report, the Commission for Public Complaints Against the Royal Canadian Mounted Police (RCMP) noted that policing was becoming more complex in terms of the legal regime that governs the rights of the accused and the admissibility of evidence. And further, the Commission stated:

> RCMP officers need to keep up to date on developments in criminal law, especially those that affect the use of police powers, acceptable methods of gathering evidence, and the rights of accused persons. In reviewing complaints, the Commission frequently concludes that the police officer in question was unaware of an important element of the law he or she was attempting to enforce. This shortcoming is not confined to junior officers of the Force; some supervisors have given unsound advice to police under their command because they failed to consider all relevant provisions of a law.

This observation was not restricted to the RCMP. In his 2001 report, "Evaluation of the Training Provided by the Police Academy at the Justice Institute of British Columbia", Dr. Radford noted:

> Worthy of special mention was that more than 70% of the police officers interviewed made spontaneous reference to the need for regular and useful legal updates.

This is one reason why the "In Service: 10-8" newsletter was created. After 1,028 pages encompassing 616,046 words, "In Service:10-8" is proud to be a staple of so many police officers' diets.

HIGHLIGHTS IN THIS ISSUE

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

National Library of Canada Cataloguing in Publication Data

Main entry under title:

In service:10-8. -- Vol. 1, no. 1 (June 2001)-

Monthly.

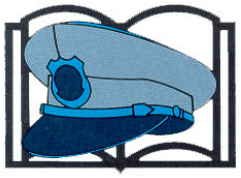
Title from caption.

"A newsletter devoted to operational police officers across British Columbia."

ISSN 1705-5717 = In service, 10-8

1. Police - British Columbia - Periodicals. 2. Police – Legal status, laws, etc. – Canada – Cases – Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten - eight.

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



"I would like to be added to your electronic mailing list for the In Service newsletter. It has been made reference to several times over some of the training courses I have attended recently, and I would like to receive the material on a regular basis. I am currently a member [in Ontario] and believe the material published would be beneficial in our constantly changing work environment. Thank you." - **Police Officer, Ontario**

****

"I was wondering if you could add me to the distribution list for the 10-8 newsletter? It's a great read and it would be fabulous if I could get new issues sent to me directly." - **RCMP Constable, British Columbia**

****

"I was wondering if you could put me on your distribution list for the '10-8 Newsletter'? It seems to be a great resource and it would be great to have it in the electronic version." - **Police Detective, Major Crime Section, British Columbia**

****

"Could you please add my email address to your electronic fan-out newsletter. I've found articles to be interesting as well as educational" - **Conservation Officer, Saskatchewan**

****

"All of us out here really appreciate the time and effort you put into keeping us abreast of evolving legal issues. I always refer to your publication first in preparing our Department's bi-annual Legal Update Seminars." - **Police Constable, British Columbia**

****

"Would you please include me on your e-mail list for the monthly publication. I can surely use this case law in training and practical applications." - **Police Sergeant, Ontario**

****

"I absolutely love your publication. As a new officer (1 yr.) I am finding it interesting and invaluable." - **Police Constable, British Columbia**

"I can't remember how it came to be that I started receiving this newsletter but I want to thank you for sending it to me. I find it a very informative easy read that keeps up on the ever changing case law we have to deal with. My son just started on the job and would like to receive a copy as well." - **Police Officer, Ontario**

****

"For 7-years I have read your paper faithfully from the first tiny little issue to the grand 40-pagers. I post it every month on our Service's Intranet site for other members to read. Really appreciate the stuff you put together - like refresher training in a box." - **Police Sergeant, Manitoba**

****

"Can you please add me to your distribution list. I find your publication very interesting and valuable. Many thanks." - **Police Constable, Drug Section, British Columbia**

****

"[A colleague] sent along your latest on-line publication for 10-8. Excellent publication!!! How can I get an on-line subscription?" - **Police Staff Sergeant, Ontario**

****

"I have heard many good things about your 10-8 Newsletter and would be very interested in receiving information on how I can obtain a subscription, be it through email or regular mail." - **RCMP Constable, British Columbia**

****

"I am submitting this email requesting to get on your 10-8 newsletter list. I have read a few of them and found them very informative and useful for training purposes." - ***Police Constable, Training Branch, Ontario***

****

"I am currently in police recruit training, and our instructor showed our class your 10-8 newsletter. I would really appreciate being added to the distribution list for this excellent publication. Thank you." - **Police Constable, British Columbia**

www.10-8.ca

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 27 for the answers.

1. The reasonable grounds threshold required for an investigative detention is lower than that required for an arrest.
   (a) True
   (b) False

2. If the police cannot corroborate the "criminal" aspect of a tip, they will never have enough grounds for an arrest.
   (a) True
   (b) False

3. The police may use the random stop powers under provincial highway traffic legislation as a general power of detention for investigative purposes unrelated to traffic enforcement.
   (a) True
   (b) False

4. When proceeding with a breathalyzer demand under the *Criminal Code* at an accident scene, the police officer must satisfy the court not only that he had reasonable and probable grounds to believe the driver was impaired, but also that there were reasonable and probable grounds to believe the accident occurred within the preceding three hours.
   (a) True
   (b) False

5. The police are not precluded from using reasonable persuasion to encourage a detained person to break their silence after their right to silence has been asserted following the exercise of the right to counsel.
   (a) True
   (b) False

Note-able Quote

It is not enough to aim. You must hit - Italian Proverb

ON-DUTY DEATHS DOWN

On-duty peace officer deaths in Canada fell by five last year. In 2006, six peace officers lost their lives on the job. This matches the 10-year lows of six deaths in 1998, 1999 and 2003.

Over the last 10 years motor vehicles, not guns, continue to pose the greatest risk to officers. Since 1997, 34 officers have lost their lives in circumstances involving vehicles, including automobile and motorcycle accidents (23), vehicular assault (3), and being struck by a vehicle (8). These deaths account for nearly 43% of all on-duty deaths, which is more than twice the next leading causes of gunfire (15) and aircraft accidents (12). On average, eight officers lost their lives each year during the last decade, while 1997, 2002 and 2005 had the most deaths at 11 per year.

Source: The Officer Down Memorial Page, www.odmp.org

2006 Roll of Honour

Senior Constable Don Doucet
Sault Ste. Marie Police Service, ON
End of Watch: May 14, 2006
Cause of Death: Vehicular Assault

Constable Robin Cameron
Royal Canadian Mounted Police, CAN
End of Watch: July 15, 2006
Cause of Death: Gunfire

Constable John Goyer
Abbotsford Police Department, BC
End of Watch: April 19, 2006
Cause of Death: Duty Related Illness

Constable Marc Bourdages
Royal Canadian Mounted Police, CAN
End of Watch: July 16, 2006
Cause of Death: Gunfire

Senior Constable John Atkinson
Windsor Police Service, ON
End of Watch: May 5, 2006
Cause of Death: Gunfire

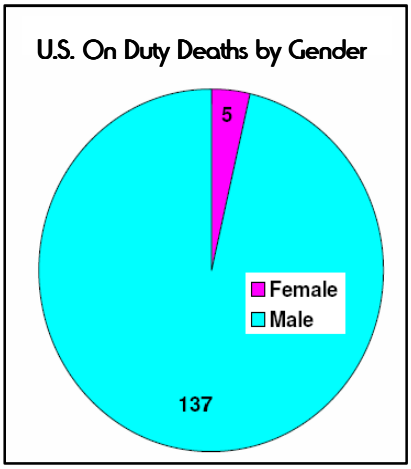
Constable David Mounsey
Ontario Provincial Police, ON
End of Watch: November 13, 2006
Cause of Death: Automobile Accident

Canadian Peace Officer On-Duty Deaths (by year)

Cause	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	Total
Aircraft accident		2		2		1	2	1		4	**12**
Assault			1								**1**
Auto accident	1	2	1	3	5	2	1	1	2	2	**20**
Drowned		1				1			1	1	**4**
Duty related illness	1										**1**
Fall							1				**1**
Gunfire	3	5	1		1	2				3	**15**
Heart attack		1	2		1		1		1	1	**7**
Motorcycle accident				1			2				**3**
Natural disaster					1						**1**
Stabbed			1						1		**2**
Struck by vehicle					3		2	2	1		**8**
Training accident						1		1			**2**
Vehicular assault	1		1					1			**3**
Total	**6**	**11**	**7**	**6**	**11**	**7**	**9**	**6**	**6**	**11**	**80**

U.S. On-Duty Deaths

During 2006, the U.S. lost 142 peace officers. The top cause of death was gunfire (51) — including accidents — followed by automobile accidents (35), vehicular assaults (16), and being struck by a vehicle (11). The state of California lost the most officers (15), followed by Virginia (10) and the states of Florida, Illinois, New York, and Texas, each with eight. The average age of deceased officers was 37 years and the average tour of duty was 10 years and 9 months.



Source: The Officer Down Memorial Page, www.odmp.org

2006 U.S. Peace Officer On-Duty Deaths

Cause	Total
Aircraft accident	3
Assault	2
Auto accident	35
Bomb	1
Duty related illness	2
Gunfire	48
Gunfire (accidental)	3
Heart attack	10
Motorcycle accident	7
Stabbed	1
Struck by vehicle	11
Vehicle pursuit	3
Vehicular assault	16
Total	**142**

NEW LAW: STREET RACING

On December 14, 2006 a new law came into force addressing street racing. New crimes were created for street racing based on dangerous driving and criminal negligence offences. Furthermore, in street racing situations, this new law increases the maximum punishments for some offences and also provides for minimum prohibitions on driving that increase on second and subsequent offences.

Defining Street Racing

Street racing is now defined in s.2 of the *Criminal Code* as "operating a motor vehicle in a race with at least one other motor vehicle on a street, road, highway or other public place."

The New Offences

Section 249.3 creates an indictable offence to cause bodily harm while street racing:

> *s.249.3 Criminal Code*
> *Everyone who by criminal negligence causes bodily harm to another person while street racing is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.*

Section 249.2 creates an indictable offence to cause death while street racing:

> *s.249.2 Criminal Code*
> *Everyone who by criminal negligence causes death to another person while street racing is guilty of an indictable offence and liable to imprisonment for life.*

Section 249.4 creates a dual offence for dangerous operation of a motor vehicle while street racing and indictable offences for dangerous operation causing bodily harm or death:

> *s.249.4 Criminal Code*
> *(1) Everyone commits an offence who, while street racing, operates a motor vehicle in a manner described in paragraph 249(1)(a).*
> *(2) Everyone who commits an offence under subsection (1)*
> *(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or*
> *(b) is guilty of an offence punishable on summary conviction.*
> *(3) Everyone who commits an offence under subsection (1) and thereby causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.*
> *(4) Everyone who commits an offence under subsection (1) and thereby causes the death of another person is guilty of an indictable offence and liable to imprisonment for life.*

"Bodily harm" is defined in s.2 of the *Criminal Code* as "any hurt or injury to a person that interferes with the health of comfort of the person and that is more than merely transient or trifling in nature."

Street Racing Sentencing Grid

Offence	Punishment (Jail)		Punishment (Driving Prohibition)	
	Min	Max	Min	Max
Criminal Negligence Cause Death while Street Racing s.249.2 *Criminal Code*	none	life	1st offence.....1 yr 2nd offence.....life	life
Criminal Negligence CBH while Street Racing s.249.3 *Criminal Code*	none	14 yrs	1st offence.....1 yr 2nd offence.....2 yrs 3rd + offences....3 yrs	10 yrs 10 yrs life
Dangerous Operation while Street Racing s.249.4(2) *Criminal Code*	none	Summarily=6 mos Indictment=5 yrs	1st offence.....1 yr 2nd offence.....2 yrs 3rd + offences....3 yrs	3 yrs 5 yrs life
Dangerous Operation CBH while Street Racing s.249.4(3) *Criminal Code*	none	14 yrs	1st offence.....1 yr 2nd offence.....2 yrs 3rd + offences....3 yrs	10 yrs 10 yrs life
Dangerous Operation Cause Death while Street Racing s.249.4(4) *Criminal Code*	none	life	1st offence.....1 yr 2nd offence.....life	10 yrs

GROUNDS FOR DETENTION LESS THAN ARREST

R. v. Aslam, 2006 BCCA 551

Two police officers driving a marked police car routinely ran the licence plate of a van travelling in the opposite direction. The van was registered to an Asian name living out of town, but the driver appeared to be East Indian. The police decided to do a licence and registration check, activated their emergency lights, and made a u-turn. The van made an erratic move to the curb and parked; the two occupants got out and walked away toward a lane. The officers cut them off, identified themselves as police, and asked the accused who owned the vehicle. He said he wanted to talk to his lawyer and appeared nervous and sweaty.

The accused and his companion were detained while police conducted further investigation to determine whether the van was stolen. The following reasons were cited for the detention:

- The men were not Asian;
- They refused to identify the owner;
- The manner they parked the vehicle; and
- They were breathing heavy and sweating.

One of the officers went to the van, which was locked and looked inside. He saw the passenger door handle and ignition cylinder were damaged. He opined that the van was stolen. Both men were then arrested for possessing stolen property and patted down. In the accused's pocket police found a key, which they wanted to use to open the door and look in the glovebox for information about the registered owner. As soon as the officer opened the door he detected an overwhelming odour of marihuana and concluded there was a large quantity of it in the van. He saw a duffle bag between the driver and passenger seats and opened it, finding packages of marihuana.

"An investigat[ive] detention requires reasonable grounds to suspect that a detainee is criminally implicated in the activity under investigation. The threshold is lower than the reasonable and probable grounds required for an arrest."

The men were re-arrested for possessing marihuana for the purpose of trafficking and given their *Charter* warning. The accused again asked for a lawyer and did not give a statement. The police returned to the van, opened the rear hatch and found five more duffle bags of marihuana. In total 202 lbs. of marihuana was seized from the van. The accused was subsequently convicted in British Columbia Supreme Court of possessing marihuana for the purpose of trafficking. He then appealed his conviction to the British Columbia Court of Appeal arguing the detention, arrest, and search were unlawful because they lacked sufficient factual foundation.

Justice Mackenzie, however, dismissed the accused's appeal. Writing for the unanimous court, Justice Mackenzie first noted the test for investigative detention:

> An investigat[ive] detention requires reasonable grounds to suspect that a detainee is criminally implicated in the activity under investigation. The threshold is lower than the reasonable and probable grounds required for an arrest. The grounds for detention must be a reasonable suspicion determined objectively from the circumstances. [para. 6]

Here, the trial judge did not err in concluding the officers had reasonable grounds for an investigative detention. Further, once the officer saw the damaged door handle and ignition cylinder the officer had "reasonable and probable cause" to conclude the van was stolen, thereby justifying arrest. The pat down search that followed was "reasonable incident of that arrest." The warrantless search of the van using the key was also lawful. "Here the intended search of the glove compartment was for the purpose of locating documents that would assist in determining ownership of the vehicle and relevant to the theft for which the [accused] was originally arrested," said Justice Mackenzie. He continued:

> Once the door was opened the officer testified that the smell of marihuana was overwhelming, consistent with the large quantity found by the subsequent search. At that point there were reasonable and probable grounds to arrest the [accused] for a drug offence and it was not

> necessary to formally arrest the [accused] for that offence in the circumstances before making the search…[references omitted, para 11]

The Court also rejected the accused's assertion that the officers' grounds for arrest dissipated once the vehicle key was found in his pocket. The officer testified that car thieves use master or filed keys to steal vehicles and finding the key did not cause him to reconsider the arrest. The trial judge's conclusion that the officers continued to have reasonable and probable grounds for arrest from the time of initial arrest until the opening of the van door to determine ownership was sound. The accused's appeal was dismissed.

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

REASONABLE GROUNDS DOES NOT REQUIRE CORROBORATION OF CRIMINAL ASPECT OF TIP

R. v. Goodine, 2006 NBCA 109

Police received a Crime Stoppers tip that the accused had been travelling to Montreal every two to three weeks and was returning with contraband cigarettes. The tipster was untested and the tip was anonymous, however the following information was provided:

- he was 39 or 40 years of age;
- he lived on the West River Road in Grand Falls, New Brunswick;
- he worked for Carvell Goodine and Sons, his father's business;
- he was using a new Dodge pickup truck;
- he had a girlfriend who operated a Dodge FX and provided the vehicle's plate number;
- The tipster provided the accused's personal phone number and said the accused had been involved in the purchase and distribution of contraband tobacco products for the previous six to 12 months, used either the Dodge pickup truck or his girlfriend's Dodge FX to ferry the contraband tobacco products from Montreal to Grand Falls, and that the accused's *modus operandi* was to deliver the contraband to locations selected by his customers. There was little traffic to and from his residence. The tipster also stated that the accused had returned from Montreal the previous day with contraband tobacco products.

The police were then able to confirm, by surveillance and other means, the accuracy of almost every "neutral" piece of information provided, including the accused's place of residence, phone number, and age, his girlfriend's identity and place of residence, and that the vehicles described were regularly parked at the accused's residence. Their licence plate numbers and ownership were also verified.

Over the next four months the tipster called three more times. Twice to report the accused had traveled to Montreal and had returned with a load of contraband tobacco. On the final occasion the tipster said the accused had gone to Montreal to pick up more tobacco products and would be returning later in the day.

At this point the police investigators believed they had reasonable and probable grounds to arrest the accused. They set up surveillance at the Quebec-New Brunswick border and waited to see him cross into New Brunswick. In the meantime, police called his mother's house and asked for him. They were told he had gone to Montreal earlier that day and would be returning sometime before midnight. As midnight approached, police saw the accused's vehicle on the Quebec side of the border heading for New Brunswick.

The accused was followed and stopped as he entered Grand Falls. He was arrested for possession of contraband cigarettes and admitted their presence in the back of his truck, which was covered with a tarp. A warrant was subsequently obtained and 19 cases containing 50 cartons of cigarettes along with a plastic baggie holding 37 cigarettes was seized. At trial in New Brunswick Provincial Court the accused was convicted of unlawfully possessing tobacco products under the *Excise Act*.

The accused then appealed to the New Brunswick Court of Appeal arguing he was arbitrarily detained under s.9 of the *Charter*. In the accused's view, he was arbitrarily detained because his arrest was

unlawful for lack of reasonable grounds. The tipster was untested and only "neutral" or "innocent" bits of the information had been corroborated. None of the "criminal" aspects had been corroborated by independent sources.

Justice Drapeau, authoring the opinion of the New Brunswick Court of Appeal, ruled that corroborated "criminal" aspects of a tip are not always required in assessing whether the police have reasonable grounds. He stated:

> Once unpacked the case on appeal boils down to the following narrow question, one of first impression in this Court: must the allegation of criminal activity by an untested anonymous tipster always be corroborated through other independent investigative means before the police can lawfully act upon that allegation and proceed to arrest its target? In my view, an affirmative answer is not ordained, as a matter of law. There are cases where a trial judge could reasonably conclude that, on the totality of the circumstances, the arresting officers had the requisite grounds to act as they did even though the "criminal" aspect of the tip had not been corroborated in the manner suggested above. Such corroboration is certainly not required by law in cases where, like the present one, there is no suggestion of any improper motive on the tipster's part and the corroborated "neutral" data are such that a reasonable and dispassionate observer would conclude the tipster is both closely acquainted with the target and, to some extent, privy to the criminal activity being reported. The case against a finding of unlawfulness is the more compelling where, as here, that observer would be at a loss to point to any justification – other than farfetched speculative possibilities - for the conclusion that the tipster's allegation of criminal conduct is unreliable. [para. 2]

And further:

> As I note in the introduction to these reasons, lack of corroboration of the "criminal" aspect of a tip by an untested anonymous source does not preclude a finding that an arrest based on that tip was lawful, at least where the following circumstances are in play: (1) there is no evidence that an improper motive underlies the tipster's report; (2) the corroborated "neutral" data would lead a reasonable and dispassionate observer to infer that the tipster is both closely acquainted with the target and privy to the criminal activity being reported; and (3) that observer would be at a loss to point to any fact-based, as opposed to speculative, justification for the conclusion that the allegation of criminal conduct is unreliable. In my view, the issue for trial judges is always whether, having regard to the totality of the circumstances, sufficient grounds existed to lawfully carry out the arrest. In other words, there is no hard and fast rule; what is required is a case-specific determination that reflects an assessment of the totality of the circumstances apparent to the arresting officers at the time they took action. [para. 20]

"...lack of corroboration of the 'criminal' aspect of a tip by an untested anonymous source does not preclude a finding that an arrest based on that tip was lawful..."

In order for a warrantless arrest to be lawful there must be reasonable and probable grounds, or credibly based probability. The standard is not proof beyond a reasonable doubt or a prima facie case. Although a tip by itself is insufficient to provide reasonable grounds, a tip can provide the necessary grounds if its reliability is satisfactorily established. This assessment requires a "totality of circumstances" approach. Where information is provided by an informant, a variety of factors must be considered including:

- The degree of detail of the tip;
- The informant's (tipster's) source of knowledge; and
- Indicia of the informer's reliability (such as past performance or confirmation from other investigative sources).

In holding that the trial judge did not err in his assessment of whether the accused's arrest was based on reasonable and probable grounds, Justice Drapeau wrote:

> The trial judge did not commit an error of law in rejecting the proposition that the tip upon which the officers relied to arrest [the accused] could not provide the requisite reasonable and probable grounds because its "criminal" aspect had not been independently corroborated. Corroboration of that nature was not necessary because: (1) there is not a

> shred of evidence that the tipster was actuated by an improper motive; (2) the corroborated "neutral" data, particularly the same-day trip to Montreal and back on August 28, are such that one is driven to the conclusion that the tipster was closely acquainted with [the accused] and, to a significant extent, privy to the criminal activity being reported; and (3) no one can point to any pre-arrest statement by the tipster that might cast doubt on his or her reliability. This case is entirely distinguishable on its facts from *R. v. Cormier (R.D.)* (1995), 166 N.B.R. (2d) 5… where the arresting officers acted upon "nothing more than a hunch" …[para. 30]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

ENTRY TO PROTECT LIFE VALID AFTER NEIGHBOUR REPORTS GUNSHOTS

R. v. Hill, 2006 BCCA 530

Police received a 911 call from one of the accused's neighbours reporting that she heard a gunshot coming from his property situated on a five acre parcel. Police were dispatched and advised to proceed with caution. Upon arriving near the property, police were approached by the complainant's husband who also said he heard the shot and believed it came from the accused's house. Shortly thereafter, officers heard two more gunshots they believed came from the area of the accused's house. The complainant was contacted by police and said she heard these two other shots as well and believed they came from the accused's house.

A member of the Emergency Response Team (ERT) became involved in discussions on how best to approach the situation. A decision was made by police to contact the accused and clear his home, believing they had a public duty to search the house to ensure no one had been injured or killed. Wearing bullet proof vests, officer managed to get the accused to exit his house by using a siren and loud hailer. The police told the accused why they were there and he suggested the shots may have come from a neighbouring property or from a container near the house that had a firecracker device in it. The police did not accept these explanations and after another occupant left the house police cleared it. In a search that lasted six minutes, police discovered 105 lbs. of marihuana in a small room in the basement. These drugs were subsequently seized under a warrant.

At trial in the Supreme Court of British Columbia the accused was convicted of possessing marihuana for the purpose of trafficking. Although the search of the home was without a warrant and therefore *prima facie* unreasonable, the judge found the common law duties of the police permit a warrantless entry to preserve the peace, prevent crime, and protect life and property. These duties, the judge ruled, authorized the police to respond to exigencies in a manner required by the emergency.

Here, the police believed the 911 call was legitimate, it was supported by objective criteria, the complainant had no ulterior motive in reporting the gunshots, and there was nothing to suggest the shots did not come from the residence. As well, the officers collectively viewed entry as necessary, the accused's inconsistent explanations for the sounds added to police concern, and the purpose of entry was not to investigate a crime but to secure the life and safety of anyone in harm's way. The accused received 30 months in prison, a $50,000 fine and was prohibited from possessing weapons.

The accused appealed to the British Columbia Court of Appeal arguing the warrantless search of his home was unreasonable under s.8 of the *Charter*. In his view, the circumstances did not provide a reasonable belief at the time of entry that there was a person in the house who needed emergency aid and assistance. The Crown, on the other hand, submitted that the circumstances must be viewed as a whole, rather than on a piecemeal basis.

Justice Prowse, for the unanimous British Columbia Court of Appeal, upheld the accused's conviction. Although the police could not pinpoint the location of the shots they heard, they were nonetheless still acting on the report by the complainant, confirmed by her husband, that the gunshots were connected to the accused's residence. The police were concerned enough that they contacted ERT and

consulted amongst themselves numerous times before finally approaching the residence. The officers honestly believed they needed to search the house to properly investigate the complaint and ensure no one inside was in harm's way. The accused's appeal was dismissed.

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

STOP OF VEHICLE LEAVING BAR LATE AT NIGHT NOT ARBITRARY

R. v. Schell, 2006 SKCA 128

A police officer parked his police car with its park lights on about half a block away from the front entrance of a local liquor establishment in a small town in the early morning hours. His intentions were to act as a deterrent and also stop every vehicle leaving the area to check driver sobriety. After seeing two men leave the bar and walk around the corner, the officer saw a truck, which he had noted earlier parked on a side street near the bar, drive down the street. He followed the truck a few blocks and stopped the vehicle, asking for a driver's licence and vehicle registration. Noting the accused's breath smelled of alcohol, a roadside test was administered and he failed. He was taken to the police station and two breathalyser samples over the legal limit were obtained.

At trial in Saskatchewan Provincial Court the judge ruled the accused had been arbitrarily detained by the police contrary to s.9 of the *Charter* because there was no articulable cause to stop him. The only reason the police stopped the vehicle was because it was being driven away from the immediate area of the bar where it had been parked. The certificate of analysis was excluded under s.24(2) and the accused was acquitted. An appeal by Crown to the Saskatchewan Court of Queen's Bench was unsuccessful.

The Crown then appealed to the Saskatchewan Court of Appeal arguing the officer had reasonable grounds (or articulable cause) to detain the accused. In the Crown's view, a patrol officer's decision to stop as many vehicles as possible leaving a local bar does not make the stop arbitrary. The accused, on the other hand, submitted there was no cause for suspicion presented at trial that would justify detention .

Justice Lane, writing the Saskatchewan Court of Appeal's opinion, allowed the Crown's appeal. The detention took place in a smaller community, late on a Friday night about bar close time. The officer observed the accused walk from the bar and then a vehicle seen parked nearby leave the immediate area. The stop was not random and the officer had reasonable grounds to detain. Justice Lane stated:

> The officer had objective grounds for detaining the [accused] in the circumstances of this case as previously stated. It was late at night, around the time the bar was to close, and the patrons were leaving. He saw the [accused] leave the bar, and shortly thereafter saw a vehicle he had previously identified leave the immediate vicinity of the bar and proceed down the street. The apprehension took place close to the bar. [para. 19]

There was no s.9 *Charter* breach and the certificate of analysis was admissible. Since the essential elements of the offence were admitted, a conviction on an over 80mg% charge was entered and the matter remitted back to Provincial Court for sentencing.

Complete case available at www.canlii.org

JP ENTITLED TO DRAW REASONABLE INFERENCES FROM INFORMATION

R. v. Durling, 2006 NSCA 124

Police received an anonymous Crime Stoppers tip reporting that the accused was growing marihuana in the basement of the white house she was renting. The tipster stated there were huge lights plugged into outlets similar to those used for stoves and dryers. The accused's phone number and place of work was also provided.

The police followed up on the tip. Investigators confirmed the phone number belonged to the accused at the address provided. The house was

verified as rental property and a drive-by of the address revealed a white single story bungalow with a brick chimney and a small wine coloured vehicle parked near the rear door. When police drove by the mall where it was reported the accused worked, they saw a vehicle similar to the wine coloured car parked. The licence plate was checked and the vehicle was registered to the accused, but at a different address. Police also called the accused's workplace and she answered the phone. The police drove by the residence several more times and saw lights on and cars in the driveway, but nothing of any consequence.

A second Crime Stoppers report was received from the tipster again confirming the existence of the grow operation and that about 150 plants would be soon harvested. A hand held FLIR was used on the residence and an increased level of heat was detected coming from the basement compared to the remainder of the home. This was consistent with the use of high powered lights used at a grow operation and with them being in the basement. The FLIR was also aimed at several neighbouring residences and no similar elevated heat levels were detected.

The investigators also noted the basement windows were covered with a material designed to prevent light from being observed and obtained a warrant from a justice of the peace to search the house and found evidence confirming the grow operation. The accused was subsequently charged with producing marihuana and possession for the purpose of trafficking.

At trial in Nova Scotia Provincial Court the judge quashed the warrant. In his view there was insufficient information upon which to base the warrant. The search was therefore warrantless and a breach of the accused's *Charter* rights. The evidence was excluded and the accused was acquitted. The Crown then appealed to the Nova Scotia Court of Appeal arguing the justice of the peace had enough evidence to justify the warrant.

The legal test for determining whether a judge properly issued a search warrant is not whether the reviewing judge would have issued it, but rather whether the issuing judge could have issued it. In other words, it is not the role of the reviewing judge to substitute their view of the evidence for that of the issuing judge. In this case, the Nova Scotia Court of Appeal ruled the warrant was quashed in error.

The trial judge considered that there was a lack of corroboration respecting the illegal aspects of the tip while many of the legal details of the tip (ie. name, address, place of employment) were corroborated. The FLIR results and covered window observations were weighed by the trial judge and he concluded the police had only a strong suspicion, not credibly based probability required for a warrant. The trial judge also wrongfully suggested the justice of the peace could only draw proper inferences from the information as opposed to reasonable inferences. A justice of the peace is entitled to draw their own inferences as long as those inferences are reasonable. Since the trial judge applied the wrong standard of review he erred in law. Thus the Court of Appeal was required to apply the proper test. In this case, Chief Justice MacDonald found the warrant valid. He stated:

> Thus, based on the information provided in this case, as supplemented in the *voir dire*, I ask whether the JP *could* have issued the warrant? For the following reasons, I would say that she could:
> -The tipster was specific as to the respondent's identity, her phone number, her employment, the location of her residence, and the fact that the premises were leased. This was all corroborated by the police.
> - As revealed in the *voir dire*, the tipster reported to have personal knowledge as opposed to reporting hearsay.
> - The FLIR results were probative not only in relation to other nearby dwellings, they also confirmed that the increased heat was coming from the basement. This corroborates the tipster's report.
> - The covered basement windows further corroborated the alleged illegal activity. [para. 30]

The search was lawful, there was no breach of s.8, and the evidence was admissible. The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

REASONABLE GROUNDS REQUIRES SUBJECTIVE BELIEF BASED ON OBJECTIVE CRITERIA

R. v. Rhyason, 2006 ABCA 367

The accused was driving a vehicle when he struck and killed a pedestrian crossing the street in a marked, lit crosswalk at a controlled intersection. The attending officer noted the accused had bloodshot eyes, an unusually blank stare, possibly from shock, and he blinked unusually slow. He was also shaking and had alcohol on his breath. He admitted to being the driver and was polite, but upset, showed no balance or speech problems, and did not take long to answer questions. The officer arrested him for impaired driving causing death after forming the "opinion" he had consumed enough alcohol to impair his driving. Breath samples were subsequently taken.

At trial in the Alberta Court of Queen's Bench the accused argued the officer did not have the requisite reasonable and probable grounds needed to demand a sample of his breath under s.254(3) of the *Criminal Code*. In his view, the results of the breath sample should have been excluded. The judge disagreed and concluded that the officer did have the required grounds, although borderline. Although the trial judge noted there were no obvious sign of impairment and the signs that were evident were equally consistent with emotional distress, the officer did have a deceased pedestrian, an admitted driver with a smell of alcohol on his breath, and minor evidence consistent with alcohol consumption.

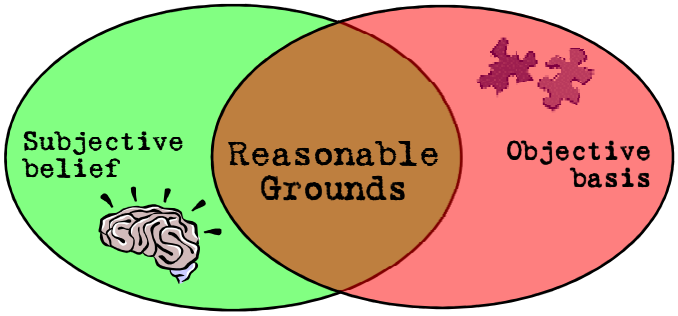
Furthermore, the accident itself was a valid component of the officer's grounds even though there was no slurring, no staggering, and no unusual driving before the accident. The breathalyser certificate was admissible and the accused was convicted of over 80mg% and impaired driving causing death.

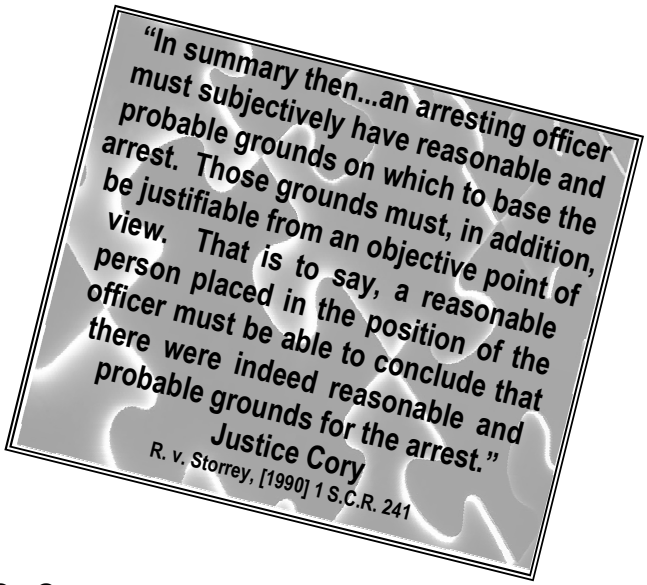
The accused then appealed the trial judge's ruling to the Alberta Court of Appeal again submitting, among other issues, that the officer did not have reasonable and probable grounds for the breath demand. In a 2:1 majority, the Alberta Court of Appeal first noted that "a finding that there were reasonable and probable grounds requires a finding that the officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief" (internal quotations omitted).

Subjectively, in this case, the officer's "opinion" the accused was impaired was no different that an honest belief he was impaired. Objectively, the officer had a combination of facts that the accused was impaired that went beyond alcohol consumption alone. Even without evidence of unusual driving the officer was entitled to consider the accident that, with no other apparent cause, suggested alcohol consumption had impaired the driver's conduct .

Justice Slatter, in dissent, would have allowed the appeal, set aside the convictions and ordered new trials. In his view, the trial judge applied the wrong legal test in deciding whether the officer had objective reasonable and probable grounds.

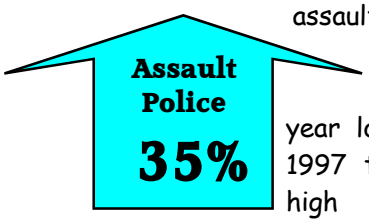
Complete case available at www.albertacourts.ab.ca



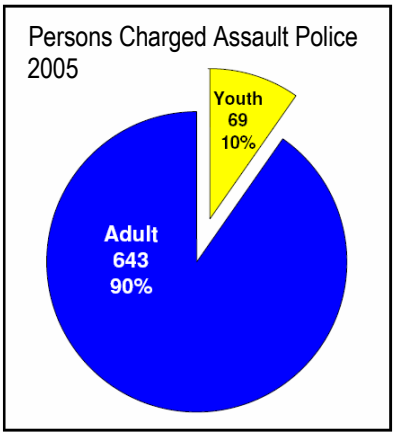


ASSAULTS AGAINST B.C. POLICE RISE

Although the Canadian Centre for Justice Statistics recently reported Canada's overall crime rate dropped by 5% including a 2.2% reduction in violent crime, British Columbia's Ministry of Public Safety and Solicitor General reports that assaults against the police are on the rise . The number of offences for assaulting police have risen from a 10 year low of 750 in 1997 to a 10 year high of 1,011 in 2005. That is an increase of nearly 35%. Of the 1,011 reported offences in 2005, 916 were cleared, representing a clearance rate of almost 91%. There were 712 persons charged, including 643 adults and 69 youths. Perhaps most disturbing, is that the number of youths charged with assaulting a police officer has risen over 43%; from 48 in 1996 to 69 in 2005.

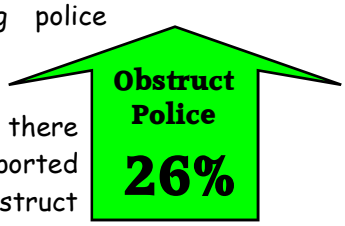


The rate of assaults against British Columbia police in 2005 was 13.5 per 100 police officers. This is higher than the U.S. average rate of assaults at 11.9 per 100 sworn officers as reported by the U.S. Department of Justice (Federal Bureau of Investigation, Law Enforcement Officers Killed and Assaulted, 2005).



The rate of weapons possession offences has also risen considerably. In 1999 there were 1,695 reported weapons possession offences. By 2005 that total had more than doubled to 3,398.

The number of offences of obstructing police have also increased. In 2000 there were a reported 1,226 obstruct police offences. That total had risen to 1,552 offences in 2005; an increase of more than 26%.

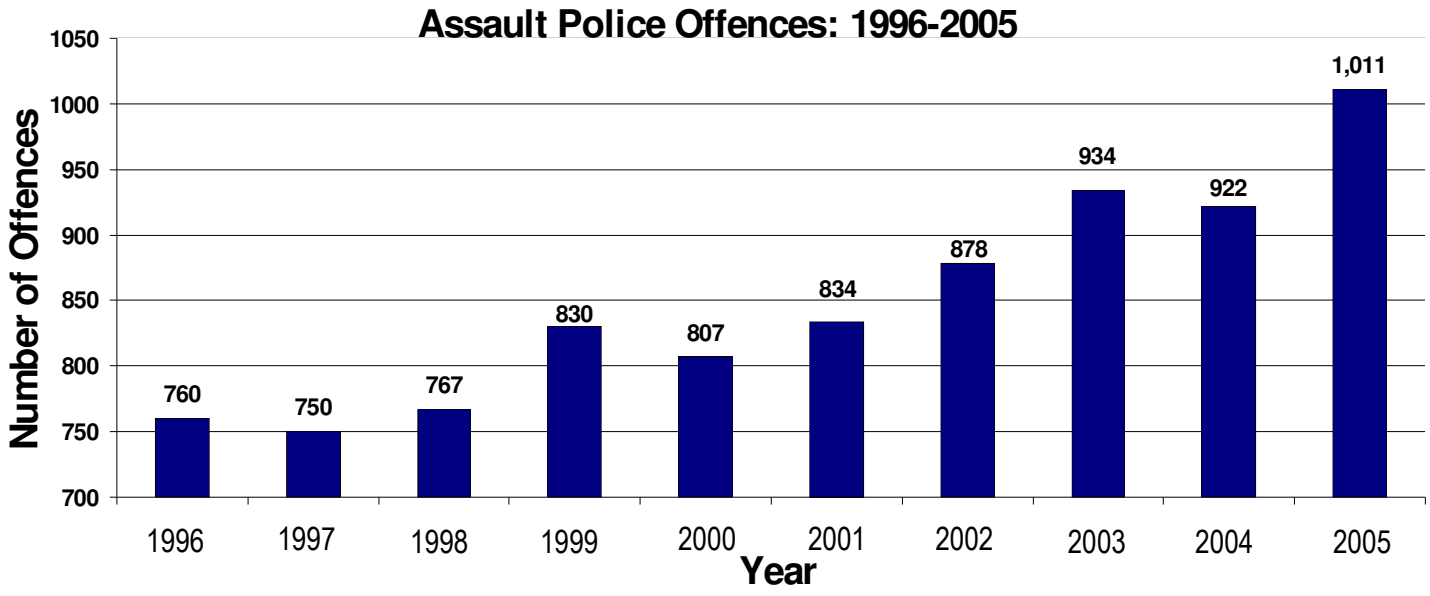


Obstruct Police Offences		
Year	Number of Offences	Number of Officers
2000	1,226	6,708
2001	1,330	6,895
2002	1,421	6,958
2003	1,384	7,106
2004	1,524	7,193
2005	1,552	7,469

Source: Police and Crime, Summary Statistics, 1996-2005, Ministry of Public Safety and Solicitor General

Source: Statistics Canada, Police Resources in Canada, Years 2000-2005, Catalogue No:85-225-XIE

Source: Police and Crime, Summary Statistics, 1996-2005, Ministry of Public Safety and Solicitor General



PAST STANDARD PRACTICE PROVES FACT

R. v. Cunningham, 2006 ABCA 345

A police officer completed a notice of intention to produce a certificate of analysis of breath samples. The document was a "self-carbonizing" form but the affidavit of service was not properly sworn. At trial the officer could not recall comparing the copies, but testified it was his standard practice to do so. The trial judge found the officer's standard practice met the evidentiary burden placed on the crown to prove service beyond a reasonable doubt. The accused was convicted, but appealed to the Alberta Court of Appeal.

In a memorandum of judgment the Alberta Court of Appeal dismissed the accused's appeal. Whether or not the Crown can rely on an officer's past practice where the affidavit of service is defective and the officer cannot specifically recall the events will be assessed on a case by case basis. Here, the officer's standard practice met the Crown's obligation of proving service of the Notice of Intention. Even though it would have been preferable for the Crown to have adduced more evidence to further support the reliability of the officer's evidence, such as how long and how often the officer used this standard practice and how long the officer had been a police officer, the trial judge weighed appropriate factors and looked for circumstantial guarantees of reliability of standard practice.

Complete case available at www.albertacourts.ab.ca

TRAFFIC LEGISLATION DOES NOT CREATE POWER TO DETAIN FOR INVESTIGATION

R. v. Houben, 2006 SKCA 129

Two police officers on routine patrol in a residential neighbourhood at about 2:30 am stopped a pick-up truck they saw on three previous occasions driving in different directions. The accused was asked for his driver's licence and registration. It was apparent he had consumed alcohol and a roadside screening test was performed. The accused failed and a breathalyser demand was given. He subsequently provided samples over 80mg%.

At trial in Saskatchewan Provincial Court on a charge of over 80mg% the trial judge found the accused had been arbitrarily detained contrary to s.9 of the *Charter*. She held the police were engaged in preventative policing and had stopped the accused to rule out suspicious behaviour. The certificate of analysis was excluded and the accused was acquitted.

> s.9 *Charter*
> Everyone has the right not to be arbitrarily detained or imprisoned.

The Crown unsuccessfully appealed to the Saskatchewan Court of Queen's Bench. In the appeal judge's view there was no authority to stop the accused under s.40(8) of Saskatchewan's *Highway Traffic Act (HTA)* because the detention was not related to highway safety reasons. Nor was there an articulable cause, or reasonable grounds, to detain him for an offence. The police officers were not involved in any criminal investigation nor did they have reason to believe he had committed or was engaged in an ongoing offence. The arbitrary detention ruling was upheld.

The Crown then appealed to the Saskatchewan Court of Appeal arguing that there were reasonable grounds to detain the accused or, in the alternative, that the police had the authority to stop a motor vehicle under s.40(8) of the *HTA* to rule out suspicious behaviour.

Motor Vehicle Legislation

Section 40(8) of the *HTA* reads:

> s.40(8) *Highway Traffic Act*
> A peace officer who:
> (a) is readily identifiable as a peace officer; and
> (b) is in the lawful execution of his or her duties and responsibilities;
> may require the person in charge of or operating a motor vehicle to stop that vehicle.

This section allows the police to randomly stop a motorist. A stop of this nature is arbitrary under s.9 of the *Charter* but saved by s.1 if the purpose of the stop is related to highway traffic matters. It does not, however, allow the police to stop any

vehicle at any time at any place without a reason legitimately connected to highway safety. Justice Jackson wrote:

> …Even though a detention may be arbitrary, if a police officer is acting pursuant to s. 40(8) of *The Highway Traffic Act* any stop effected by the officer is a justifiable infringement of the individual's rights under s. 1 of the *Charter*.
>
> While the police officer acting under s. 40(8) need not have "reasonable grounds to detain," it must be the police officer's intention to be proceeding to satisfy the aims of that statute as articulated in such authorities as *Mellenthin*. The police officer need not say expressly to himself or herself that he or she is proceeding to exercise the authority under s. 40(8), or testify to this express effect, but the trier of fact must be able to conclude on the basis of the evidence that the police officer was checking for "sobriety, licences, ownership, insurance and the mechanical fitness of cars." In sum, s. 40(8) cannot be used to create a general power of detention for investigative purposes.
>
> .....
>
> If a police officer has a suspicion that a driver is involved in criminal activity, unrelated to traffic enforcement, such that he or she would like to stop a motor vehicle, the suspicion must meet the test in *Mann*.
>
> If the law were otherwise and a police officer could stop a motor vehicle for a mere suspicion short of "reasonable grounds to detain," and then say that he or she had been exercising the power under s. 40(8) simply because that power exists, all stops could become those to check out suspicious activity. The police officer could stop anyone at any time on the basis of suspicion. At least in the context of motor vehicle stops, there would be no reason to have created a power to stop related to "reasonable grounds to detain." [paras. 64-68]

"In sum, s. 40(8) cannot be used to create a general power of detention for investigative purposes."

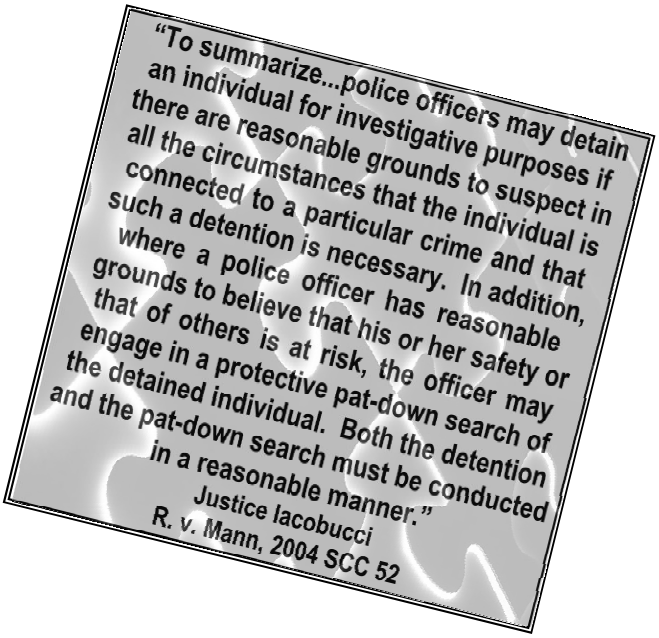
Here, the police officers testified they were not concerned with highway traffic matters when they made their stop. Thus, the stop could not be justified under s.40(8).

Reasonable Grounds to Detain

Under the common law the police may detain a person for investigative purposes if there are reasonable grounds to suspect the person is connected to a particular crime and the detention is necessary. In this case, however, the trial judge found the police had no criminal activity in mind. They were not investigating any crime in the neighbourhood. Nor was the neighbourhood known as a high crime area or one frequented by prostitutes. The officers were acting on hunches, mere suspicion, or as the officers called it "preventative policing." The requirements of reasonable grounds to detain, or articulable cause, requires something more than a hunch, intuition, or curiosity. Therefore, the stop could not be justified as an investigative detention.

The Crown's appeal was dismissed.

Complete case available at www.canlii.org



Note-able Quote

I believe that people should strive for the top of their game, not the top of the organization. Each of us should work to reach our potential, not necessarily the corner office. Sometimes you can make the greatest impact from somewhere other than first place. - John C. Maxwell

SKATEBOARDER IS A 'PEDESTRIAN'

R. v. Atchison, 2006 ABCA 258

The accused was charged under s.41(1) of Alberta's *Use of Highway and Rules of the Road Regulation* for failing to yield to a pedestrian in a cross-walk after she struck a person with her vehicle while they were crossing the street on their skateboard. At the initial hearing the traffic commissioner determined that the skateboarder was not a pedestrian under Alberta's *Traffic Safety Act* (*TSA*) and dismissed the case.

> s.41(1) *Use of Highway and Rules of the Road Regulation*
> A person driving a vehicle shall yield the right of way to a pedestrian crossing the roadway within a crosswalk.

> s.1(1)(ww) *Traffic Safety Act*
> "vehicle", other than in Part 6, means a device in, on or by which a person or thing may be transported or drawn on a highway and includes a combination of vehicles but does not include a mobility aid.

The Crown successfully appealed to the Alberta Court of Queen's Bench and the traffic commissioner's decision was overturned. The judge ruled that a pedestrian under the *TSA* included a person on a skateboard or similar device and the matter was sent back for trial.

The accused then appealed the judge's reversal of the traffic commissioner's decision to the Alberta Court of Appeal. Using the rules of statutory interpretation, Justice Picard, delivering the judgment for the court, upheld the ruling that a skateboarder was a pedestrian. He found that a skateboard, although not specifically covered in the TSA and only mentioned twice in the act and the regulation, was clearly not a "vehicle" nor a "mobility aid". A "pedestrian", on the other hand, could include a person on a skateboard. Justice Picard stated:

> s.1(1)(v) *Traffic Safety Act*
> "mobility aid" means a device used to facilitate the transport, in a normal seated orientation, of a person with a physical disability.

> The scheme and object of the *TSA* is to promote the safety of persons using roadways by imposing various requirements and rules such as those set out in Division 9 of the Regulation. This Division establishes rules for yielding the right of way to other vehicles and pedestrians, but does not specifically refer to persons on skateboards or similar devices. Neither are there rules anywhere else in the *TSA* or Regulation that deal with yielding to persons on skateboards and the many other similar devices that are commonly used on modern roadways. Thus, there is a distinct gap in the legislation, unless persons on such devices can be considered pedestrians.
>
> If persons on skateboards and similar devices are not considered pedestrians for purposes of the *TSA*, the driver of a vehicle striking such a person could never be charged with an offence; similarly, if two persons were struck, one walking and one travelling on a skateboard or similar device, the driver could only be charged with striking the person who was walking. As pointed out by the summary conviction appeal justice, this is an absurd result and cannot have been the intention of the Legislature.
>
> s.1(1)(gg) *Traffic Safety Act*
> "pedestrian" means
> (i) a person on foot, or
> (ii) a person in or on a mobility aid,
> and includes those persons designated by regulation as pedestrians.
>
> While most dictionary definitions of pedestrian generally refer to a person travelling on foot, this Court has previously noted that the definition of pedestrian in Black' s Law Dictionary, 6th ed. includes persons on roller skates, ice skates, stilts or crutches…. Persons travelling with the aid of these types of devices can still be considered to be travelling on foot, as opposed to in a vehicle, and it is our view that the ordinary and grammatical meaning of the word "pedestrian" is broad enough to encompass persons travelling on skateboards or similar devices.
>
> Thus, when the ordinary and grammatical meaning of the word "pedestrian" is considered in light of the object and scheme of the TSA and the intention of the Legislature, it is our view that it must include persons on skateboards and similar devices. [references omitted, paras. 9-12]

The accused's appeal was dismissed and the case was remitted back for trial.

Complete case available at albertacourts.ab.ca

NOT ENOUGH TO SHOW BAC DIFFERENT TO REBUT PRESUMPTION

R. v. MacDonald, 2006 ABCA 177

The accused was stopped in a check stop and failed a roadside screening test. He subsequently provided two breath tests with readings of 146 mg% and was charged with impaired driving and operating a vehicle having a blood alcohol content (BAC) over 80mg%.

At trial in Alberta Provincial Court the accused said he had consumed six cans of beer evenly spaced over a period of three and a half hours and finished his last beer five minutes before being stopped by police. He called an expert in the absorption and elimination of alcohol and the effects of alcohol on the human body. The expert testified he tested the accused's elimination rate of alcohol (using vodka) and determined it to be 18.5 mg% per hour. As a result of his tests, the expert stated that the accused would have had to drink nine and half beers to get the readings he did. If he did have only six beer his BAC at the time of driving would have been 71mg%. Even assuming that the accused's elimination rate was average, between 10mg% and 20mg%, his BAC would be between 64mg%-109mg%. And accounting for the unabsorbed beer he had drank five minutes before the stop, his BAC could have been between 56mg%-101mg%.

The trial judge convicted the accused of over 80mg% but acquitted him of the impaired driving charge. The accused unsuccessfully appealed to the Alberta Court of Queen's Bench. The appeal judge found the "straddle evidence"—opinion evidence that the accused's BAC may have been over or under the legal limit at the time—speculative or conjecture. In his view, evidence to the contrary under s.258(1)(c) of the *Criminal Code* required evidence eliminating a scenario that the accused's BAC could be over 80mg% at the time of driving. The accused then appealed to the Alberta Court of Appeal.

There are two standard presumptions found in the *Criminal Code* relating to breathalyser cases:

1. **presumption of accuracy**—under s.258(1)(g) (and s.25 of the *Interpretation Act*) the certificate of analysis showing the readings of breath samples is presumed to accurately reflect the BAC when the accused blew into the instrument.

2. **presumption of identity**—under s.258(1)(c) the accused's BAC at the time of testing is the same level as at the time of driving. As well, under s.258(1)(d.1), if the accused's BAC is over 80mg% reading at the time of testing it is presumed it exceeded 80mg% at time of driving. Both these presumptions of identity require the sample be taken within two hours of the time of driving or care and control.

In order to rebut these presumptions the accused must raise a reasonable doubt by showing evidence to the contrary. It is not enough for an accused to demonstrate that their BAC was different than what was recorded by the instrument. Rather, they must point to or adduce evidence tending to show

Presumption of Identity

- BAC at time of driving same as BAC at time of test (s.258(1)(c) CC)
- if BAC > 80mg% at time of test, then BAC at time of driving >80mg% (s.258(1)(d.1) CC)

Time of Driving — Time of Test

2 hours

their BAC was under 80mg%. Justice O'Brien, writing the opinion of the Alberta Court of Appeal, held:

> …In order to rebut them, both presumptions require evidence tending to show that the concentration of alcohol in the blood did not exceed the legal limit of 80 mg, at the time of the test in the case of the presumption of accuracy and at the time of the driving in the case of the presumption of identity. [para. 34]

In this case the expert only measured the accused's elimination rate. He did not measure his absorption rate nor did he attempt to simulate the same conditions at the time of driving. The quantity of alcohol, pattern of drinking, food consumption and type of drink (vodka versus beer) were different when used to calculate elimination rates. Nor were the ranges drawn from the general population acceptable. There was no evidence that the accused was absorbing and eliminating on the date of the offence within the range of the general population. Similarly, the expert's evidence did not tend to show that the accused' s BAC did not exceed 80mg%. It showed a range of BAC levels, some over the legal limit and some under it. Justice O'brien wrote:

> The offence created by s. 253(b) is not the quantity of alcohol consumed, but rather is the consumption resulting in an alcohol concentration exceeding 80 mg in 100 ml. The section applies equally to slow absorbers and eliminators and to fast absorbers and eliminators. In my view, the presumptions are legislated to avoid arguments based upon whether an accused is a fast or slow absorber and eliminator and the presumption of accuracy is not rebutted by demonstrating a range of possible alcohol levels, giving rise to conjecture as to whether or not the blood alcohol content was within the legal limit at the material time. Conjecture does not tend to show anything. Something more is needed to rebut the statutory presumption of the accuracy of the breathalyzer.
>
> This is not a matter of denying [the accused] the benefit of reasonable doubt based upon evidence that might be true. This is a matter of statutory presumptions and the evidentiary basis required to displace them. The test result cannot be discredited because of speculation that another average person may more quickly eliminate and thereby obtain a lesser reading. On the contrary, where the range put forward by the expert evidence discloses that the breathalyzer could properly register a reading in excess of 80 mg for the average person, then such evidence is confirmatory of a test result disclosing an alcohol level in excess of the legal limit. [paras. 58-59]

And further:

> Here, it is the introduction of the range of possible blood alcohol levels based upon population averages, without evidence of where [the accused] fits within that range, that leads to the speculation in this case. [para. 62]

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

STRAIGHT SHOOTIN' FROM THE JUDGE

"Let's get the record straight.

- Do I view the Charter as a weed whose growth should be stunted? – Not on your life.
- Do I have a problem with counsel who use the Charter to preserve and protect the rights of individuals and minority groups from state excesses? – Absolutely not.
- Do I have a problem with counsel who use the Charter to promote and advance the cause of justice? – Absolutely not.

Now ask me –

- Do I have a problem with counsel who trivialize and demean the Charter and who use it, not as a means of promoting justice, but as a means of delaying and in some cases obstructing it? – You bet I do.
- Do I have a problem with counsel who clog the courts and tax an already overburdened justice system by bringing Charter and other applications that are baseless? – Absolutely.
- Does it bother me that the antics of these same counsel are depriving worthy litigants from being able to access the courts in a timely fashion? – Absolutely.
- Does it bother me that these same counsel are pilfering precious legal aid funds at the expense of needy litigants with legitimate causes? – Absolutely.

- Am I going to give up on my fight against those who would abuse our criminal justice system and make a mockery of it? – Never.

And let there be no doubt about it. The problems of which I speak are not, as an assistant professor at Osgoode Law School recently wrote, simply a product of "poor judgment by many criminal defence counsel on what Charter issues are worth litigating, as well as a plodding and prolix approach by some in advancing these claims".

Unfortunately, the professor was not present when a distinguished member of the defence bar said to me..."Judge, you only have a problem with long criminal trials because you are on a fixed salary".

The message – if you were making $500 or $600 an hour and $5,000 or $6,000 a day in court, you wouldn't be complaining about long trials. You'd want them to go on forever!

And lets not kid ourselves. It doesn't have to be $5,000 or $6,000 a day. Many would be happy with $2,000 or $3,000 or even a $1,000. And for those who think that way, the Charter is like a gift from heaven. It is the godsend of all godsends."

Source: Remarks to the Justice Summit-2006, Justice Michael Moldaver, Ontario Court of Appeal Justice, "The State of the Criminal Justice System in 2006: An Appellate Judge's Perspective"

TIME OF ACCIDENT REQUIRES REASONABLE GROUNDS

R. v. Searle, 2006 NBCA 118

A police officer was dispatched to the scene of a two vehicle accident. The officer discovered one of the vehicles unoccupied while another officer dealt with the other driver. The officer subsequently located the other driver (the accused) and had him sit in the rear of the police car. The officer noted physical signs of impairment and formed the opinion the accused had operated a motor vehicle while impaired by alcohol. A demand for breath samples was given and the accused was advised of his rights to counsel. At the police station the accused spoke to duty counsel and two breath samples were subsequently taken.

"...the issue is not whether the accident did in fact occur in the last three hours prior to the demand being made, but rather whether the police officer, on reasonable and probable grounds, believed that to be the case."

At trial in New Brunswick Provincial Court the accused was convicted of over 80mg% and the impaired charge was stayed. Although the Crown did not ask and the officer did not directly testify to his knowledge about when the accident happened, the trial judge ruled the officer could infer from the circumstances that he had knowledge the accident occurred moments before he was dispatched, which would bring the officer's demand within the three hour period required by s.254(3) of the *Criminal Code*.

The accused's appeal to the New Brunswick Court of Queen's Bench was unsuccessful. The accused again appealed, this time to the New Brunswick Court of Appeal arguing, among other grounds, that the trial judge misapplied the test for determining whether the officer had reasonable and probable grounds required under s.254(3).

Justice Larlee, writing the opinion of the court, concluded that the officer did not have the necessary reasonable and probable grounds to believe the accused had committed the alcohol related driving offence within the preceding three hours as the legislation required. She stated:

> In order to make a demand for a breath sample, a police officer must strictly comply with the requirements of s. 254(3) of the Code. In particular, the officer may make a demand if he or she believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under s. 253 of the Code.

In Bernshaw, the Supreme Court concluded that to strictly comply with the requirements of s. 254(3), the police officer has to subjectively have an honest belief that the person who has allegedly committed the offence must have done so within the preceding three hours. Furthermore there must objectively be reasonable grounds for this belief...

> To be clear the issue is not whether the accident did in fact occur in the last three hours prior to the demand being made, but rather whether the police officer, on

> reasonable and probable grounds, believed that to be the case... Section 254(3) requires more than assumptions from a police officer, it requires an actual belief, based on reasonable and probable grounds, that the offense was committed within the preceding three hours... [references and quotes omitted, paras 11, 12, 13]

And further:

> I disagree with the trial judge that in these circumstances a natural inference can be drawn from the evidence that [the officer] subjectively believed that an accident had occurred in the three hours before he gave the demand. It might be that the officer made the demand because he felt that [the accused] had been driving while impaired within the last three hours but it may also be that the officer simply did not address his mind to the time element. Crown Counsel did not ask the critical question. The question remains whether there is any piece of evidence upon which an inference could be drawn that [the officer] had addressed his mind to this issue?
>
> Did anybody tell [the officer] when the accident happened? There is no evidence that he talked to [the other driver involved in the accident] about it. We do not know what the dispatcher told [the officer]. A court cannot infer in a vacuum what was in the mind of the police officer. In some cases there may be indicia that the officer actually turned his mind to the time issue but, in this case, there is no evidence that the officer turned his mind to the question and, in my opinion, the trial judge erred in inferring subjective reasonable grounds to the officer.
>
> In my respectful view, it was not open for the trial judge, on the evidence before him, to conclude that the demanding officer had an honest belief that [the accused] had committed an offence under s. 253 within the preceding three hours when he made the breathalyser demand. ... [references omitted, paras. 16-18]

"A court cannot infer in a vacuum what was in the mind of the police officer."

Since the demand did not comply with s.254(3) it was unlawful and the Crown could not rely on the presumption found in s.258(1)(c) of the *Criminal Code*. The accused's appeal was allowed and an acquittal was entered.

Complete case available at www.canlii.org

YOUNG PERSON EXPLANATION NEED ONLY BE CLEAR

R. v. L.T.H., 2006 NSCA 409

The accused, a 15 year old youth, was arrested by Cole Harbour RCMP for dangerous driving following a car chase. He was advised of his rights and said he did not want to speak to a lawyer. About two hours later a police officer from the Halifax Regional Police Service took custody of the accused and arrested him for theft, possession of property obtained by crime, failing to stop for police, and dangerous driving. He was read his rights, given the police caution, and told he had the right to speak with an adult. He said he understood. Eleven hours later he was taken to an interview room where a detective went through a young offender statement form. This was all videotaped. The accused said he did not want to speak to a lawyer, parent, or adult and he initialed and signed the form. He was then interviewed and provided an inculpatory statement.

At trial in Nova Scotia Youth Justice Court the judge said the Crown had to prove beyond a reasonable doubt that a statement made by a young person to a person in authority met the requirements of s.146 of the *Youth Criminal Justice Act* (*YCJA*). She found the statement was voluntary—not induced by threats, promises, oppression, or trickery. However, she was not satisfied the accused had fully understood his rights before giving his statement.

In her view, answering "Yes" to "Do you understand?" was not enough to prove compliance. Rather, at the very least, the officer should have asked the young person to explain in their own words what the rights mean and the consequences of waiving them. The judge then ruled the statement inadmissible. The Crown appealed to the New Brunswick Court of Appeal arguing, in part, that the judge erred in ruling the statement inadmissible because she imposed an obligation on the Crown to prove beyond a reasonable doubt that the young person in fact understood the explanation.

Justice Oland, authoring the judgment of the New Brunswick Court of Appeal, agreed with the Crown. In addition to the protections provided by the *Charter* for all persons, young persons also receive special protections under s.146 of the *YCJA* when questioned by police or other person's in authority. This provision outlines what is required before a statement made by a young person is admissible (s.146(2)(b)) and necessitates that any waiver must be recorded on video tape, audio tape, or in writing (s.146(4)).

Justice Oland ruled that the Crown does not need to prove the young person actually understood the explanations given by police. Nor is there a requirement that the young person re-cite or explain his understanding back to the police. Rather, the Crown only needs to prove beyond a reasonable doubt that the explanation was clear and in language appropriate to the young person's age and understanding. Justice Oland stated:

> Section 146(2)(b) stipulates that certain rights must be "clearly explained to the young person in language appropriate to his or her age and understanding." A plain reading of that provision shows that the legislative intent was not directed to an inquiry into whether or not the young person understood those rights. The test was not, as the judge stated here, whether "the young person clearly understood his or her rights" or whether he "fully understood his rights and options." Rather, what was intended was an inquiry pertaining to the clarity of the explanation. This would take into account, among other things, the practices and methods of the person "in authority" in obtaining the statement, and the basis for his conclusion that the explanation of his or her rights was clear and appropriate for the particular young person to whom it was given. [para. 25]

For the purposes of waiver under s.146(4) the Crown is required to satisfy a judge that the young person understood their rights and the effect of waiving those rights. Justice Oland wrote:

> ...Section 146(4) allows a young person to waive his or her rights, but requires that the waiver either be recorded or be in writing and include a statement signed by the young person that he or she had been informed of the right waived. An understanding of the right must precede a waiver of that right. In other words, unless he or she appreciates what is being waived, a young person cannot give a valid waiver. Accordingly, when it alleges that a young person waived a right, the Crown must satisfy the judge that the young person understood what that right was and the effect that waiver will have on that right... [para. 34]

The standard of proof placed on Crown in establishing compliance with s.146(4) is not proof beyond a reasonable doubt but rather a probability standard.

Since the judge's decision to exclude the accused's statement was based on legal errors the Crown's appeal was allowed, the acquittal set aside, and a new trial was ordered.

Complete case available at www.canlii.org

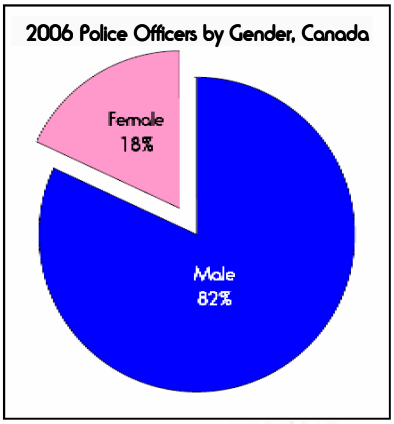
STATEMENT ONUS & BURDEN GRID

Issue	Onus	Burden
Voluntariness (Common law)	Crown	Crown must prove statement made to police was voluntary beyond a reasonable doubt.. If Crown cannot prove statement was voluntary, the statement is inadmissible at common law. (see for example R. v. Oickle, 2000 SCC 88)
Right to Silence (*Charter* s.7)	Accused	Accused must prove on a balance of probabilities that their s.7 *Charter* right was violated. If accused proves *Charter* right violated, court will engage in a s.24 *Charter* enquiry. (see for example R. v. Hebert, (1990) 2 S.C.R. 151)
Right to Counsel (*Charter* s.10(b))	Accused	Accused must prove on a balance of probabilities that their s.10(b) *Charter* right was violated. If accused proves *Charter* right violated, court will engage in a s.24 *Charter* enquiry. (see for example R. v. Manninen, (1987) 1 S.C.R. 1233)
Youth Statement Explanation (*Youth Criminal Justice Act* s.146(2)(b))	Crown	Crown must prove beyond a reasonable doubt that the explanation given to an accused youth was clear and in language appropriate to the youth's age and understanding. The Crown need not prove the young person actually understood the explanation. (see R. v. LT.H., 2006 NSCA 409)
Youth Statement Waiver (*Youth Criminal Justice Act* s.146(4))	Crown	Crown must prove on a balance of probabilities that the young person understood what right they were waiving and the effect of the waiver will have on that right.. (see R. v. LT.H., 2006 NSCA 409)

COPS ACROSS CANADA

According to a 2006 report released by Statistics Canada there were 62,458 police officers across Canada last year. Ontario had the most officers (23,759) while the Yukon had the least (116) (see map below for all provincial/territorial numbers). With a population of 32,501,100, Canada's average cop per pop ratio was 192 police officers per 100,000 residents.

There were 11,211 female officers accounting for 18% overall. British Columbia had the greatest percentage of female officers (21.4%) while Prince Edward Island had the lowest (13.6%).



Female officers accounted for 6% of senior officers, 11% of non-commissioned officers, and 21% of constables.

The RCMP had the largest presence in British Columbia with 5,355 officers, followed by Alberta (2,328), Ontario (1,310) and Saskatchewan (1,142).

Canada's Largest Municipal Police Services 2006

Service	Officers	% Female
Toronto, ON	5,371	16%
Montreal, QU	4,346	28%
Peel Regional, ON	1,667	16%
Calgary, AB	1,599	13%
Edmonton, AB	1,356	16%
Vancouver, BC	1,303	20%
Winnipeg, MN	1,262	14%
York Regional, ON	1,174	16%
Ottawa, ON	1,138	21%

Source: Statistics Canada, 2006, Police Resources in Canada, Catalogue No:85-225-XIE

CANADA: By the Numbers

In 2005, the total expenditures on policing was **$9,281,569,000**

POLICE MAY PERSUADE DETAINEE TO VOLUNTARILY BREAK SILENCE

R. v. Singh, 2006 BCCA 281

The accused was arrested three days after a man was killed. The man shot was standing inside the door of a pub when he was struck by a stray bullet fired from outside the pub. There had been an argument between a group of men and pub staff and the shot had been fired at a pub employee standing outside the pub. No weapon was recovered and there was no forensic evidence. However, surveillance video inside the pub caught the initial argument on tape along with the men walking towards the exit doors. A police officer also took surveillance photographs of the accused at another pub the following day and subsequently identified him as one of the men in the video from the pub shooting. As well, the intended victim of the shooting identified the accused as the shooter.

The accused was interviewed twice by police following his arrest. Both interviews were video and audio taped. The first interview in the evening lasted 70 minutes while a second interview the following morning lasted 47 minutes. Before the first interview the accused was given a *Charter* warning and spoke to a lawyer twice; once by telephone and again in a meeting. During the first interview the accused tried to end the interview between 15 and 20 times by saying he did not want to talk about the incident or didn't know anything about the incident and by asking to be returned to his cell. Each time the investigator continued to talk, outlining what the police knew about the shooting and inviting comment. The accused admitted he had been to the pub and identified himself as one of the persons seen in the pub video. The accused did not confess to the crime and the interview ended shortly afterwards.

"Police techniques that are intended to persuade a detained person to voluntarily break his silence normally do not offend a basic sense of fairness."

At trial in British Columbia Supreme Court the accused argued the statements he made to police were involuntary and violated his right to remain silent under s.7 of the *Charter*. Although he felt the tactics of the investigator caused him some concern, the trial judge admitted edited versions of the statements. In his view, the accused's right to talk or to remain silent was not undermined or overborne by the investigator's admitted dedication to put part of the police case against the accused in an effort to get him to confess, no matter what. The accused's admission that he was the person in the video was freely made and did not result from the police breaking down his desire to maintain silence. As the trial judge noted, the investigator's persuasion did not deny the accused the right to choose to speak to police or deprive him of an operating mind. The Crown tendered only the first statement made to police to the jury and the accused was convicted of second degree murder.

The accused then appealed to the British Columbia Court of Appeal arguing that once a detainee states he does not want to make a statement he has exercised his right to remain silent under s.7 of the *Charter* and any further police conduct, like persistent questioning, violates that right. In his view, once he asserted his right to silence the police must stop their efforts in getting an admission. Furthermore, he submitted that the strategy employed by the investigator denied him the choice to remain silent.

Justice Mackenzie, authoring the unanimous decision, first found that "the police are not precluded from using reasonable persuasion to encourage a detained person to break his silence after his right to silence has been asserted following the exercise of the right to counsel." In this case, "the officer used a sophisticated technique of persuasion but the [accused] knew he was talking to a police officer and he was not under any misapprehension of his position." This is different than a situation where the police introduce an undercover police officer into a cell in the guise of a fellow prisoner to trick the detainee into thinking he was talking to another prisoner and not the police. This was an investigative interview where the accused was aware he was in the presence of a police officer.

As for the "stratagem" employed by the investigator, he was trying to persuade the accused to talk despite his resistance for the most part. However, the accused's right to choose was not overborne. Justice Mackenzie stated:

> Police techniques that are intended to persuade a detained person to voluntarily break his silence normally do not offend a basic sense of fairness. Here both interviews were videotaped and the trial judge was in an excellent position to assess the fairness of the process. In my view, there was no error of law or principle in the trial judge's approach to the issue, and there are no grounds to disturb his factual conclusion that the interview technique employed by [the investigator] was a legitimate technique of persuasion. It was not unfair. [para. 20]

The accused's appeal was dismissed.

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

DELAY IN SEARCHING INCIDENT TO ARREST EXPLAINED

R. v. Cheng, 2006 BCSC 1835

Just before 1:00 am a police officer was fueling up her unmarked police car at a a self-serve gas station when she saw a Subaru Legacy pull up beside a GMC Jimmy parked in a parking lot across the street. The occupants were noisy and appeared to be partying. A rear passenger in the Subaru waved to the GMC in a beckoning motion. Using binoculars, the officer obtained the licence number of the vehicle and learned the GMC was registered to the accused, who had an extensive criminal record including a conviction for trafficking. The accused then exited the passenger side of the Subaru and got into the driver's door of the GMC. The vehicles then left.

The officer stopped the GMC and detained the accused for investigation of drug trafficking. She asked for and took his keys so he wouldn't flee. Meanwhile, other officers located and pulled over the Subaru and learned the driver had purchased a small rock of cocaine for $20. This drug was turned over to police. Within 20 minutes, the officer detaining the accused learned the occupants of the Subaru had purchased a rock of cocaine. The officer determined she had reasonable grounds to arrest the accused and did so, handcuffing and turning him over to another officer.

The arresting officer was then called away to investigate a robbery, returning about 30 minutes later to search the vehicle. She testified she wanted to search the vehicle to find evidence relating to drug trafficking, like the $20 bill used to purchase the cocaine. A small amount of marihuana was found, a torn lottery sheet, and a cell phone. The officer wanted a police dog to search the vehicle but it was busy at the robbery call. The vehicle was towed to a compound where it was searched again at 3:30 am, using the police dog. The dog indicated on the driver's seat back, through where the seatbelt exits the seat. A wad of cash was removed from this location containing 2 x $50, 21 x $20, 15 x $10 and 7 x $5. A second wad of cash was seen nearby but the seat had to be cut to remove it. Above the cash was a duct taped envelope with seven flaps of heroin (1.5 grams each) and a rock of cocaine and a second paper envelope with four flaps of cocaine (4 grams each).

The Arrest

At trial in British Columbia Supreme Court the accused argued, in part, that the police did not have the necessary grounds to make the arrest. In assessing whether the requisite grounds existed, Justice Myers explained what was required:

> In order for an arrest to be lawful there must be a subjective belief of the person who authorized the arrest that there was reasonable and probable grounds for the arrest. As well, those grounds must be justifiable from an objective point of view. The police do not have to go so far as to establish a *prima facie* case against the accused to justify the arrest. [reference omitted, para. 39]

In this case, the officer had the necessary grounds from both a subjective and objective point of view. This included the brief meeting in the parking lot where the businesses were closed, the hand beckoning motion, the occupants of the Subarau "whooping it up", the vehicles heading off after the meeting, the accused's criminal record with a

conviction for trafficking, and the Subaru driver's statement he purchased a rock of cocaine and handing it over to police. Justice Myers said:

> In my view the view of [the officer] was also justifiable from an objective point of view. The factors taken into consideration by her would not provide sufficient grounds on their own, but that is not the test. They are to be considered cumulatively… The police are entitled to "put two plus two together" [references omitted, para. 44]

The Search

When searching as an incident to arrest the police must be attempting to achieve some valid purpose connected to the arrest such as:

- the safety of the public and the police;
- the protection of evidence from destruction; and
- the discovery of evidence which can be used at trial.

Here the officer said she wanted to find the $20 used to buy the cocaine. This subjective purpose was to uncover evidence which could be used at trial and was also objectively reasonable.

The accused also submitted that there was no risk that evidence would disappear and there was enough time to get a warrant. Justice Myers, however, rejected this assertion:

> The delay itself – approximately 90 minutes – was not long.... Had the dog been available at the scene of the arrest the search would have been made then. In my view, the delay in conducting the search in this case was explicable and reasonable and does not lead me to draw an inference that the search was done for an improper purpose.
>
> Turning to the area of the search, in a search incident to arrest, the police are entitled to search the interior of the vehicle which the accused occupied at the time of the arrest as well as the trunk…
>
> […]
>
> In this case, a visual observation disclosed that there was cash hidden in the seatbelt area. When that was removed further objects could be seen above it. They could not be reached by hand, and the upholstery was cut. Under the circumstances I do not find that to be unreasonable. [references omitted, paras. 50-53]

"...in a search incident to arrest, the police are entitled to search the interior of the vehicle which the accused occupied at the time of the arrest as well as the trunk…."

The accused was convicted.

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

EVIDENCE SEARCH INCIDENT TO ARREST MUST BE RELATED TO ARREST

R. v. Wilson,
(2006) Docket:C41549 (OntCA)

After the accused was pulled over by Toronto police a CPIC search was conducted. It was learned he was on a recognizance for possessing marihuana, weapons, assault, and attempted murder charges. Conditions included not to be in Toronto except for school, court, or to meet counsel and not to have a cell phone or pager in his possession. A cell phone was seen in the accused's left front pocket; he was arrested and charged with breach of recognizance. Unbeknownst to police, the cell phone condition had been deleted two months earlier.

The accused was patted down and $2,315.16 was found in his pockets. He was placed in the rear of the police car and advised of his right to counsel. During the pat down and while seated in the police car the accused was fixated on his vehicle. Police searched his car and found a Kentucky Fried Chicken bag containing 54.62 grams of crack cocaine. He was charged with possession for the purpose of trafficking and possession of proceeds of crime (the money).

At trial in the Ontario Superior Court of Justice the accused argued his arrest for breach of recognizance was unlawful because the cell phone condition violation had been removed and the officers never asked the accused why he was in Toronto to determine whether he fell within any of the exceptions to the order. The trial judge however, ruled the arrest lawful. "The test…is

whether the arresting officer had reasonable and probable grounds for believing that a criminal offence occurred, or was to occur," said the judge. "The reasonableness of the belief is based on an objective common-sense review of the circumstances known to the officer at the time of the arrest."

In this case, there was no statistical evidence concerning the reliability or unreliability of CPIC information. The officer did however, describe CPIC as generally reliable and a useful tool. Further, the accused never told the officers that the cell phone condition had been deleted nor his purpose for being in Toronto. The trial judge stated:

> I agree with the Defence that it would be cause for concern if the computers were not properly and regularly updated. An error must be assessed, however, within the context of the particular circumstances of any particular case. In this case, the fact that there was technically and in reality no breach of the cellphone term in the recognizance does not in my view raise the matter to the level of a constitutional infringement or this has not been proven on a balance of probabilities. In this case, both subjective and objective elements of the Storrey test have been satisfied. Not only did the officer have subjective grounds for the arrest, but a reasonable person standing in his shoes would also find that he acted reasonably in ordering that the [accused] be placed under arrest for breach of recognizance. Accordingly, I find no violation of the [accused's] s. 9 Charter rights in that regard.[para. 55]

As for the search of the vehicle, the judge found it was incidental to the arrest. Police are entitled to search as an incident to arrest for their safety or the safety of the public, to protect evidence from destruction, and to discover evidence to be used at trial. The trial judge held:

> Clearly, the police, in conducting the search, were attempting to achieve a valid objective connected to the arrest within the meaning of the relevant jurisprudence. In the circumstances, I find that there was sufficient circumstantial evidence to justify a search of the vehicle and a reasonable prospect of securing evidence of illegal activity. The search itself was unobtrusive and reasonably performed. Given the actions of the [accused], the reduced expectation of privacy in a vehicle, particularly this vehicle of which the [accused] was not the owner, the non-conscriptive nature of the evidence, its positioning in front of and within reach of the applicant (though not in plain view) and the good faith of the police officers, the warrantless search was, I find, a justifiable use of police powers.[para 61]

The accused appealed to the Ontario Court of Appeal arguing, in part, that the vehicle search violated s.8 of the *Charter*. The Court however, rejected the appeal:

> The events that transpired [after the initial vehicle stop] were lawful. The [accused] appeared to be in breach of his bail giving the officer reasonable grounds to arrest. The search of the interior of the vehicle was justified as a search incident to arrest. The trial judge overstated the search power by stating that it could be justified to search for securing evidence of "illegal activity". However there was evidence to sustain a proper search incident to arrest for the purpose of securing evidence of the two apparent breaches of the recognizance. Accordingly there was no violation of s. 8 of the *Charter*. [para. 2]

Complete case available at www.ontariocourts.on.ca

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **True** —see *R. v. Aslam* (at p. 7 of this publication).
2. (b) **False**—see *R. v. Goodine* (at p. 8 of this publication).
3. (b) **False**—see *R. v. Houben* (at p. 15 of this publication).
4. (a) **True**—see *R. v. Searle* (at p. 20 of this publication).
5. (a) **True**—see *R. v. Singh* (at p. 24 of this publication).

Note-able Quote

Success is not final, failure is not fatal: it is the courage to continue that counts - Winston Churchill

DIVING TO LOCATE VEHICLE NOT PART OF MOVING or STORAGE

Rothesay Regional Joint Board of Police Commissioners v. Carr, 2006 NBCA 121

Police received an emergency call that a vehicle had entered a river where a ferry loaded vehicles and a rescue operation was quickly organized. A private dive team was called to assist but the vehicle with the body of its driver was not located until the following day. The dive team also helped bring the vehicle to shore. The vehicle was subsequently released to the car owner's insurer who paid the towing and storage charges. The police were billed $12,082.19 for the dive team but believed the owner of the car (mother of the deceased) was liable for the expenses under the provisions of ss.196(2) and 197(1) of New Brunswick's *Motor Vehicle Act*, so they sued.

196(2) *Motor Vehicle Act*
... any peace officer upon discovery of any vehicle ... that apparently has been involved in an accident and that is a menace to traffic ... shall take such vehicle into his custody and shall deal with the same as provided in section 197.

At trial in the New Brunswick Court of Queen's Bench the judge dismissed the claim. The plaintiff Board of Commissioners appealed to the New Brunswick Court of Appeal contending the *Motor Vehicle Act* created a statutory obligation on the registered owner to pay for the diving services.

197(1) *Motor Vehicle Act*
A vehicle detained, seized, impounded or taken into custody of law under this Act, shall be stored in such place as the Minister or the Registrar may direct and the owner of such vehicle at the time of such detention, seizure, impounding or taking into custody shall be liable for the costs and charges for the storage and moving thereof.

Justice Deschenes, with Justices Drapeau and Larlee concurring, agreed with the trial judge's disposition of the matter. In Justice Deschenes' view, ss. 196 and 197 of the *Motor Vehicle Act* did not make the registered owner liable for the diving charges. He stated:

> In general terms, the provisions invoked by the [plaintiff] are meant to cover situations where a peace officer comes upon a vehicle under circumstances described earlier, including a vehicle that apparently has been involved in an accident and is a menace to traffic. The section gives the officer the statutory right to move the vehicle and store it. Section 197 then makes the owner of the vehicle taken into possession, liable for the costs and charges incident to the moving and storage of the vehicle, and provides the necessary reimbursement mechanisms for such moving and storage charges from the owner of the vehicle.
>
> In my respectful view, those provisions of the *Act* are clearly and unambiguously not meant to apply to a case, such as this one, where police officers are called to the scene of an accident involving a vehicle and become involved in what is essentially a rescue operation. Under such circumstances, the peace officers simply cannot reasonably be considered as having "discovered" or come upon a "vehicle that apparently has been involved in an accident and is a menace to traffic" as envisaged in section 196(2).
>
> There is another obvious reason why the [plaintiff's] claim could not be allowed. Under section 197(2) of the *Act*, the owner of the vehicle taken into custody is only liable for the costs and charges incident to the moving and storage of the seized vehicle. In this case, the [plaintiff's] claim is for diving charges incurred in locating the vehicle. In my view, assuming that the [plaintiff] is entitled to recoup the payments made to the diving team by an action, rather than through the enforcement mechanisms provided for in section 197, the diving charges clearly do not constitute "moving" or "storage" charges contemplated in section 197(1) of the *Act*.
>
> In my respectful view, the interpretation the [plaintiff] would give to the relevant provisions, namely, that the peace officers in this case "discovered" [the owner's] vehicle under water, that the vehicle had apparently been involved in an accident and was a menace to traffic, and that the diving charges involved in locating the vehicle constitute "moving" or "storage" charges is not a sensible interpretation and is simply not compatible with the modern and overarching principle of statutory interpretation... [references omitted, paras. 10-13]

The Board of Commissioner's appeal was dismissed.

Complete case available at www.canlii.org