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

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On March 2, 2007 42-year-old Constable Daniel Tessier of the Laval Police Department was fatally shot during a drug bust in Brossard, Quebec. His partner Constable Stephane Forbes was wounded in the arm.

Constables Tessier and Forbes had been part of a large simultaneous crackdown on a drug-dealing network with search warrants out for eight locations, six in Laval and two in Brossard.

Constable Tessier had been assigned to the morality and drug squad only one week before his death. He had been a police officer for 15 years.

Constable Tessier is survived by his wife, who also serves as a police constable, and two young daughters ages 10 and 12.

With the death of Constable Tessier, a total of 13 police officers have lost their lives to gunfire over the past 10 years. Other officers killed by gunfire include:

2006

Constable Marc Bourdages
July 16, 2006
RCMP Saskatchewan

Constable Robin Cameron
July 15, 2006
RCMP Saskatchewan

Constable John Atkinson
May 5, 2006
Windsor Police Service Ontario

2005

Constable Valerie Gignac
December 14, 2005
Laval Police Department

Constable Anthony Gordon
March 3, 2005
RCMP Alberta

Constable Lionide Johnston
March 3, 2005
RCMP Alberta

Constable Brock Myrol
March 3, 2005
RCMP Alberta

Constable Peter Schiemann
March 3, 2005
RCMP Alberta

2004

Corporal James Galloway
February 28, 2004
RCMP Alberta

2002

Constable Benoit L'Ecuyer
February 28, 2002
Montreal Police Service

2001

Constable Dennis Strongquill
December 21, 2001
RCMP Manitoba

Constable Jurgen Seewald
March 5, 2001
RCMP Nunavut

Source: Officer Down Memorial Page, available at www.odmp.org/canada

They are our heroes. We shall not forget them.

HIGHLIGHTS IN THIS ISSUE

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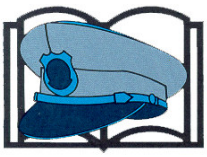
'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"Want to say I appreciate getting these 10-8 newsletters ... Some of your info has been very helpful to me and some MP training that I have done in Use of Force and related topics. Especially helpful was some of your handcuffing articles, such as Justifying Wrist Restraints. Keep up the good work!" - **Military Police Sergeant, Ontario**

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"Thanks tons and keep up the excellent, essential work!" - **Police Staff Sergeant, Ontario**

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"I have read your in service :10-8 "A Peer Read Publication" and quite enjoy the information provided for operational purposes as well as keeping current with the justice system and its case law(s) ... I request to be added on your list for its publication in the future. Thanks in advance." - **Police Officer, Ontario**

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"Was hoping you could add me to your 10-8 letter list. I've been [a police officer] for just over 5 1/2 years, and as scary as it sounds I have 40% of the department junior to me. This seems to be a reality in today's policing. The new guys have been drilling me with all kinds of questions, especially search and seizure. I had a friend pass on the web site and it has been very helpful. The information, especially forming grounds and articulation, is phenomenal. I would be grateful if you would add me to your list." - **Police Constable, Alberta**

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"I just received a copy of 10-8 through a bulk e-mail at my station. It's nice to see that someone has had the foresight to compile some of the most significant case laws that affect how we do our jobs on a daily basis. Could you add me to your list please?" - **Police Officer, Ontario**

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"Can you please add me to the electronic distribution list. It will keep me from stealing them from work and reading them at home." - **Police Constable, British Columbia**

"I have periodically received your newsletter and on every occasion have found the information to be well laid out and pertinent to our profession. I would like to be added to your email distribution list so I can receive this newsletter on a regular basis. Keep up the good work! - **Police Constable, Manitoba**

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"I just read 10-8 for the first time. I must say that I'm quite impressed and would like to become a subscriber." - **Police Corporal, British Columbia**

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"Both myself and my fellow sergeant ... use your newsletter in our briefings to quiz our members on points of case law. As you know policing is changing constantly and it is the police officer's responsibility to keep up with changes so that we can do our job effectively. Thank you for your publication. I find it a very valuable tool to stay fresh and current in case law ." - **Police Sergeant, New Brunswick**

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"I find the case law examples you give much easier to understand and make it easier to articulate myself properly in court." - **Police Constable, British Columbia**

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"I was wondering if you would be able to add me to your e-mail list for the In-Service Newsletter. I find many of the case laws you publish directly reflect some of the scenarios and investigations that we experience in our unit and the continual electronic update would be an asset" - **Police Sergeant, Manitoba**

****

"Can you please put me on your e-mail distribution list. Your articles are great and help to any police officer wanting to stay current on the ever changing case law" - **Police Constable, British Columbia**

****

"Please sign me up for the 10-8 newsletter ...The information I have been able to source off of the open internet is great, and it is nice to have case law spelled out in layman's terms like it is in the newsletter publication. Thank you." - **Police Constable, British Columbia**

IN-SERVICE LEGAL ROAD TEST

The "In Service" Legal Road Test is a simple multiple choice quiz designed to challenge your understanding of the law. Each question is based on an article featured in this issue. See page 21 for the answers.

1. Which RCMP rank is highest?
   (a) Assistant Commissioner
   (b) Deputy Commissioner

2. The police must provide a s.10(b) right to counsel *Charter* warning immediately at the outset of every investigative detention.
   (a) True
   (b) False

3. The right to counsel under s.10(b) of the *Charter* is not triggered when police question a subject unless that person is arrested or detained.
   (a) True
   (b) False

4. When the police deliberately interrogate a suspect without recording it when video equipment is available, some courts are holding that the voluntariness of the statement is suspect.
   (a) True
   (b) False

5. Which of the following was the greatest cause of death in British Columbia in 2005?
   (a) homicide
   (b) drug induced
   (c) motor vehicle accidents
   (d) suicide

6. When searching as an incident to arrest, the police must suspend their search until the arrestee has had the opportunity to retain counsel.
   (a) True
   (b) False

Note-able Quote

"The best executive is the one who has sense enough to pick good men to do what he wants done, and self-restraint to keep from meddling with them while they do it".—Theodore Roosevelt

BRIEF INTERLUDE BETWEEN INVESTIGATIVE DETENTION & RIGHT TO COUNSEL OK

R. v. Suberu, 2007 ONCA 60

Police were called to a Liquor Control Board of Ontario (LCBO) store where a man was attempting to purchase a $3 bottle of beer using a $100 LCBO gift certificate obtained earlier that day in another town using a stolen credit card. An employee tried to stall the man until police arrived. The accused approached the employee and asked what was taking so long. As police arrived one officer spoke to the other man while a second officer accosted the accused as he walked towards the exit. The accused said, "He did this, not me, so I guess I can go."

The officer followed the accused out of the store and detained him as he started to get into the driver's seat of a vehicle located in the parking lot. The officer said, "Wait a minute. I need to talk to you before you go anywhere." The officer then had a brief conversation with the accused where he was asked a series of questions, including who the male inside the store was, where he was from, and who owned the van. At the time however, the accused was not advised of his right to counsel under s.10(b) of the *Charter*.

The officer was then advised by police radio that two suspects had purchased the gift certificates using a stolen credit card. A vehicle description and licence plate number was also provided which matched the accused's vehicle. The officer asked the accused for identification and vehicle ownership papers. While the accused retrieved the documents the officer saw an LCBO bag containing liquor, Wal-Mart bags, and several boxes with new merchandise behind the front seat. The accused was arrested for fraud, but interrupted the officer and said it wasn't him, but his friend. When asked who owned "all the stuff" in the van, the accused said some of the property was his and some belonged to the male in the store. The accused was again arrested for fraud and advised of his right to counsel. The van was searched and police found a black purse with information pertaining to the owner of the stolen credit and debit cards.

At trial in the Ontario Court of Justice the officer detaining the accused said he did so because he was not sure whether the accused was involved in incident nor the extent of his involvement if he was. The officer explained his purpose for questioning was to look into what was going on. The trial judge concluded that the circumstances of this case involved a "momentary investigative detention" and the officer's questions were "introductory and preliminary" and asked "merely to determine if their was any involvement" by the accused. The trial judge determined that the accused's right to counsel under s.10(b) was not triggered. He was convicted of possession of a credit card obtained by crime and two counts of possession of property obtained by crime under $5000. The accused's appeal to the Ontario Superior Court of Justice was dismissed. The Superior Court Justice was not convinced the trial judge erred in his legal analysis. The accused then appealed to the Ontario Court of Appeal.

Justice Doherty, writing the unanimous Ontario Court of Appeal decision, first examined the application of s.10(b) to investigative detentions. He said:

> All persons who are detained by the police must be advised of their right to counsel without delay. … If a detained person chooses to exercise his or her right to counsel, that person must be afforded a reasonable opportunity to contact and speak with counsel in private. The police must refrain from questioning the detainee until the detainee has availed him or herself of that reasonable opportunity…
>
> Police officers are authorized to detain persons for investigative purposes where there is a clear nexus between that individual and a recent or ongoing criminal offence. In addition to that nexus, the detention for investigative purposes must be a reasonable detention based on all of the circumstances and must be conducted in a reasonable manner. Investigative concerns will usually justify only a brief detention following which the officer will either have to release the individual or, if reasonable and probable grounds exist, arrest the individual. Investigative detention is not an arrest and cannot be treated as a *de facto* arrest by the police or by the courts…
>
> There is an obvious tension between the requirement to inform detained persons of their

right to counsel and the proper and effective use of brief investigative detentions. Not only will most investigative detentions justify only a brief detention of the individual, most will occur "on the street" in dynamic and quickly evolving situations. The police must move quickly in these situations to react to the circumstances as they change and to new information as it becomes available. If the police are obliged to advise every person detained for investigative purposes of their right to counsel before asking any potentially incriminating questions, the police are presumably required to stop any questioning and facilitate contact with counsel if the detained person chooses to exercise his or her right to counsel. The delay inherent in this process, not to mention the redirection of police resources that would be required to comply with requests to consult with counsel, would render the police power to briefly detain persons for investigative purposes in aid of criminal investigations largely illusory.

In addition to the negative impact on the ability of the police to effectively investigate crimes, a requirement that the police advise detained persons of the right to counsel immediately could seriously impair the liberty interests of detained persons. If the police are required to advise a person detained briefly for investigative purposes of his or her right to counsel before asking any questions and if the person exercises that right, the detention of that person will potentially be considerably longer than it would otherwise have been. The police may also be required to take the person into physical custody to transport that person to another location where he or she can effectively exercise the right to counsel. These lengthier detentions, accompanied in some cases by transportation to another location while in physical custody, could also necessitate personal searches of the detained persons that would not be appropriate in the context of a brief investigative detention. The interpretation of s. 10(b) urged by counsel for the [accused] in the context of brief investigative detentions would inevitably result in significant additional interference with the liberty and personal security of those detained for investigative purposes. [paras. 39-42, references omitted]

Justice Doherty then went on to review the two purposes served by the police advising a detainee of the right to counsel; providing them with an opportunity to get legal advice (eg. right against self-incrimination, right to silence) while under detention and to assist them with regaining their liberty as quickly as possible. In examining these two purposes, Justice Doherty wrote:

> The first of these two purposes – to advise detained persons of their rights – is operative in the context of a routine investigative detention. Persons who are detained for investigative purposes are usually questioned. Often, questions asked in the context of a routine investigative detention, even exploratory questions like those asked by [the officer in this case], may have an incriminatory potential. Access to legal advice in the course of an investigatory detention would give the detainee some protection against the risk of self-incrimination. That protection would, however, come with a significant cost.
>
> The second purpose underlying the obligation to advise detained persons of the their right to counsel – to assist those persons in regaining their liberty – will often not be served by requiring that individuals subject to brief investigative detentions be advised of their right to counsel. To the contrary, as indicated above, a person who is under investigative detention and who after being advised of his or her right to counsel chooses to exercise that right, will almost inevitably end up suffering a longer detention and more intrusive state conduct than he or she would otherwise have endured. [Justice Iacobucci] in *R. v. Mann*…recognized the potential negative impact on the detained person's liberty when he cautioned against using s. 10(b) to artificially prolong investigative detentions. [paras. 44-45]

Justice Doherty then looked at the words "without delay" as they are used in s.10(b) of the *Charter* and ruled that the police can wait a short time—or take a brief interlude—between the beginning of an investigative detention and advising the detainee of their right to counsel. During this interlude, the officer can make a quick assessment of the situation to determine whether anything more than a brief detention may be warranted. He said:

> A proper interpretation of s. 10(b) in the context of investigative detentions must bear in mind not only the purposes underlying s. 10(b), but the practical realities of the nature, length, and purpose of investigative detentions. I think the phrase "without delay" takes on significance in the context of investigative detentions.

The words "without delay" have been construed in the context of detentions following arrest as meaning "immediately… When the detained person is arrested, only legitimate police safety concerns or similar exigencies can justify any delay in advising the arrested person of his or her rights under s. 10(b) of the *Charter*.

Considered in the context of an arrest, a restrictive reading of the words "without delay" in s. 10(b) is fully justified by a purposive interpretation of the section. Detention during an arrest will include physical restraint, a personal search, and will usually involve moving the detainee to a jail. That detention will not be brief and will significantly interfere with the detainee's liberty and security of the person. Advising an arrested person of his or her right to counsel will not usually prolong the detention. An arrested person is also obviously in need of immediate advice as to his or her rights while in detention. The concern that detained persons should have access to legal advice about their rights and the concern of minimizing interference with the liberty of detained persons are both promoted by advising arrested persons of the right to counsel immediately upon arrest.

"In summary, … s.10(b) applies to … detentions for investigative purposes. However, in deciding whether there has been compliance with s.10(b) in the context of a brief investigative detention, the phrase "without delay" should be read so as to countenance some brief interlude between commencing a detention and advising the detained person of his or her right to counsel. During that brief interlude, the police may take appropriate steps to make a quick assessment of whether anything beyond the brief investigative detention"

The phrase "without delay" in s. 10(b) has, however, been read somewhat more broadly in respect of detentions other than arrests. …

In my view, a brief interlude between the commencement of an investigative detention and the advising of the detained person's right to counsel under s. 10(b) during which the officer makes a quick assessment of the situation to decide whether anything more than a brief detention of the individual may be warranted, is not inconsistent with the requirement that a detained person be advised of his or her right to counsel "without delay"…

Acknowledging that there can be a brief time span between an initial detention for investigative purposes and the administration of the s. 10(b) rights also reflects the nature of the vast majority of investigative detentions. Like the detention in this case, most investigative detentions are the result of "psychological compulsion" and not physical restraint. It is often difficult to tell exactly when in the course of a dynamic interchange between the police and an individual that a detention based on psychological compulsion begins. In some cases, the nature of the questions put to the person by the officer and that person's responses to those questions will be relevant in determining whether there was a psychological detention… It seems highly artificial to select an arbitrary point in what is a fluid encounter and declare that from that point forward the person was detained and the next words out of the officer's mouth should have been advice as to the person's right to counsel.

Finally, and again most importantly, I see nothing in the phrase "without delay" which precludes the interpretation I would place on s. 10(b) insofar as investigative detentions are concerned. The words "without delay" are semantically capable of a broader meaning than "immediately" in the appropriate context…

In interpreting the words "without delay" somewhat more expansively in the context of investigative detentions than in the context of arrest, I do not mean to read s. 10(b) out of police/citizen encounters that do not progress past the investigative detention stage. The time limit imposed by the words "without delay" is of necessity a tight one and can accommodate only brief interludes between commencing an investigative detention and advising the detained person of his or her right to counsel.

The police activity during the brief interlude contemplated by the words "without delay" must be truly exploratory in that the officer must be trying to decide whether anything beyond a brief detention of the person will be necessary and justified. If the officer has already made up his

> or her mind that the detained person will be detained for something more than a brief interval, there is no justification for not providing the individual with his or her right to counsel immediately… [paras. 46-54, references omitted]

And further:

> In summary, … s. 10(b) applies to … detentions for investigative purposes. However, in deciding whether there has been compliance with s. 10(b) in the context of a brief investigative detention, the phrase "without delay" should be read so as to countenance some brief interlude between commencing a detention and advising the detained person of his or her right to counsel. During that brief interlude, the police may take appropriate steps to make a quick assessment of whether anything beyond the brief investigative detention of the individual may be warranted. [para. 63, reference omitted]

Since there was no s.10(b) breach it was unnecessary to consider s.24(2). The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

POLICE QUESTIONING DOES NOT NECESSARILY TRIGGER DETENTION

R. v. Lewis, 2007 NSCA 2

The accused was the last person to disembark a Via Rail sleeper car when he was seen by plainclothes members of a Jetway Unit. A Jetway Unit is a criminal interdiction team that monitors passengers at airports, train stations, and bus depots for the purpose of mainly intercepting illegal contraband such as drugs. After spotting travellers exhibiting nervous or avoiding behaviour, officers approach them, identify themselves and enter into conversation. The traveller is arrested if proper grounds form and a search is conducted. A police dog, trained in narcotic detection, may be used to sniff the traveller's baggage.

A dog handler, who was waiting in a reception area, was signalled to approach the accused with his drug sniffing dog, a yellow Labrador. As the officer followed the accused with his dog on a leash, the dog sniffed the accused's backpack. The accused pulled the backpack away, but the dog pursued it, and then sat indicating he had detected an odour of narcotic.

Another officer then approached the accused, identified himself, and asked him if he wouldn't mind speaking to him. The officer told him he had done nothing wrong and was not under arrest. The accused identified himself and answered a few questions. During this time it was learned the accused had a prior drug related record with a notation of violence. At that point the officer arrested the accused for possession of narcotics. He was advised of his *Charter* rights and said he wanted to speak to a lawyer.

The accused's backpack was then opened and cocaine and a set of electronic scales was found. He was then re-arrested for possession for the purpose of trafficking. He was again advised of his right to counsel and asked if he wanted to talk to a lawyer, but was told there was no way to give him privacy at the railway station so he could have privacy at the police station, a few minutes away.

At trial in Nova Scotia Supreme Court on charges of possessing cocaine for the purpose of trafficking and trafficking in cocaine the accused argued he had been arbitrarily detained (s.9 *Charter*), denied his right to counsel (s.10(b) *Charter*) and subjected to an unreasonable search (s.8 *Charter*). The trial judge, however, ruled that he had not been arbitrarily detained prior to arrest, which was based on reasonable grounds, and the search that followed was justified as an incident to arrest. The judge also found the accused's right to counsel had not been violated. He was convicted of possession for the purpose of trafficking, but then appealed to the Nova Scotia Court of Appeal.

Detention?

The trial judge concluded the accused had not been detained prior to his arrest because he was not physically constrained nor was he given a direction or demand that may have had legal consequences. Furthermore, there was no evidence the accused had a reasonable perception he had no choice but to comply with police. Rather, the officer was not threatening in any objective sense. Justice Fichaud, authoring the unanimous judgment, found the trial

judge did not err in holding there was no physical constraint, no demand or direction, and no reasonable perception of compulsion. The accused did not testify as to how he perceived the situation. Even though a court can infer a detention from the circumstances without an accused's testimony, there is no legal presumption that a detention occurs simply because a police officer conducts an interview.

Access to Counsel

The trial judge held that it was impractical to give the accused access to counsel on a public pay phone at the railway station because it would not provide privacy. He was then transported almost immediately to the police station and provided a phone to use and was not subject to any form of interrogation between the time of arrest and his lawyer call. Justice Fichaud again concluded the trial judge did not err in finding the accused's right to a reasonable opportunity to consult counsel without delay was respected.

The accused also argued that the police should have not searched him after his arrest until he had the opportunity to consult counsel. He submitted this violated his right to counsel in that the police have a duty to suspend obtaining incriminating evidence until the detainee has had the opportunity to consult counsel. Justice Fichaud disagreed. Although the police have the right to be informed of the right to retain and instruct counsel without delay on arrest, the police do not have to suspend the search incident to arrest until the detainee has had the opportunity to retain counsel.

The Search

The accused argued the search of his backpack was not incidental to arrest, but rather incidental to his detention and part of a strategy to develop grounds for the arrest and search of a Jetway targeted individual. In rejecting this submission, Justice Fichaud held:

> [The accused] was arrested for possession of a narcotic. The search was for the purpose of locating the narcotic - ie. discovery of evidence that may be used at [his] trial. This was a search incidental to arrest… It was not a search for an unrelated purpose. [references omitted, para. 39]

Finally, the accused contended that his arrest was illegal because the grounds used to support it included information about his drug record that was obtained during police questioning and before he was advised of his right to counsel. Although a search incident to an illegal arrest is itself illegal, the accused's arrest in this case was lawful. The arrest was based on reasonable grounds-the detection by a drug dog of a narcotic in the backpack of someone with a drug record. The accused was not under detention when he identified himself to police during conversation and the police were entitled to use the identification to check his record. Since there was no detention, there was no requirement that the police inform the accused of his right to counsel under s.10(b) before learning he had a drug record.

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

LEGALLY SPEAKING:

Search Incident to Arrest

"The right to search incident to arrest derives from the fact of arrest or detention of the person. The right to retain and instruct counsel derives from the arrest or detention, not from the fact of being searched. Therefore immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel."-Justice Lamer, R. v. Debot, [1989] 2 S.C.R. 1140

BREATHALYSER OPERATOR NEED NOT SPEAK TO LAWYER BEFORE LAWYER SPEAKS TO CLIENT

R. v. Fitzsimmons,
(2006) Docket:C44435 (OntCA)

After failing a roadside screening device the accused was arrested for impaired driving, read his *Charter* rights, cautioned, and given the breath demand. At the police station he was handed over to the qualified technician who again reiterated

the accused's right to counsel. He requested counsel and the technician contacted a lawyer for him. The lawyer asked the technician questions about the incident, including why the accused had been stopped and whether there was an accident. The technician, however, refused to talk about the investigation and told the lawyer he was not the arresting officer. The lawyer then told the technician that he could not give proper legal advice without knowing the reasons and grounds for the stop. The technician refused to answer. The accused then spoke to the lawyer in private.

At trial in the Ontario Court of Justice the accused argued his rights under the *Charter* were breached because, in part, the police failed to facilitate his right to retain and instruct counsel by not assisting his lawyer. The lawyer testified that the advice he gave to the accused was based on information provided by the accused, rather than information he wanted to get about what was in the mind of the officer. Furthermore, the lawyer also said the time of the incident was important to the advice he had to give. Finally, the accused stated he did not feel he received complete advice about whether or not he had to give a breath sample. The application to exclude the evidence was dismissed and the accused was convicted of over 80mg%.

The accused successfully appealed to the Ontario Superior Court of Justice. The appeal court judge ruled that the answers sought from the technician by the lawyer were not an onerous burden and the failure to provide this information unduly limited the accused's right to counsel. In her view, the evidence did not establish that the accused possessed all the necessary facts to permit the lawyer to assess whether the police had the required reasonable and probable grounds to demand a breath sample. A new trial was ordered.

The Crown then appealed to the Ontario Court of Appeal. Justice Weiler, authoring the unanimous decision, found the burden was on the accused to prove on a balance of probabilities that he was not able to exercise his s.10(b) rights in a meaningful way. The burden was not on the Crown to prove the accused had all the information required by legal counsel to provide him with the necessary advice. In this case, the accused's right to counsel was not breached when the breathalyser operator refused to speak to the accused's lawyer before the lawyer spoke to his client. Justice Weiler stated:

> Upon arrest the police have an obligation to provide the detainee with the reason for his arrest, advise him of the right to counsel, and to provide him with an opportunity to exercise that right. In this case, instead of consulting with his client, counsel for the detainee insisted on speaking to the breathalyser technician first and the technician's refusal to answer counsel's questions formed the basis of the alleged infringement of [the accused's] *Charter* rights. Further, although counsel claimed that he needed the information from the breathalyser technician in order to properly advise his client, he did not seek to obtain this same information from his client.
>
> Counsel's obligation was to first consult with his client, the detainee, and to ask him what he needed to know in order to advise him. This he did not do… [paras. 17-18]

And further:

> The fundamental purpose of s. 10(b) is to ensure that detainees are sufficiently informed of their jeopardy and their right to counsel and are given a reasonable opportunity to exercise that right. [The breathalyser operator] was under no obligation to answer [the lawyer's] questions before [the lawyer] spoke to [the accused]. Indeed to place such an obligation on a breathalyser operator is impractical and could seriously interfere with the officer's ability to carry out his duties not only with respect to this detainee but others as well. We are not satisfied that there was any information necessary to the giving of legal advice that counsel could not have obtained by other means such as by asking his client. [para. 24]

Justice Weiler did caution however, that she was not addressing the question of whether the police have an obligation to provide a lawyer with information they cannot obtain from the detainee. The Crown's appeal was allowed, the order of a new trial was set aside, and the conviction of over 80mg% was restored.

Complete case available at www.ontariocourts.on.ca

BC DEATHS

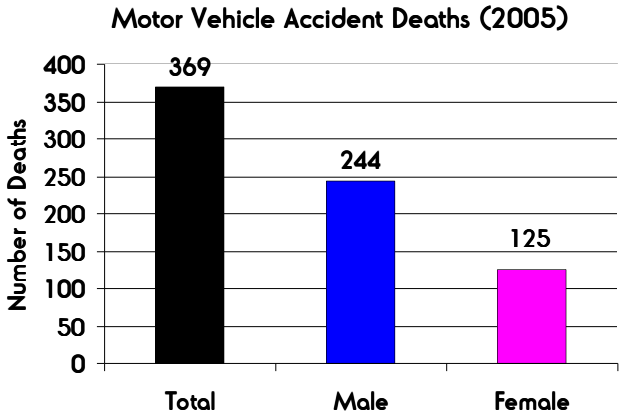
The British Columbia Vital Statistics Agency recently released its 2005 Annual Report. The report is based on information collected for events, such as deaths, in the 2005 calendar year.

Report Fast Facts

- Unintentional injuries were the leading cause of death for people aged 15-24 years old and 25-44 years old
- Of the 223 deaths of 15-24 year olds, 92 resulted from unintentional injuries and 34 from suicide
- Suicide was the second leading cause of death for people aged 15-24 and the third leading cause of death for people 25-44 years old
- 1,605 people died from external causes of death, such as motor vehicle accidents, poisonings, falls, suicide, and fire

Deaths by Motor Vehicle Accident

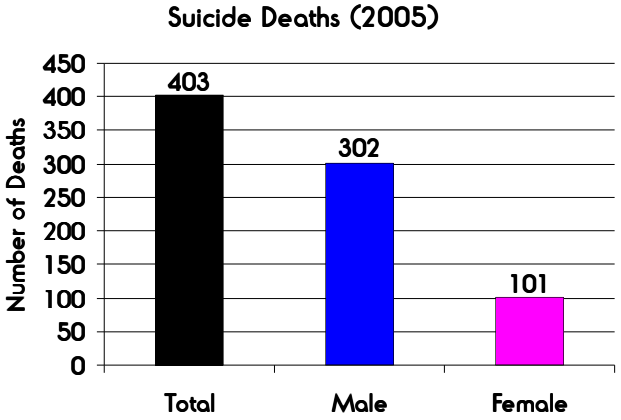
- 369 people died from motor vehicle accidents



- Deaths caused by motor vehicle accidents included:
  - ✞ **58** pedestrians (35 male / 23 female)
  - ✞ **36** motorcycle riders (33 male / 3 female)
  - ✞ **164** occupants of cars (92 male / 72 female)
  - ✞ **51** occupants of pick-up trucks or vans (40 male / 11 female)

Deaths by Suicide

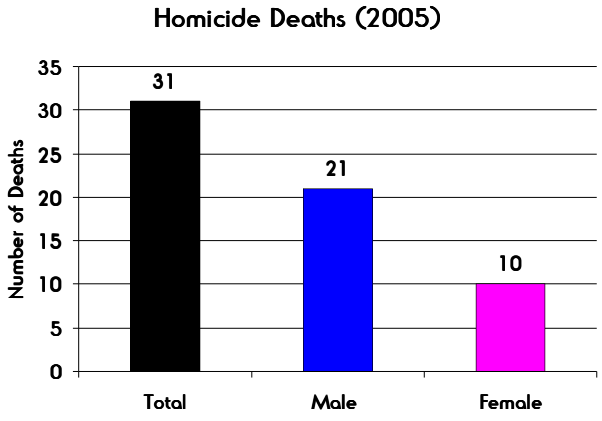
- 403 people died from suicide



- Deaths caused by suicide included:
  - ✞ **154** by hanging, strangulation, or suffocation (119 male / 35 female)
  - ✞ **76** by drugs, medicaments, or biological substances (37 male / 39 female)
  - ✞ **34** by gases and vapours (29 male / 5 female)
  - ✞ **24** by jumping from a high place (15 male / 9 female)

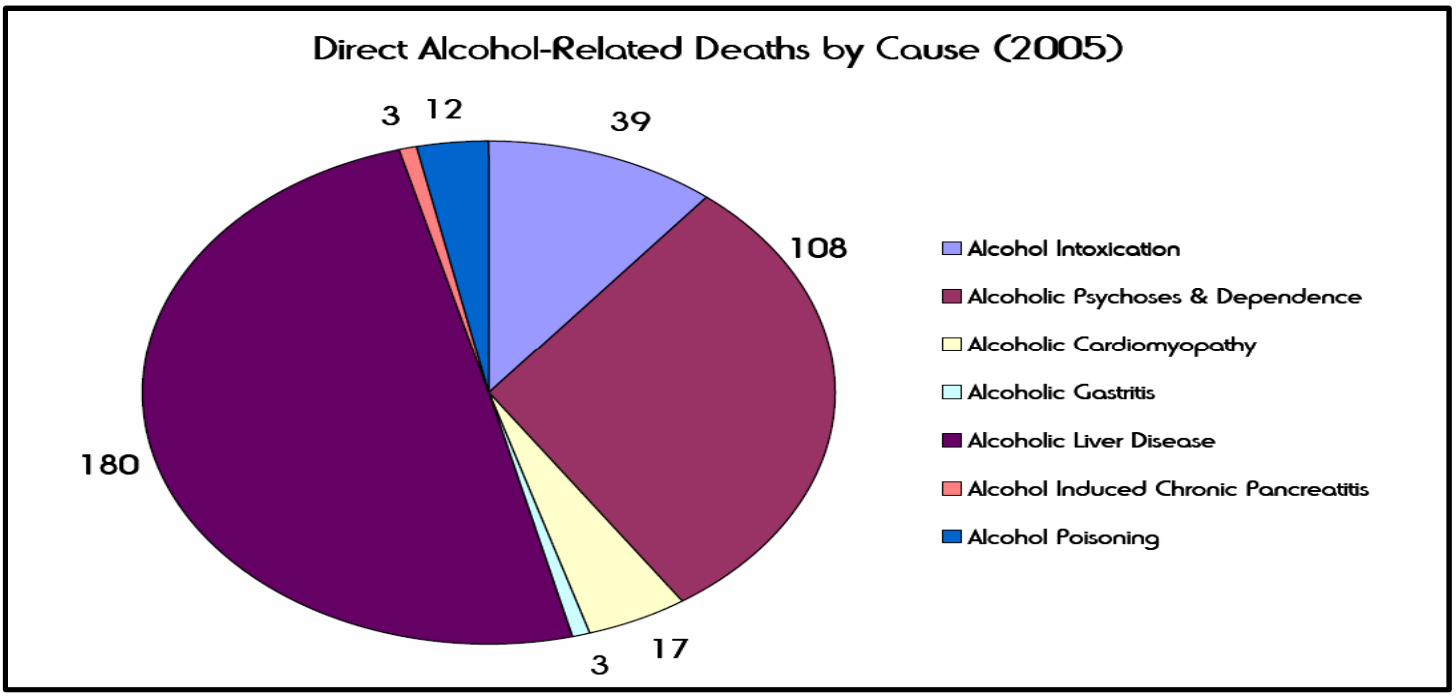
Deaths by Homicide

- 31 people died from homicide



Deaths by Alcohol

- There were 1,878 alcohol-related deaths
- 362 deaths were directly related to alcohol and another 1,516 were indirectly related to alcohol
- Of the 1,878 deaths, 1,432 were male and 446 were female

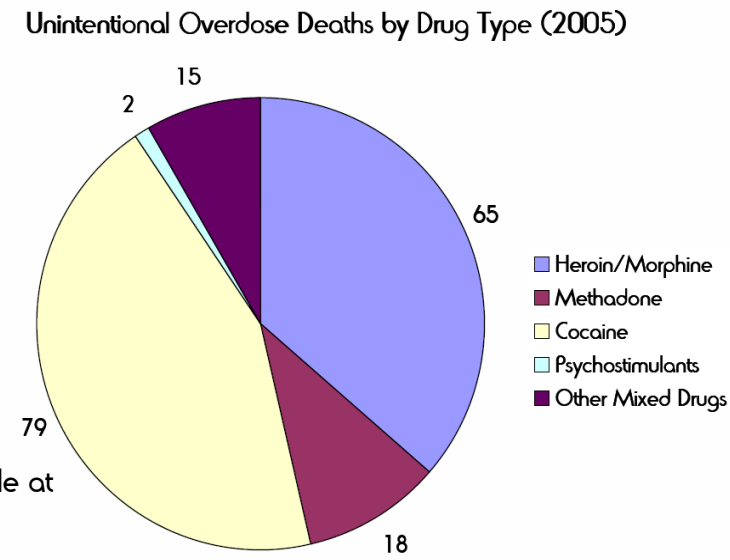


Deaths by Drugs

- There were 342 drug-induced deaths, including illicit and prescribed drugs (229 male / 113 female)
- Drug induced deaths included
  - ✞ 66.7% accidental poisoning
  - ✞ 22.8 % suicide
  - ✞ 6.7 % drug use / abuse
- 179 deaths were unintentional illicit / illegal overdoses

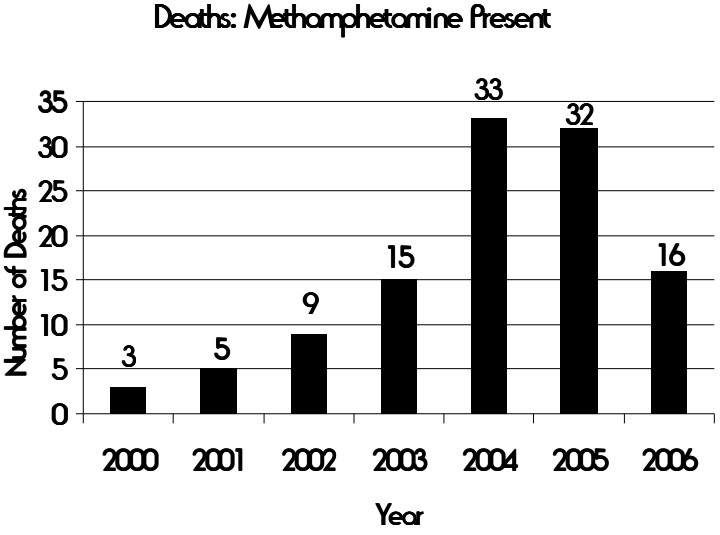
The complete Vital Statistics 2005 Annual Report is available at

www.vs.gov.bc.ca



BC METH DEATHS DOWN

The British Columbia Coroner's Service released its methamphetamine (meth) death statistics for 2006. In the April 2007 report, 16 people who died in 2006 had meth present in their bodies, half the total for the previous year. Of those 16 deaths, only two had meth alone listed as the drug leading to death. Five deaths occurred where meth was identified as contributing to death, and two deaths involved meth and one or more other drugs. In three deaths meth was present but ruled not relevant to the death while four deaths were still under investigation. The complete report is available at www.pssg.gov.bc.ca/coroners.



MR. BIG SCENARIO DID NOT BREACH s.7 *CHARTER*

R. v. Osmar, 2007 ONCA 50

Following the murder of two men about one month apart, the accused became a suspect and was surveilled for several months but police were unable to obtain any incriminating evidence. Police subsequently planned an undercover operation. An undercover officer befriended the accused at a drug treatment centre and had several more contacts with him over a period of five months. During this time the undercover officer introduced the accused to his "boss", also an undercover officer. During their subsequent liaisons the accused told the "boss" he had killed the two men. This admission was surreptitiously audio taped and the accused was arrested and charged with two counts of first degree murder. At trial in the Ontario Superior Court of Justice the accused was convicted.

The accused appealed to the Ontario Court of Appeal arguing, in part, that the statements he made to the undercover police officers should not have been admitted because his right against self-incrimination protected by s.7 of the *Charter* had been violated. He submitted that s.7 is implicated whenever the state seeks to use self-incriminating evidence by coercive means. He contended that the trickery the police used in this case combined with elicitation amounted to coercion and there is no requirement that an accused be detained in order to trigger s.7.

Justice Rosenberg, authoring the unanimous Ontario Court of Appeal decision, rejected the accused's appeal. Section 7 of the *Charter* is not infringed by undercover police operations where the suspect is not detained. First, the common law confessions rule, which also serves the principle against self incrimination, requires the Crown to prove that a statement is voluntary beyond a reasonable doubt. This rule however, only applies to statements made by an accused to a person they believe to be a person in authority, such as a police officer. Concerns about the reliability of confessions to private individuals can be addressed by appropriate jury instructions warning that such statements might be untrue or unreliable and given little weight.

Second, the Supreme Court's judgment involving the use of statements made under statutory compulsion in response to provincial traffic legislation did not assist the accused. In that case, the court examined four contextual factors in deciding whether the statement was admissible; (1) the existence of coercion, (2) an adversarial relationship, (3) the real possibility of an unreliable confession to a person in authority, and (4) abuse of power. Even if these criteria were applied to this case, there was no violation of the principles of fundamental justice. There was little, if any coercion. The accused was not under pronounced psychological and emotional pressure, and there was no abuse of power. He was not threatened or intimidated, but rather presented with an opportunity to obtain employment in a criminal organization.

Finally, the accused's right to silence was not violated. Section 7 does not apply to undercover operations prior to detention. Nor was the accused in circumstances that could be considered the functional equivalent of a detention and equally needing protection from the greater power of the state. He chose to speak to the undercover officers and "was not under the control of the state nor was the context such as to require that he be protected from the greater power of the state."

The accused's appeal was dismissed and his convictions upheld.

Complete case available at www.ontariocourts.on.ca

WHO IS MR. BIG?

" The police resort to this technique when they have a suspect in a serious crime, usually murder, but they have been unable to obtain sufficient evidence against the suspect. While there are some variations, in general, in the Mr. Big scenario police officers posing as organized crime figures offer the suspect the opportunity to join their organization. The cost of entry to the organization is that the suspect demonstrate that he can be trusted and is capable of carrying out the kind of criminal acts required by the organization. The suspect is persuaded by inducements and other means to admit to a serious crime to demonstrate his trust in the organization and that he can be counted on to carry out the criminal orders of Mr. Big" - Justice Rosenberg, R. v. Osmar

VOLUNTARINESS QUESTIONED IN UNRECORDED INTERVIEWS

R. v. Philogene,
(2006) Docket:C43401 (OntCA)

Following the stabbing and robbery of a woman, the accused was subsequently located by a police tracking dog, arrested, placed in the back of a police car, and advised of his right to counsel. The accused said he understood his rights and wanted to call a lawyer when he got to the police station. At the station, the officer-in-charge was told that the accused wanted to call a lawyer at the earliest convenience. The officer-in-charge told him he could use the telephone to contact a lawyer and asked him if he understood. The accused replied in the affirmative.

Without being provided the opportunity to call a lawyer, the accused was placed in an interview room and was interviewed by a detective for 10 minutes, which was not recorded on video. A second interview involving another detective, accompanied by two other officers, took less than five minutes, but was not video recorded either. During a third interview the first detective returned to the interview room and asked if the accused had been read his rights to counsel and his caution, and the accused replied that he had and that he understood. The detective asked him if he wanted to speak with a lawyer, and he answered "no." No one had told the detective that the accused had indicated that he wished to call counsel at the station, nor did the detective believe that any opportunity had been provided to call counsel while he was waiting in the interview room.

The detective proceeded to talk to the accused about the incident in a non-videotaped interview. During this 15 minute interview, the accused stated that the weapon used was not a knife but a bottle. A fourth interview, which lasted 23 minutes, was videotaped. At the outset of the videotaped interview, the detective informed the accused of his right to counsel and asked him if he wanted to speak to a lawyer. The accused said no. In the course of the interview, the accused confessed to the offence.

At trial in the Ontario Superior Court of Justice the accused testified that the detective spent the first interview feeding him the version of events that the detective wanted in a videotaped interview. He also alleged that during the second interview the other detective had made intimidating statements to him along the lines of, "I wish I had been there when you were arrested." He testified that he had not been telling the truth and said that he was so scared that he would have said anything to get out of the room and that he had not given the interview of his own free will. He also said he was told that he could go home if he confessed, but this was denied by the detective.

The trial judge ruled that both the videotaped statement and a transcript of it were admissible as evidence. He held that the accused had been informed of his right to counsel a number of times, and that on the videotape he did not display any sign of fear. The accused was found guilty of robbery, aggravated assault, and assault with a weapon.

The accused appealed to the Ontario Court of Appeal arguing the trial judge erred in holding that his statements were voluntary and that his rights under s.10(b) were not violated.

Voluntariness

Even though a statement has been ultimately videotaped, it could still be rendered involuntary. The Court stated:

> In order to properly determine voluntariness, the trial judge was obliged to consider what preceded the taped statements. He ought to have found the untaped portion of the interviews suspect and gone on to do an analysis of whether there was a sufficient record of the untaped portion to be able to rule on the voluntariness of the taped portion… The [accused] was in custody; video equipment was available and the police deliberately set out to interrogate him without taping. The resulting interrogation was thus rendered suspect by the fact that it was not recorded.

"The [accused] was in custody; video equipment was available and the police deliberately set out to interrogate him without taping. The resulting interrogation was thus rendered suspect by the fact that it was not recorded."

> taping. The resulting interrogation was thus rendered suspect by the fact that it was not recorded. The trial judge failed to take these factors into account as part of his reasoning on the question of the voluntariness of the taped statement.
>
> The circumstances prior to the taped interview are rendered even more suspect by the fact that at trial [the detective] admitted to making his notes after the interrogation; that his notes were selective, not exhaustive; and that they contained inaccuracies. On the voir-dire, [the detective] testified that it was impossible for him to stay on top of the conversation and make notes and that was why the notes were only a summary of portions of the conversation. At trial, [the detective] admitted that his notes of the unrecorded 10:35 p.m. interrogation were after-the-fact summaries. [references omitted, paras. 13-14]

Here, the accused alleged that both fear of prejudice and hope of advantage had been held out to him by different police officers. The trial judge did not deal with the issue of inducement. In rejecting the accused's evidence of intimidation and/or inducements to confess, the trial judge did not subject the detective's reasons for not videotaping the pre-statement interrogations to the same level of scrutiny that he applied to the accused's testimony.

Right to Counsel

The accused's s. 10(b) rights were violated. The accused told the arresting officer that he wished to speak to a lawyer when he arrived at the station and this wish was communicated to the officer in charge by the arresting officer. However, he was not provided with access to a telephone in the hour and thirty-five minutes that he was detained in an interview room before he said he didn't want to speak to a lawyer and was interviewed by the detective. The Court stated:

> The duty to facilitate contact with counsel requires the police to offer to use of the telephone…The fact that the breach of the [accused's] right to counsel involved the implementational aspect of the right as opposed to the informational aspect still resulted in the infringement of the [accused's] s. 10(b) rights. This is not a situation of the [accused] failing to be diligent in the exercise of his right to counsel; he was never given the opportunity to be diligent in exercising that right prior to the breach of his right to counsel.
>
> We do not propose to enter into speculation as to whether the [accused] would have given his statements had there been compliance with the implementational component of his rights. The accused was treated unfairly while he was in custody and the admission of his videotaped statement would bring the administration of justice into disrepute. His statements should have been excluded pursuant to s. 24(2) of the Charter. [references omitted, paras. 19-20]

The accused's appeal was allowed, the conviction set aside, and an acquittal was entered.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Unrecorded Confessions

"[T]he Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. That onus may be readily satisfied by the use of audio, or better still, video recording. Indeed, it is my view that where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation suspect. In such cases, it will be a matter for the trial judge on the voir dire to determine whether or not a sufficient substitute for an audio or video tape record has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt." Ontario Court of Appeal, R. v. Moore-MacFarlane (2001) Dockets:C31374 and C30881 (OntCA) (para. 65)

Note-able Quote

"People are like stained-glass windows. They sparkle and shine when the sun is out, but when the darkness sets in, their true beauty is revealed only if there is a light from within".—Elizabeth Kubler Ross

VIOLENCE TO ESCAPE THEFT NOT ROBBERY UNDER s.343(a) *CRIMINAL CODE*

R. v. Newell, 2007 NLCA 9

The accused entered a supermarket, placed a quantity of meat in a hand basket, and left the store without paying. A loss prevention officer saw the theft and touched the accused on the shoulder as he was entering a parking lot just outside the store. The loss prevention officer identified himself and told the accused he would have to return to the store. The accused spun around, dropped the basket of meat, and tussled with the loss prevention officer. The accused had a knife in one hand which he swung at the loss prevention officer who then backed off. The accused then ran away leaving the meat.

At trial in Newfoundland Provincial Court the accused was convicted of robbery under s.343(a) of the *Criminal Code*. The trial judge ruled that the violence used against the loss prevention officer was connected to the theft and part of an ongoing enterprise.

s.343(a) Criminal Code
Every one commits robbery who steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property.

The accused then appealed to the Newfoundland Court of Appeal arguing, in part, that he should have been acquitted of robbery because he only committed a theft and did not use violence for the purposes prohibited under s.343(a). Justice Cameron, writing the decision of the Newfoundland Court of Appeal, agreed. The theft was completed before the violence or threats of violence was used against the loss prevention officer. Thus, the violence was not used to "overcome resistance to the stealing." Using violence or threats of violence to enable a thief to escape does not elevate a completed theft into a robbery under s.343(a). Justice Cameron stated:

> In this case, the Crown accepts that the theft was complete when the [accused] exited the store. The violence cannot be said to be to overcome resistance to the theft.
>
> I turn now to the trial judge's view that the whole of the events prior to the [accused] running away were part of one seamless incident and though a theft might have been completed, for the purpose of s. 343(a) it was still ongoing when the tussle between [the loss prevention officer] and the [accused] took place.
>
> Though one might find some support for this approach in English jurisprudence, as the discussion up to this point demonstrates it is not supported by the weight of Canadian authority. Further, the distinctions between s. 343(a) and (b) support the view that Parliament intended to preserve in (a) the traditional limitation that the violence had to be before or contemporaneous with the theft. To conclude that a theft is complete for the purpose of s. 322 but not for the purpose of s. 343 runs counter to the fact that robbery is considered to be aggravated theft. [footnote omitted, paras. 30-32]

A conviction of theft was substituted for the robbery conviction.

Complete case available at www.canlii.org

LEGALLY SPEAKING:

Racial Profiling

"A police officer who uses race (consciously or subconsciously) as an indicator of potential unlawful conduct based not on any personalized suspicion, but on negative stereotyping that attributes propensity for unlawful conduct to individuals because of race is engaged in racial profiling. Racial profiling is wrong. It is wrong regardless of whether the police conduct that racial profiling precipitates could be justified apart from resort to negative stereotyping based on race. For example, a police officer who sees a vehicle speeding and decides to pull the vehicle over in part because of the driver's colour is engaged in racial profiling even though the speed of the vehicle could have justified the officer's action. Police conduct that is the product of racial profiling and interferes with the constitutional rights of the target of the profiling gives rise to a cause of action under the Charter."- Justice Doherty, Ontario Court of Appeal, Peart & Grant v. Peel Regional Police et al, (2006) Docket:C40334 (OntCA) (references omitted, paras. 90-91)

RCMP FAST FACTS

The Royal Canadian Mounted Police is Canada's largest police organization. As of January 1, 2007 the force was 24,578 strong, including 16,783 police officers, 63 special constables, 2,978 civilian members and 4,626 public servants. As well, more than 75,000 volunteers assist the RCMP which is divided into four regions with 15 divisions. (source: www.rcmp-grc.gc.ca)

Region	Division	Area
North West	D	Manitoba
	F	Saskatchewan
	G	Northwest Territories
	V	Nunavut Territory
	K	Alberta
	Depot	Regina, Saskatchewan
Pacific	E	British Columbia
	M	Yukon Territory

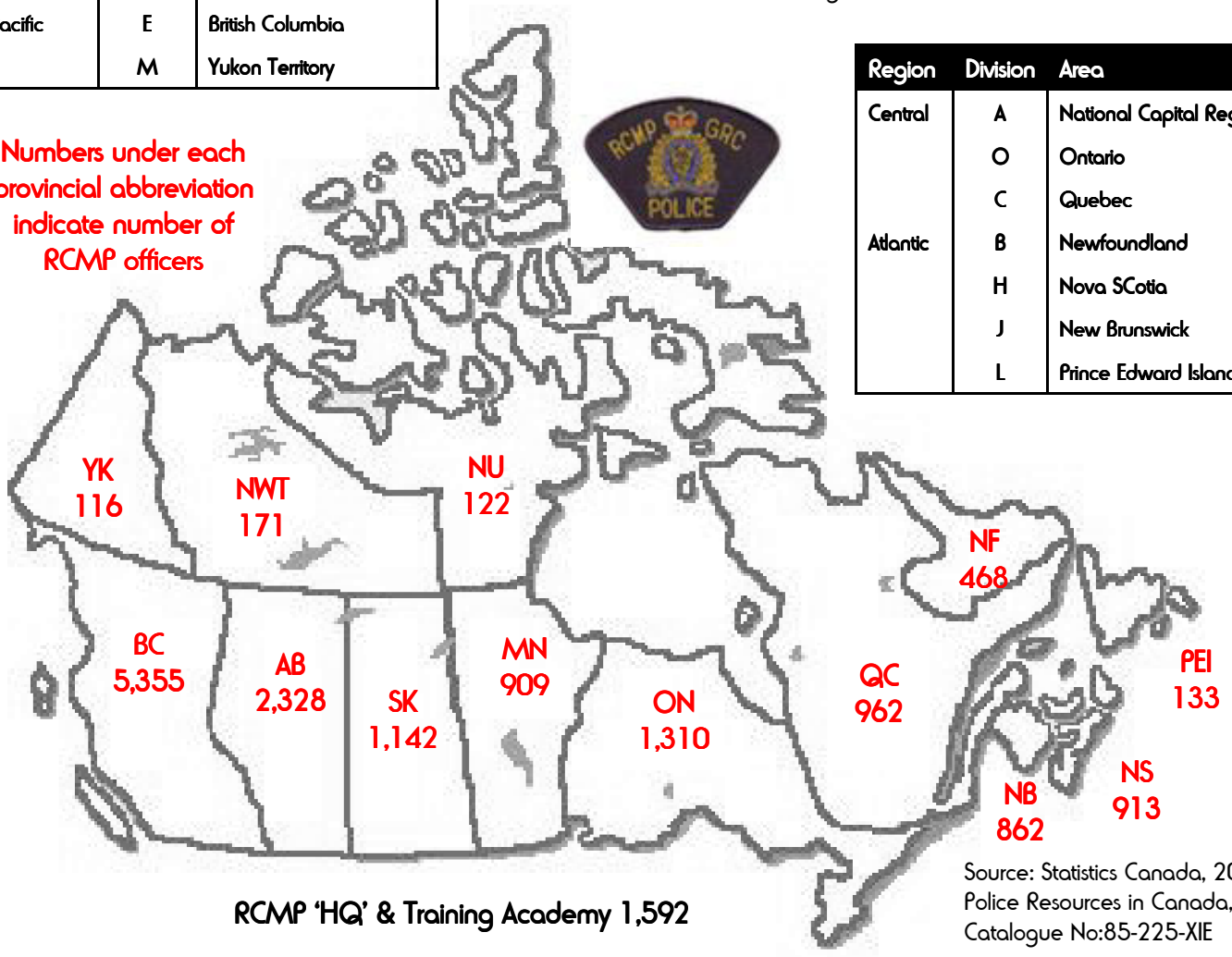
CANADA's LARGEST MUNICIPAL RCMP DETACHMENTS

Detachment	Police Officers
Surrey BC	483
Burnaby BC	221
Richmond BC	173
Kelowna BC	134
Langley Township BC	125
Prince George BC	121
Coquitlam BC	120
Nanaimo BC	116
Kamloops BC	111
Red Deer AB	111

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

Region	Division	Area
Central	A	National Capital Region
	O	Ontario
	C	Quebec
Atlantic	B	Newfoundland
	H	Nova SCotia
	J	New Brunswick
	L	Prince Edward Island

Numbers under each provincial abbreviation indicate number of RCMP officers



RCMP 'HQ' & Training Academy 1,592

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

Insignia	Rank	# of Positions
	Commissioner	1
	Deputy Commissioner	6
	Assistant Commissioner	26
	Chief Superintendent	56
	Superintendent	165
	Inspector	360
	Corps Sergeant Major	1
	Sergeant Major	6
	Staff Sergeant Major	6
	Staff Sergeant	813
	Sergeant	1,724
	Corporal	3,109
	Constable	10,510
	Total	16,783

source: http://www.rcmp-grc.gc.ca/about/organi_e.htm, [accessed March 3, 2007]

OFFENDER MUST SATISFY COURT THAT HOUSE SHOULD NOT BE FORFEITED

R. v. Siek, 2007 NSCA 23

Police executed a search warrant on a single story residence with a full basement and attached garage. They found a marihuana grow operation consisting of a total of 518 plants (279 mature plants and 239 plants in the cloning stage). There was no furniture in any of the rooms but a few blankets on the living room floor, clothing, and a telephone. Police found 180 marihuana clones under fluorescent lights in a bathroom. The master bedroom contained a ventilation system leading to a turbine on the roof, several boxes of florescent light tubes, and a number of growing pots. Another bedroom served as a storage room for growing equipment and supplies such as fertilizers, grow material, and electrical equipment. None of the bedrooms appeared to be occupied; only one contained any personal effects.

In the full basement, three of the four rooms had been converted into marihuana grow rooms, with high intensity lights, reflective shields, and ventilation systems. In one room with 13 lights and shields, the police found boxes containing over nine kilograms of cannabis marihuana bud and over two kilograms of shake. Another room contained an active grow of 61 budding marihuana plants under 11 lights and shields. The third contained another 13 lights and shields over 118 pots filled with soil. Ventilation flex tubing ran from the basement to the attic. Electricity had been diverted at the power mast on the main residence and on the garage, which had a separate power service. The two-car garage housed over 200 cannabis marihuana plants of different sizes (from clones to 18 inches tall) under two high intensity lights. Turbines had been installed to provide fresh air and allow venting.

Police estimated the profit potential, if sold on a gram level, to be between $435,000 and $870,000 and, if sold on a pound level, between $242,000 and $339,000. Equipment (ballasts/condensers, 1000 watt lights and reflective shields) was valued at $20,000, excluding the cost of the wiring, timers,

pots, soil, nutrients and labour. The Nova Scotia Power Corporation calculated the value of the electricity that had been diverted at over $5,500.

The accused pled guilty in Nova Scotia Provincial Court to unlawful production, possession for the purpose of trafficking, and fraudulent diversion of electricity. He was sentenced to two years in prison, imposed a $300 victim surcharge, prohibited from firearms, and ordered to forfeit the lights, shields, exhaust fans, electrical panels, ballasts, grow nutrients, and grow mix. However, the Crown's application to forfeit the accused's real (estate) property was rejected. The trial judge found the forfeiture of the property would be disproportionate. He emphasized that the accused had not made any profit from the illegal activity—this was his first crop that had been seized, he used his legitimate earnings to purchase the property, and he had been sentenced to two years in prison. The Crown then appealed the denial of its forfeiture application to the Nova Scotia Court of Appeal.

Justice Oland, authoring the judgment of the Nova Scotia Court of Appeal, examined the legislation allowing for property forfeiture. Under s.16 of the *Controlled Drugs and Substances Act* (*CDSA*) the Crown may make an application when a person is convicted of a designated substance offence to have "offence-related property" forfeited. If the judge is satisfied, on a balance of probabilities, that any property is offence-related property and that the offence was committed in relation to that property, the judge shall order the property forfeited.

Justice Oland also noted there was a two-part analysis in determining whether real property can be forfeited.

1. First, the Crown must persuade the judge that the property is "offence related property" and that the offence was committed in relation to that property. "Offence related property" is defined in s.2 of the *CDSA* as "any property…(a) by means of or in respect of which a designated substance offence is committed, (b) that is used in any manner in connection with the commission of a designated substance offence, or (c) that is intended for use for the purpose of committing a designated substance offence." Offence related property includes any property, whether personal property or real property. Further, property becomes offence related property not because of its characteristics but because of the use made of it. Unless the property is real property or a dwelling house, the judge "shall" grant the forfeiture order. In other words, s.16 calls for presumptive forfeiture and the offence related property is automatically forfeited.

2. Second, there are two types of property that can be saved from forfeiture; dwelling houses (s.19.1(4)) and real property (s.19.1(3)). In the case of real property, the judge must consider whether a forfeiture order would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the offender. If the real property is a dwelling house, the judge must also consider the impact of forfeiture on the offender's immediate family. Under this second part of the analysis the offender bears the burden of persuading the court that forfeiture is disproportionate and should not be granted. If persuaded, the judge "may" decline to order forfeiture.

Justice Oland summarized the legislation as follows:

> …s. 16.(1) applies only whenever an offender has been convicted of a designated substance offence, such as trafficking or production. The Crown is not permitted to apply for forfeiture for offences such as simple possession of certain substances. That feature, in combination with the broad definition of offence-related property, indicates that Parliament intended that, once used in the commission of the more serious offences which come within the definition of a designated substance offence, property would be taken from the offender and forfeited to the Crown, unless specifically exempted.

"[The CDSA] presumption in favour of forfeiture serves to emphasize that forfeiture is a consequence of the offender having chosen to use an asset in the commission of the offence and having purposely converted it into offence-related property."

> This feature of the legislative scheme relating to forfeiture in the *C.D.S.A.* is striking. Once there is a finding that property constitutes offence-related property, forfeiture will automatically follow, unless the property is real property and the offender can satisfy the court under s.19.1(3) that forfeiture would be disproportionate, having regard to the factors listed in that provision. This presumption in favour of forfeiture serves to emphasize that forfeiture is a consequence of the offender having chosen to use an asset in the commission of the offence and having purposely converted it into offence-related property.
>
> That presumption is displaced only when, pursuant to s. 19.1(3), the offender satisfies the court that the impact of an order of forfeiture would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the offender. The sentence imposed is not included in the factors to be considered by the court. Nor does the *C.D.S.A.* provide that forfeiture of offence-related property is to be considered part of the punitive sanction. [paras. 43-45]

In this case, the trial judge over-emphasized some matters, did not consider others, and considered one that was inappropriate. First, the sentence imposed was not a valid consideration in determining the disproportionality of forfeiture. "Forfeiture is a consequence of property having been converted into offence - related property," said Justice Oland. "While part of the sentencing process, it is not part of the sentence itself. It follows that forfeiture, if granted, should not affect the sentence imposed for the offence. Similarly, the sentence should not be impacted by a forfeiture order. Finally, it is not essential that forfeiture and sentencing be dealt with in the same hearing."

Second, the trial judge over-emphasized the lack of profit and loss of equity in the property obtained by legal means. The Court sated:

> In addition, after having heard evidence that the marihuana grow showed three distinct stages of production and that considerable time and money had been invested, the judge did not make any finding that the grow operation would close after only six to eight months as the [accused] had testified. Thus the fact that the [accused] had not made any profit is more a function of when the police executed the search warrant than anything else. Had the grow operation not been discovered, it may have continued, and he would have had more time to sell the product. The [accused's] failure to have made a profit from his illegal activity was not a particularly significant consideration in making forfeiture disproportionate.
>
> Furthermore, the source of the monies the [accused] expended to establish the grow operation is not a factor of great consequence. By his own admission, shortly after he acquired it, the [accused] converted the Property into a marijuana grow operation, and thus into an offence-related property. Whether he used his own legitimate earnings, proceeds of crime, or another source of financing for its acquisition does not alter the fact that what he did to it made the Property subject to forfeiture, unless the court could be satisfied that the disproportionality test was met. Similarly, his loss of $20,000 that he spent for grow equipment, his repayment of $5,500 for the diverted electricity, and his having kept the mortgage and other payments current as long as he did, are not heavily significant considerations in determining disproportionality. [paras. 33-34]

In allowing the Crown's appeal and ordering the forfeiture of the property Justice Oland concluded:

> Having considered the factors set out in the disproportionality test, I turn finally to the impact of forfeiture of the Property upon the [accused]. He would lose his considerable investment in the Property and the grow equipment, but any loss by way of forfeiture would be of his own doing by having chosen to convert it into offence-related property. However, the [accused] would not be left homeless, as he had another place to live, and had a relatively good financial position and a strong employment history.

Complete case available at www.canlii.org

Note-able Quote

"Surely the fact that a uniformed police officer is wearing his hair below his collar will make him no less identifiable as a policeman."—Thurgood Marshall, former U.S. Supreme Court Justice

LEGALLY SPEAKING:

Reasonable Grounds - Arrest

There is a lawful arrest when a police officer subjectively believes that there are grounds to do so, and those grounds are objectively reasonable. The totality of the circumstances relied upon by the arresting officer will form the basis for the objective assessment. It would constitute an error in law to assess each fact or observation in isolation. An objective assessment will include the dynamics within which the police officer acted, and his or her experience. - Ontario Court of Appeal, R. v. Lawes, 2007 ONCA 10 (para. 4)

PARKING AT RED LIGHT STILL DRIVING

York v. Tassone, 2007 ONCA 215

A police officer saw the accused in the driver's seat of his car approach a red light. He illuminated the car and saw the accused was not wearing his seat belt. The accused then pulled the belt across his body, but was charged with failing to wear a seatbelt under s.106(3) of Ontario's *Highway Traffic Act*.

At trial the accused said he was driving the car, but put it in park and took off his seatbelt for 15-20 seconds to check for his wallet at the red light. After finding his wallet he put his seat belt back on and went through the intersection.

The Justice of the Peace accepted the accused's testimony but found it did not constitute a defence to the charge. He found the accused was still operating and driving a motor vehicle on a highway even though he stopped at the red light and put his car in park. The accused was convicted.

The accused successfully appealed to the Ontario Court of Justice. The appeal judge found the definition of "drive" to imply movement of the vehicle at the time of driving. Although the accused had care and control of the vehicle, the appeal judge ruled he was not driving the car. The conviction was quashed and a new trial was ordered.

The York Regional Municipality appealed the judge's decision to the Ontario Court of Appeal. In a unanimous judgment the conviction was restored. The Court stated:

> Read in light of the important statutory purpose of minimizing driver and passenger injuries resulting from car collisions, the words "drives on a highway", in our view, do not render the seat belt requirement inapplicable to the situation of drivers waiting at red traffic lights. Such an interpretation would be inconsistent with the purpose of this statutory provision. Accidents occur even when vehicles are stopped at traffic lights. In our view, s. 106(3) must be interpreted as requiring the driver to wear a seat belt continuously from the time he or she puts the vehicle in motion on the highway to the time the driver leaves the highway, parks the vehicle in a position in which the vehicle can be left unattended, or gets out of the vehicle. [para. 8]

Complete case available at www.ontariocourts.on.ca

MUSCULAR POWER v. MUSCULAR STRENGTH: THE BIGGER THEY ARE, THE HARDER THE FALL?

Insp. Kelly Keith
Atlantic Police Academy

Why is it that some big bodybuilder types can't punch their way out of a wet paper bag? How is it that a person who can bench press 350 pounds for 10 reps can't punch harder than the person who can bench 200 lbs for one rep? The difference is that one possess muscular strength, the other muscular power or otherwise known as speed strength.

I believe it is more important for a Police Officer to be able to produce force in a brief amount of time than it is to move an object with maximal force. More often than not, police officers are spontaneously assaulted; a suspect quickly lunges at the officer.

Since this is a physical fitness article, the officer safety issue of reactionary gap, will be left aside. When a suspect lunges at an officer with intent to assault, the suspect will either try to strike the officer or throw them to the ground. Just as in cycling where there are spinners (aerobic) or grinders (muscular), in fighting there are generally

strikers or grapplers. If the striker lunges at an officer, the officer with muscular power/speed strength will be able to strike fast and hard, thus creating space to enable time to get to their intermediate weapons.

The officer with muscular strength will need to get a hold of the suspect to be able to convert his strength into a positive attribute. If the suspect grabs a hold of the officer, the officer with muscular power/speed strength is able to quickly defeat the grab by displacing the suspect's balance. They can quickly use their power to pull the suspect to one side or the other, displacing balance. The officer with muscular strength will do well if the suspect is simply attempting to out muscle the officer to the ground. However, if the suspect is using quick pushing and pulling motions to grapple with the officer then muscular strength will not be optimized.

The good news is that the police officer that has been working on their muscular strength and neglecting muscular power can make some small changes and quickly get access to the muscular power/speed strength.

The key to developing muscular power/speed strength is applying speed to the desired movement. In other words, when doing the bench press you will generally have to take a couple plates off the bar. Your goal now will be to press the bar as fast as you can through the range of motion the bar travels. You can split your sets up and perform two sets of muscular strength bench presses and then two sets of muscular power/speed strength sets. This can be done for almost every exercise you do. If you're doing wide grip chin ups, attempt to move your body through the range of motion as fast as you can. The two exercises that are best known for developing power are Olympic lifts (cleans and snatches). By muscular power/speed strength training you will train your muscles to utilize the strength you have already built in a functional manner.

Plyometric exercises are an excellent way to increase muscular power/speed strength. This type of exercising does not require a lot of equipment. In fact most are body weight exercises, medicine balls, or steps. The key to plyometric exercises is to maximize the force through the range of motion, and minimize the time in the rest position (ie. on the ground).

Instead of simply going for a run, attempt to train your body for functional police training by doing wind sprints. This type of cardio training is far more functional for a police officer than just going for a run. It is not very often police officers chase a suspect for two to five miles at a steady jog pace. Just as with weights you can combine this type of training with your regular runs that you already enjoy. You can alternate running days, where you do wind sprints on one day and then long steady runs on the next or split your runs up where for the first half is a paced run, and the second half is built around wind sprints.

There is one caution about muscular power/speed strength training. When you quickly drive a weight through a range of motion, you must also have the ability to stop that inertia. This does put strain on your body. Although your goal is to move the weight through the range of motion as fast as you can, it must also be done with control in mind. However, once your body adapts to this type of training, your performance injuries will be greatly reduced since your body is able to withstand the inertia of a real attack.

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (b) **Deputy Commissioner** —see p. 17 of this publication.
2. (b) **False**—see *R. v. Suberu* (at p. 4 of this publication).
3. (a) **True**—see *R. v. Lewis* (at p. 7 of this publication).
4. (a) **True**—see *R. v. Philogene* (at p. 13 of this publication).
5. (d) **suicide**—see p.10-11 of this publication.
6. (b) **False**—see *R. v. Lewis* (at p. 7 of this publication).

Note-able Quote

"I don't measure a man's success by how high he climbs but how high he bounces when he hits bottom".—General George S. Patton

POLICE NEED NOT DEMONSTRATE MORE THAN REASONABLE GROUNDS

R. v. Shepherd, 2007 SKCA 29

In the early morning hours a police officer driving a marked SUV saw the accused's vehicle fail to stop for a stop sign and then speed 20 to 25 km/h above the 50 km/h speed limit. The officer activated the lights and siren to pull the vehicle over. The vehicle moved to the right and slowed down, but then sped up over the speed limit. The vehicle repeatedly made the same manoeuvre over a three kilometer route. The vehicle eventually came to a stop and the accused was arrested for failing to stop.

While making the arrest the officer smelled an odour of alcohol and noted the accused had red eyes, appeared lethargic, fatigued, "slack-jawed", and made slow and deliberate movements. The accused said he failed to stop because he thought the vehicle behind him with flashing lights was an ambulance. The officer concluded the accused was impaired and made a breath demand. He was taken back to the police station where he was subsequently charged with evading a peace officer, impaired driving, and over 80mg%.

At trial in Saskatchewan Provincial Court the accused argued his rights under s.8 (unreasonable search and seizure) and s.9 (arbitrary detention) of the *Charter* were violated because the officer lacked reasonable and probable grounds to demand a breath sample and therefore the certificate of analysis should be excluded. Although the trial judge found the officer subjectively had reasonable and probable grounds to make the breath demand, there were not objectively reasonable grounds for concluding the accused's ability to operate a motor vehicle was impaired by alcohol. The trial judge held that the accused complied with the statutory requirements under Saskatchewan's *Highway Traffic Act* when an emergency vehicle approaches and this explanation for his behaviour (mistaking the police vehicle for an ambulance) was as equally valid as him being impaired when he drove the way he did. Since the officer did not take this explanation into account the officer lacked the necessary objective reasonable grounds for the breath demand. The trial judge excluded the certificate of analysis and the accused was acquitted of all charges. The Crown's appeal to the Saskatchewan Court of Queen's Bench was dismissed.

> s.67(8) *Highway Traffic Act* (Saskatchewan)
> Unless otherwise directed by a peace officer, the driver of a vehicle on a highway shall, when approached by an emergency vehicle sounding an emergency device or operating an emergency light, immediately drive as close as possible to the right-hand edge of the highway and shall not enter the next intersection until the emergency vehicle has passed.

The Crown then appealed to the Saskatchewan Court of Appeal arguing, among other grounds, that the appeal judge erred in upholding the decision of the trial judge. Justice Sherstobitoff, with Justice Lane concurring, ruled the officer did have reasonable and probable grounds to believe the accused's ability to drive was impaired by alcohol. In assessing whether a police officer has reasonable and probable grounds it is not required that the officer demonstrates anything more than reasonable and probable grounds. For example, the officer is not required to establish a *prima facie* case for conviction. Further, a non-expert witness, here a police officer, is entitled to give opinion evidence that a person is impaired even though it may be difficult for them to narrate factual observations separately. In this case, the trial judge did not properly consider the 20 year veteran's opinion. As for the explanation offered by the accused for not pulling over, Justice Sherstobitoff stated:

> Finally, the trial judge seems to have placed a great deal of weight on the evidence that the [accused] thought that the police vehicle was an ambulance. However, assuming the explanation to be true, it explained nothing. It did not explain the red eyes, the smell of alcohol, or his lethargic and slack-jawed appearance. It did not explain the traffic violations. In particular, it did not explain why he kept driving for three kilometers at a high rate of speed while a vehicle with emergency lights flashing followed his every move. After one or two lane changes, it must have been apparent to the [accused] that the following vehicle was not trying to get him to get out of the way. The normal reaction of a normal thinking person would be to

> move to the right of the road and stop before any intersection so as to allow the following vehicle to pass, irrespective of the fact that that was what the law (ss. 67(8) of *The Highway Traffic Act*…) required him to do. In my view, any reasonable person would view the [accused's] entire driving behaviour as tending to show that the [accused] was behaving abnormally and thus a possible sign of impairment by alcohol. This behaviour, when combined with the subsequent observations of the officer respecting the smell of alcohol the red eyes, and the lethargic and deliberate movements, would lead a reasonable person to conclude that the [accused's] ability to drive was probably impaired by alcohol, using the now generally accepted standard respecting what constitutes impairment set out in *R. v. Stellato,* [1994] 2 S.C.R. 478… [para. 12]

Justice Lane, in his concurring reasons, pointed out that the trial judge misunderstood the statutory requirements imposed on a driver on the approach of an emergency vehicle under the *Highway Traffic Act*. The *Act* requires a driver pull over to the right and not to enter the next intersection until the emergency vehicle has passed. In this case the pursuit lasted three kilometers and each time the accused pulled over the police vehicle pulled over behind him. The police vehicle never passed the accused and he continued through intersections. Justice Lane therefore concluded that the accused's explanation for his driving could not be characterized as reasonable as was found by the trial judge.

Justice Smith, in dissent, concluded the trial judge was justified in concluding the officer's belief was not objectively reasonable and that there was no basis for an appellate court to interfere with this finding.

The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

Note-able Quote

"*The leadership instinct you are born with is the backbone. You develop the funny bone and the wishbone that go with it".*—Elaine Agather

CARE & CONTROL INCLUDES RISK OF INADVERTENTLY SETTING VEHICLE IN MOTION

R. v. Buckingham, 2007 SKCA 32

The accused had driven his employer's truck to a bar and after a night of drinking decided he should take a taxi home. After waiting unusually long for a cab, he chose to enter the truck to keep warm; he was not warmly dressed and the evening was cold. He started the truck, turned on the heater, depressed the accelerator to hasten the warming, but fell asleep over the wheel.

About 10 to 15 minutes later the police found the accused asleep over the wheel, motor revving with the automatic transmission in park. The officer did not note whether the emergency brake was on. The officer turned off the engine, shook the accused awake, and noted he was unfocused and confused. He was slow to follow directions, almost fell getting out of the truck, staggered, had red blood-shot eyes, very slurred speech, and displayed a strong odour of alcohol. The officer gave the breath demand and two samples were subsequently obtained, 260mg% and 270mg%. He was charged with impaired care and control and care and control over 80mg%.

At trial in Saskatchewan Provincial Court the evidence was that before the vehicle could drive, the driver would need to step on the brake and shift the transmission into drive by pulling it towards the driver and then pushing it downward. The trial judge ruled that the accused was not in care and control of the vehicle. The accused did not intend to drive the vehicle, but rather was going to take a taxi home. The vehicle was parked off the street in a parking lot on level grade and there was no danger that he would intentionally or inadvertently set the vehicle in motion. The accused was acquitted of both charges. An appeal by Crown to the Saskatchewan Court of Queen's Bench was dismissed.

The Crown then appealed to the Saskatchewan Court of Appeal. Justice Smith, writing the opinion of the Court, examined what care and control means. In this case, the Crown conceded that the presumption of care and control due to an accused's

occupancy of the driver's seat under s.258(1)(a) of the *Criminal Code* did not apply because the accused credibly testified that he did not intend to drive. However, a person can nonetheless be in "*defacto*" care and control if there is a risk they could set the vehicle in motion, despite no intention to drive.

Justice Smith found that acts short of actual driving can constitute care and control under s.253 of the *Criminal Code* and that an intention to drive is not an essential element of the offence. The Supreme Court of Canada, in *R. v. Toews*, [1985] 2 S.C.R. 119, described care and control as follows:

> …[a]cts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous. Each case will depend on its own facts and the circumstances in which acts of care or control may be found will vary widely.

There are two aspects to the risk associated with whether the accused's use of the vehicle's "fittings and equipment" (starting the engine to turn on the heater) together with his state of intoxication created the risk that the vehicle could be set in motion thereby creating a danger to the public.

1. <u>the intoxicated accused will awaken and be too intoxicated to remember or adhere to his previous decision not to drive.</u> With respect to this aspect, the trial judge concluded the accused would not change his mind or forget his decision not to drive. It was his past practice to call a taxi when he had been drinking and that he did not drive the company vehicle while intoxicated. Justice Smith agreed it was entirely appropriate for the trial judge to consider the accused's intention not to drive in this context.

2. <u>in their intoxicated state they will inadvertently set the vehicle in motion.</u> With respect to this aspect, the trial judge commented that it would take two motions to put the vehicle in drive (depress the brake and pull the gear lever forward and down) and that it was parked off the road on a flat surface. Although it was proper for the trial judge to consider this in his risk assessment, Justice Smith concluded the trial judge paid too little attention to the fact that the accused had started the engine and was exerting pressure on the accelerator to rev it when he was discovered. Justice Smith said:

> …This was a significant use of the vehicle's fittings and equipment by an individual in a highly intoxicated state, and one that necessarily enhanced both the risk that the vehicle could inadvertently be set in motion, and the risk that if he awoke, he might intentionally set the vehicle in motion, given his intoxicated state. However small those risks were, they were not negligible, and the realization of those risks was considerably more likely as a result of the motor being activated than it would otherwise have been. It is just this creation of risk that s. 253 of the *Code* is intended to address. [para. 19]

Justice Smith, however, would not accept the Crown's submission that turning on a vehicle's engine *ipso facto* amounts to care and control in all cases. In this circumstances of this case, the vehicle was in a public parking lot, was not disabled in any way, and "starting the engine running was sufficient to establish care and control of the vehicle for the purpose of these provisions of the *Criminal Code*."

"[a]cts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous."

The Crown's appeal was allowed, the accused's acquittal was set aside, a conviction for over 80mg% was substituted, and the matter was remitted back to Saskatchewan Provincial Court for sentencing.

Complete case available at www.canlii.org

Note-able Quote

"The idea that the police cannot ask questions of the person that knows most about the crime is an infamous decision".—Edwin Meese III

BUSH TORTURE CHARGES A NULLITY

Davidson v. British Columbia (Attorney General) 2006 BCCA 447

On November 30, 2004, the same day U.S. President George Bush was in Ottawa at the invitation of the Government of Canada, a lawyer attended before a Justice of the Peace and swore a private information under s.504 of the *Criminal Code* alleging that President Bush committed crimes of torture between February 2002 and November 2004 in the Abu Ghraib prison in Baghdad, Iraq and the U.S. Naval Base at Guantanamo Bay, Cuba. Under s.7(3.7)(e) of the *Criminal Code* a person can be charged with acts of torture or counseling torture even if the acts were committed outside Canada if the person is present in Canada after the commission of the offence. If the person is not a Canadian citizen, consent must be obtained from Canada's Attorney General to continue the proceedings.

> s.7(7) *Criminal Code*
> If the accused is not a Canadian citizen, no proceedings in respect of which courts have jurisdiction by virtue of this section shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced.

When a private information is laid, the Justice of the Peace who receives the information must refer it to a Provincial Court judge to consider whether to compel the accused's appearance. The lawyer applied for a Provincial Court hearing, but had not received the consent of the Attorney General to prosecute President Bush. The Crown applied to the Provincial Court judge to have the charges declared a nullity, arguing President Bush enjoyed head of state immunity from criminal prosecution in Canada. The judge agreed and declared the information a nullity and directed no further proceedings take place.

The lawyer filed an application in British Columbia Supreme Court seeking an order quashing the ruling of the Provincial Court judge that the information was a nullity. The Crown argued the proceedings were moot and the court did not have jurisdiction because the Attorney General's consent to continue the proceedings had not been obtained. The Supreme Court judge dismissed the proceedings as an abuse of process because the lawyer intended to use the criminal process to express her political views.

The lawyer then appealed to the British Columbia Court of Appeal arguing, among other grounds, that the Provincial Court judge erred in finding President Bush had head of state immunity from the charges and that the Supreme Court justice erred in finding the charges were an abuse of process. The Crown objected to the appeal submitting, in part, that the Court had no jurisdiction to hear it because the lawyer had not obtained the consent of the Attorney General to continue the proceedings.

Justice Levine, authoring the opinion of the Court agreed with the Crown. Although s.7 of the *Criminal Code* allows a person to be charged with acts of torture occurring outside Canada, if the person is not a Canadian citizen the consent of the Attorney General must be obtained within eight days after proceedings are commenced. Proceedings are commenced upon the laying an information, as suggested by the Crown, and not when a summons or warrant is issued, as argued by the lawyer.

Since the lawyer failed to obtain the consent of the Attorney General to continue the proceedings, the British Columbia Court of Appeal did not have the jurisdiction to continue the appeal. The Crown's application to dismiss the appeal was granted and the appeal was dismissed.

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

OFFICER CONVICTED OF OBSTRUCTING JUSTICE FOR NOT TAKING BREATH SAMPLES

R. v. Beaudry, 2007 SCC 5

The accused, a police sergeant, set off in pursuit of a minivan followed by two constables after the vehicle was seen coming towards them making a strange noise—it had a flat tire. The vehicle was speeding, ran a stop sign, and almost hit a median. The minivan was finally stopped and the driver did not respond to instructions, instead banging his head on the wheel.

The driver was crying and talking in a confused manner. He got out of the vehicle, threw himself on the ground, and identified himself as a police officer. The officers could smell alcohol on him.

The driver was taken to the police station by the constables and the sergeant requested the occurrence be classified as an assist public. The sergeant spoke to the driver back at the police station and offered to take him to the hospital, but he refused. The sergeant decided to put the driver in a youth detention room to calm him down. At this time the sergeant saw the driver staggering and formed the opinion that he had reasonable grounds to believe he had committed the offence of impaired driving. He decided not to make a breath demand, instead claiming the driver was depressed and needed treatment. The sergeant also told one of the constables to use "unclassified activity" as the occurrence code.

When later asked by his superior where the impaired driving report and breathalyzer results were, the sergeant said he exercised his discretion and decided not to arrest or demand breath samples. The superior demanded a written impaired driving report which was subsequently submitted.

The sergeant was charged with obstructing justice under s.139(2) of the *Criminal Code* for deliberately failing to gather evidence needed to lay criminal charges against a suspect who he had reasonable grounds to believe was driving while intoxicated. At trial in the Court of Quebec the judge noted that the Crown needed to prove more than a breach of ethics, inappropriate or unprofessional conduct, or an error in judgment. Rather, Crown needed to prove the accused had the specific intent to obstruct, pervert, or defeat the course of justice when he chose not to administer a breathalyzer test even though he had reasonable grounds to believe he was an impaired driver.

"[A] police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process. But this discretion is not absolute. Far from having carte blanche, police officers must justify their decisions rationally."

As for the sergeant's exercise of discretion, the trial judge recognized that law enforcement and the proper functioning of the criminal justice system requires it be exercised on a daily basis. However, it must be exercised honestly and not arbitrarily, out of favouritism, or with any other dishonest intention. In this case, the judge found the accused did not have the driver take the breathalyzer test and deliberately failed to perform his duty, giving the driver preferential treatment because he was a police officer, not because he had a mental health concern. The accused was convicted. The accused's appeal to the Quebec Court of Appeal was unsuccessful. He then appealed to the Supreme Court of Canada.

Justice Charron, authoring the 5:4 majority judgment for the Supreme Court of Canada first examined police discretion and its relationship to the offence of obstructing justice:

> There is no question that police officers have a duty to enforce the law and investigate crimes. The principle that the police have a duty to enforce the criminal law is well established at common law…
>
> Moreover this principle is codified in section 48 of [Quebec's] *Police Act*…
>
> Nevertheless, it should not be concluded automatically, or without distinction, that this duty is applicable in every situation. Applying the letter of the law to the practical, real-life situations faced by police officers in performing their everyday duties requires that certain adjustments be made. Although these adjustments may sometimes appear to deviate from the letter of the law, they are crucial and are part of the very essence of the proper administration of the criminal justice system, or to use the words of s. 139(2), are perfectly consistent with the "course of justice". The ability — indeed the duty — to use one's judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands of justice is in fact the basis of police discretion. What La Forest J. said in *R. v. Beare*,

[1988] 2 S.C.R. 387, at p. 410, is directly on point here:

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.

Thus, a police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process. But this discretion is not absolute. Far from having *carte blanche*, police officers must justify their decisions rationally.

The required justification is essentially twofold. First, the exercise of the discretion must be justified subjectively, that is, the discretion must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds… Thus, a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion. However, the officer's sincere belief that he properly exercised his discretion is not sufficient to justify his decision.

Hence, the exercise of police discretion must also be justified on the basis of objective factors. I agree…that in determining whether a decision resulting from an exercise of police discretion is proper, it is important to consider the material circumstances in which the discretion was

POLICE DISCRETION & OBSTRUCTING JUSTICE
R. v. Beaudry (SCC)

Stage 1: Was there a proper exercise of police discretion?

Yes

The discretion was exercised honesty and justified on the basis of objective factors (what would a reasonable police officer do in the same situation?).

Inquiry ends:
No need to proceed further

No

The discretion was exercised dishonesty or corruptly (eg, a decision based on favouritism or cultural, social, or racial stereotypes).

Proceed to Stage 2

Stage 2: Was the offence of obstructing justice committed?

Did the accused intend to act in a way tending to obstruct, pervert, or defeat the course of justice?

A simple error of judgment is not enough for conviction.

Not exercising legitimate discretion but acting in good faith in not enough for conviction.

> exercised. However, I do not agree…on the importance of the factors [of the administrative directives and the administration of justice in the province be regarded as part of the legal context]. [references omitted, paras. 35-39]

In assessing the importance of the material circumstances as factors affecting police decision making, Justice Charon stated:

> First, it is self-evident that the material circumstances are an important factor in the assessment of a police officer's decision: the discretion will certainly not be exercised in the same way in a case of shoplifting by a teenager as one involving a robbery. In the first case, the interests of justice may very well be served if the officer gives the young offender a stern warning and alerts his or her parents. However, this does not mean that the police have no discretion left when the degree of seriousness reaches a certain level. In the case of a robbery, or an even more serious offence, the discretion can be exercised to decide not to arrest a suspect or not to pursue an investigation. However, the justification offered must be proportionate to the seriousness of the conduct and it must be clear that the discretion was exercised in the public interest. Thus, while some exercises of discretion are almost routine and are clearly justified, others are truly exceptional and will require that the police officer explain his or her decision in greater detail. [para. 40]

In determining whether the offence of obstructing justice was committed with respect to the exercise of police discretion the court must first look at whether the discretion was exercised honestly and also whether it could be justified on the basis of objective factors—What would a police officer acting reasonably in the same situation do? This analysis should be linked to the *actus reus* of the offence.

If it is found that the conduct in issue is not a proper exercise of police discretion, then it must be determined whether the offence of obstructing justice has been committed. Justice Charron stated:

> To sum up, the *actus reus* of the offence will be established only if the act tended to defeat or obstruct the course of justice. With respect to *mens rea*, it is not in dispute that this is a specific intent offence. The prosecution must prove beyond a reasonable doubt that the accused did in fact intend to act in a way tending to obstruct, pervert or defeat the course of justice. A simple error of judgment will not be enough. An accused who acted in good faith, but whose conduct cannot be characterized as a legitimate exercise of the discretion, has not committed the criminal offence of obstructing justice. [references omitted, para. 52]

In upholding the accused's conviction, Justice Charron noted a number of factors. First, the off-duty police officer was driving while in an advanced state of intoxication. He was speeding on a public roadway with a flat tire, failed to make a stop, and just missed a median. He then fled from police before eventually bringing his vehicle to a stop. Then, after pulling over, he ignored the sergeant for several minutes, sat with his head down on the wheel, cried, spoke in a confused manner, and fell down when he got out of his vehicle. The sergeant did not attempt to conceal an offence but decided not to gather evidence (obtain breath samples) that would have been needed to lay criminal charges under s.253. Here, the trial judge found the sergeant acted knowingly and did not take timely breath samples out of favouritism—because the impaired river was a police officer—and not because he was worried about the driver's health. The trial judge's conclusion that the sergeant acted out of favouritism and had the specific intent to obstruct, pervert, or defeat the course of justice by not taking breath samples was reasonable .

Justice Fish, writing the four member dissenting judgment, found the trial judge's reasons for conviction were flawed in the evaluation and analysis of the evidence including whether the accused had acted corruptly or dishonestly with the intent to obstruct justice. Justice Fish would have ordered a new trial rather than entering an acquittal because there was evidence that, if properly weighed and considered, could reasonably have supported a conviction.

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

Note-able Quote

"Every society gets the kind of criminal it deserves. What is equally true is that every community gets the kind of law enforcement it insists on".—Robert