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.

HAPPY BIRTHDAY: *CHARTER* TURNS TWENTY FIVE

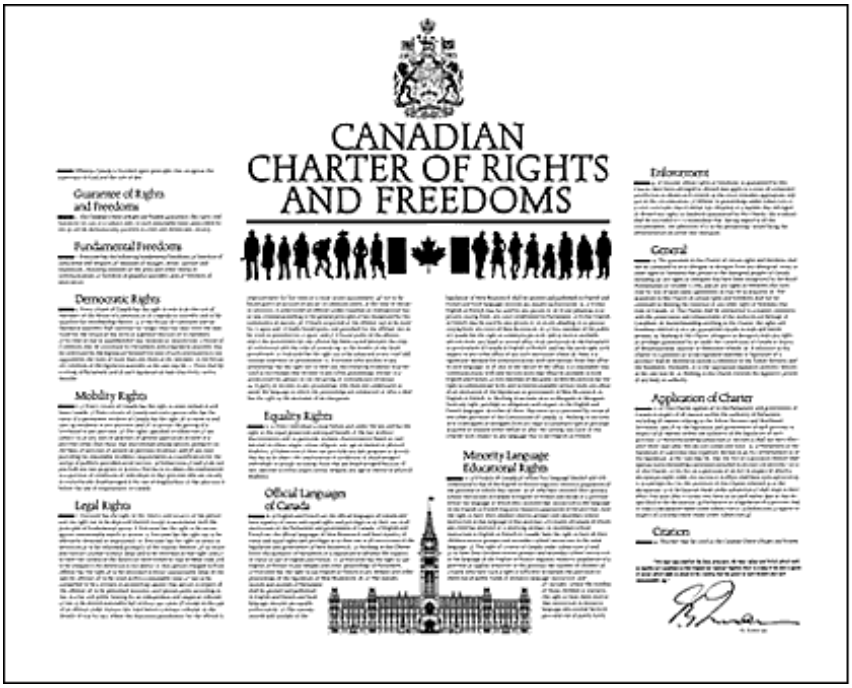
This year the *Charter of Rights and Freedoms* turned 25 years old. Back on April 17, 1982 the *Charter* came into force and is part of Canada's *Constitution Act*. It sets out rights and freedoms that Canadians believe are necessary in a free and democratic society. These rights include a number of legal rights that are enumerated in ss. 7-14.

Often, these legal rights become the basis by which accused persons challenge the admissibility of evidence gathered by the police. Under s.24(2) of the *Charter* a person may seek the exclusion of evidence if they can convince a court that evidence was obtained in a manner that infringed or denied any *Charter* rights and the admission of the evidence in the proceedings, having regard to all the circumstances, would bring the administration of justice into disrepute. Furthermore, it is not unusual for accused persons to seek a remedy under s.24(1), such as having charges stayed or stopped because of police conduct.

Most cases where police conduct is questioned involve only a few of the legal rights under the *Charter*. These include ss.7-10.

- s.7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Rights such as the right to silence and full disclosure have been entrenched in s.7 by the courts.
- s.8 Everyone has the right to be secure against unreasonable search or seizure.
- s.9 Everyone has the right not to be arbitrarily detained or imprisoned.
- s.10 Everyone has the right on arrest or detention a) to be informed promptly of the reasons therefor; b) to retain and instruct counsel without delay and to be informed of that right;

It is important for police officers to have a working understanding of how these rights affect their jobs. In some recent judgments, courts have held that the police did not act in good faith because they should have known the law and the limits of their authority, while in other cases their legal training was inadequate. The comments of Justice Doherty in *R. v. Clayton and Farmer* are apposite, "If the rights guaranteed by the Charter are to have real meaning and shape the interaction between the police and individuals, police forces must take those rights seriously. Officers must be trained to perform their duties in a manner that is consistent with those rights."



HIGHLIGHTS IN THIS ISSUE

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

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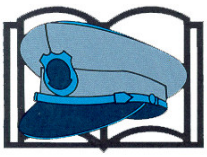
'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"Glad to see the newsletter is alive and well; the website looks great too. Can't tell you how helpful it has been during my short time out on the road. I have been a faithful reader and look forward to downloading issues and forwarding them to my squad." - **Police Constable, British Columbia**

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"Could you please add me to the "In service 10-8" electronic distribution list. I sent out case law to our members to assist in the ever changing legal landscape. This would be a great asset."- **RCMP Sergeant, British Columbia**

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"Would you please add me to your distribution list? I really enjoy reading about the case laws, especially those pertaining to vehicle searches" - **Police Constable, Manitoba**

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"I have just had the opportunity to read one of the issues and would love to be added to the distribution list. They are informative and up to date, a great resource." - **Canada Border Services Agency Officer**

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"I am now assigned to the new Station NCO position [and we] now have 24/7 report quality control for all Crown Counsel reports. Members must attend our office for approval. We review the report in PRIME and either approve it or have them make the needed changes... Needless to say, it is quite a challenge, and a ton of work. Since none of us is an expert in all areas/ investigative nuances, we have been reviewing a ton of case law, and investigative techniques, etc. and thought we could really use your 10-8 publication. Be great to have 10-8 to help make decisions and guide the members." - **Police Sergeant, British Columbia**

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"We always appreciate reading your newsletter-it is an excellent way to stay on top of the latest case law" - **Federal Wildlife Officer**

IN-SERVICE LEGAL ROAD TEST

The "In Service" Legal Road Test is a simple multiple choice quiz designed to challenge your understanding of the law. Each question is based on a case featured in this issue. See page 24 for the answers.

1. Searches incidental to lawful arrest are an exception to the rule that all warrantless searches are *prima facie* unreasonable.
   (a) True
   (b) False

2. The mere fact a person broke and entered a place but did not commit an offence inside is sufficient to rebut the presumption found in the s.348(2)(a) of the *Criminal Code* that they entered with the intent to commit an indictable offence.
   (a) True
   (b) False

3. When searching as an incident to lawful arrest, the police do not need separate reasonable grounds apart from arrest that the search will yield weapons or evidence of the offence.
   (a) True
   (b) False

4. Once an arrestee requests to speak to a lawyer, the police must refrain from eliciting incriminating evidence until the person has been provided a reasonable opportunity to consult with counsel.
   (a) True
   (b) False

5. A search incident to arrest will be unreasonable if evidence related to offences other than those for which the accused was arrested is discovered.
   (a) True
   (b) False

LATIN LEGAL LINGO:

"*de minimus (non curat lex)*"- the law does not concern itself with trifles. Something that is unworthy of the law's attention or does not rise to a level to be dealt with judicially. The matter is so trivial or technical no sentence or retribution is necessary.

FIRST WOMAN SUPREME COURT JUSTICE DIES

The Honourable Bertha Wilson, formerly a justice of the Supreme Court of Canada, passed away in Ottawa on April 28, 2007 after a prolonged illness. Justice Wilson attended the University of Aberdeen, Scotland, and graduated with an M.A. in 1944. She continued her education at the Training College for Teachers in Aberdeen, obtaining her diploma in 1945. She married the Reverend John Wilson in December 1945 and they emigrated to Canada in 1949. In 1955, Bertha Wilson enrolled at Dalhousie University to study law, and in 1957 she completed her LL.B. and was called to the bar of Nova Scotia. In 1959 she was called to the bar of Ontario. She practised law in Toronto with Osler, Hoskin & Harcourt for 17 years.

Bertha Wilson broke ground in 1975 as the first woman appointed to the Court of Appeal for Ontario, and again in 1982 when she became the first woman appointed to the Supreme Court of Canada. She retired from the Court in 1991.

Chief Justice Beverley McLachlin, on behalf of the members of the Supreme Court of Canada, lamented Justice Wilson's passing, "Bertha Wilson was known for her generosity of spirit and originality of thought. She was appointed to the Supreme Court of Canada the same year the Canadian Charter of Rights and Freedoms was enacted. As a member of this Court, she was a pioneer in Charter jurisprudence and made an outstanding contribution to the administration of justice. She will be sorely missed by all who were privileged to know her."

Source: Supreme Court of Canada News release

Note-able Quote

"*Confronted with the choice, the American people would choose the policeman's truncheon over the anarchist's bomb.*" - Spiro T. Agnew

www.10-8.ca

POLICE EXEMPLARY SERVICE MEDAL

Most countries have, as part of their honours system, some form of official award to tangibly express national gratitude for long and commendable service, particularly in fields of endeavour involving potential risk. Canada's Exemplary Service Medals recognize the men and women dedicated to preserving Canada's public safety through long and outstanding service.

The Police Exemplary Service Medal, created on August 12, 1983, recognizes police officers who have served in an exemplary manner, characterized by good conduct, industry and efficiency. Recipients must have completed 20 years of full-time service with one or more recognized Canadian police forces. Full-time police cadets in training also qualify for the award. Consideration is given only to periods of service for which no other national long service, good conduct or efficiency decoration has been awarded.

Members of the Royal Canadian Mounted Police (RCMP) and Canadian Forces are ineligible. However, full-time exemplary service of former members of the RCMP and Military Police of the Canadian Forces may qualify where that service has not been recognized by award of the RCMP Long Service and Good Conduct Medal or the Canadian Forces Decoration, respectively. The Medal may be awarded posthumously.

Description: a circular medal:

- on the obverse of which are the Scales of Justice, superimposed on a stylized maple leaf, and circumscribed with Exemplary Service - Servces Distingues;
- on the reverse of which is the Royal Cipher;
- the Medal is suspended from a ribbon of five equal stripes, two gold and three blue;
- a Bar, bearing a stylized maple leaf, may be awarded to a recipient of the Medal for each additional 10-year period of full-time service with one or more Canadian police forces.

Source: http://www.gg.ca/honours/medals/hon04-esm_e.asp

SEARCHES INCIDENT TO ARREST ARE AN EXCEPTION TO WARRANTLESS PRESUMPTION

R. v. Alkins, 2007 ONCA 264

At about 1:00 a.m. two officers observed a vehicle registered to the accused's father parked, but running, in the parking lot of an apartment building. The accused was in the driver's seat and there were three other men in the vehicle. The officers suspected that the occupants of the vehicle were committing liquor offences and were in possession of and smoking marijuana.

One officer approached the front passenger who was in breach of his probation order, which prohibited him from being in the area, while another officer approached the accused. The front passenger was arrested for failing to comply with his probation order and revealed that he had a large knife on his right side tucked into his pants when asked if he had any weapons. When searched, a gun was located in his front waistband and he was arrested for carrying a concealed weapon. It was later determined that the gun was a pellet gun.

Meanwhile, the other officer asked to see the accused's driving documents and then told him to turn off the engine of the car. After he learned that the front passenger had a weapon in his possession, the officer asked the accused to step out of the vehicle. At that point, a handgun fell out of the accused's pant leg. He too was arrested for possession of a firearm, which also turned out to be a pellet gun. The accused was patted down, but no other weapons were found.

While the accused and front passenger were being arrested and searched, the two men in the back of the vehicle had been placing their hands underneath the seat and moving around suspiciously, so they were told to put their hands on their heads. They Back-up was called and were informed that two handguns had been located. One of the backup officers opened the rear door on the passenger side to effect an arrest for possession of firearms in a motor vehicle. He saw the passenger trying to kick a large knife under the seat in front of him. The passenger was taken from the vehicle, arrested,

handcuffed and searched. A second back up officer went to the rear door on the driver's side and saw that passenger trying to conceal an item, which turned out to be another large knife.

Once all four occupants had been arrested and secured, the vehicle was searched and a large kitchen knife was located on the back seat, an Exacto knife on the floor behind the driver's seat, and a large knife on the rear floor of the vehicle. In the trunk of the car a blue backpack was found and removed. The accused said, "Ah, shit. Here we go. This should be interesting." Inside the backpack, the officer found a sawed-off shotgun with a shell chambered in the ready-to-fire position. When he was searched again at the police station, a knife with a three-inch blade was found hidden in his pants.

At trial in the Ontario Superior Court of Justice the accused was charged with eight weapons related offences; two charges related to the knife and pellet gun and six charges related to the loaded sawed-off shotgun. The trial judge ruled the searches of the accused and the interior of the vehicle were lawful as an incident to arrest, but found the Crown did not prove the knife or pellet gun were "weapons" under s.2 of the *Criminal Code*. He also found the search of the trunk breached s.8 of the *Charter*. In his view, the accused had a reasonable expectation of privacy in the trunk and there was no reason why the search needed to be done immediately without a search warrant. Neither safety nor destruction of evidence were at issue because the car could have been detained while a search warrant was sought. The evidence obtained from the search of the trunk was excluded under s.24(2). The accused was acquitted on all eight counts.

"Searches conducted incident to arrest have been recognized as an exception to the rule that warrantless searches are prima facie unreasonable."

The Crown appealed to the Ontario Court of Appeal arguing, in part, that the trial judge erred by finding a s.8 *Charter* breach when police searched the trunk. Justice MacPherson, writing the unanimous decision of the Court, first examined the power to search as an incident to arrest:

> Section 8 of the *Charter* protects against unreasonable search and seizure. Searches conducted incident to arrest have been recognized as an exception to the rule that warrantless searches are *prima facie* unreasonable…. A search incident to arrest must still be reasonable within the meaning of s. 8…. The search will be reasonable only if it is authorized by law, the law is reasonable, and the search is conducted in a reasonable manner. A search conducted incident to arrest will be authorized by law if it meets the [following] requirements […] First, the arrest must be lawful. Second, the search must be truly incidental to arrest. Third, the manner in which the search is conducted must be reasonable. [references omitted, para. 26]

Justice MacPherson concluded that the trial judge erred on two points; 1) the accused's privacy interest in the trunk and 2) the absence of a supportable reason for the search. He wrote:

> The privacy interest of the [accused] with respect to the car trunk was, in my view, miniscule. The car was not the [accused's]; it belonged to his father. Moreover, there is "a lesser expectation of privacy in a car than there is in one's home or office, or with respect to their physical person"…. The [accused] had been lawfully searched and a handgun (later determined to be a pellet gun) had been seized. A passenger in the car had been arrested and a large knife and a handgun (also later determined to be a pellet gun) were seized from him. More police arrived on the scene. When [the backup officer] and his partner searched the interior of the car – a lawful search – two more large knives and an Exacto knife were discovered. In these circumstances – four arrests, lawful searches of four persons and the interior of a car, and discovery and seizure of what appeared to be two handguns and four knives – it is difficult to see any serious privacy interest that the [accused] might have in the contents of the car trunk. The reality is that the car appeared to be filled with weapons and people connected to those weapons. [para. 40]

These same circumstances in Justice MacPherson's opinion, provided a strong and supportable reason for the car trunk search:

In my view, the search for more weapons was not only the natural thing to do; it was also fully compliant with s. 8 of the *Charter*.

When [the backup officer] arrived on the scene – a dark parking lot in the early morning hours of a wintry night – he faced "a very volatile situation in which it is fair for the police to expect the unexpected"…. [The backup officer] and his partner were responding to an emergency call for police back-up. As soon as [the backup officer] arrived, he was informed that two men had been arrested and two handguns had been seized. [The backup officer] approached the vehicle and saw two other men seated in the back of the car. When he opened a rear door, he saw one of the men trying to kick a large knife under the seat. He removed him from the car, brought him to the ground and handcuffed him. Meanwhile, his partner was dealing with the other man in the back seat. He discovered another large knife and an Exacto knife.

The purpose of s. 8 of the *Charter* is to protect against unreasonable searches. In the circumstances I have outlined, [the backup officer's] search of the car trunk for more weapons strikes me as the antithesis of an unreasonable search.

In *Cloutier* [the Supreme Court of Canada] observed that a search incident to arrest "must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public". In my view, this is precisely the situation in the present case. Where multiple weapons have been discovered on several arrested persons and in their vehicle, and where the arrests and searches leading to the discovery of the weapons are lawful, finishing the search of the same vehicle with a view to finding more weapons is the epitome of reasonable police conduct. This can be contrasted with *Belnavis* where the search, conducted with a view to discovering stolen property, was unrelated to the arrest for traffic fines.

Moreover, the discovery of additional weapons would, potentially, be connected to a fair assessment of the nature and gravity of the weapons-related charges that the four men in the car were already facing. It might shed light on the intended use to be made of the weapons already located on two of the accused and in the interior of the car. In this respect, the search complied with [Chief Justice Lamer's] stricture in *Caslake*…that "the search is only justifiable if the purpose of the search is related to the purpose of the arrest."

It is true that the discovery of additional weapons in this case led to other weapons-related charges. … Additional charges flowing from a valid search are an appropriate result of the search.

In summary, I conclude that in the circumstances of this case, where multiple suspects have been lawfully arrested and several weapons have been discovered pursuant to lawful searches of the arrested persons and the interior of a car, it is appropriate for a police officer to search the trunk of the same car with a view to discovering additional weapons. These weapons can be relevant to the weapons charges that have already been laid; they can also ground additional weapons-related charges. [citations omitted, paras. 42-48]

"Additional charges flowing from a valid search [incident to arrest] are an appropriate result of the search."

The search of the trunk was reasonable and the evidence was admissible. Furthermore, even if there was a *Charter* breach in this case, the evidence was admissible under s.24(2). The Crown's appeal was allowed, the acquittals set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Search Incident to Arrest

"[A search incident to arrest] must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case, for example, if the purpose of the search was to intimidate, ridicule or pressure the accused in order to obtain admissions." - Supreme Court of Canada Justice L'Heureux-Dube, *Cloutier v. Langlois* (1990), 53 C.C.C. (3d) 257 (S.C.C.)

FACT NO OFFENCE COMMITTED INSUFFICIENT TO REBUT B&E PRESUMPTION

R. v. Rodney, 2007 ONCA 314

The accused broke into an apartment, but left after about 30 seconds without committing an offence. At trial in the Ontario Superior Court of Justice the judge rejected the accused's explanation for being in the apartment. Although there was no evidence the accused had an intention to commit an indictable offence, the judge nonetheless entered a conviction for break and enter with intent to commit an indictable offence under s.348(1)(a) of the *Criminal Code* solely on the basis of the presumption of intent created by s.348(2)(a):

> s.348(2)(a) *Criminal Code*
> For the purposes of proceedings under this section, evidence that an accused... broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein.

The accused appealed to the Ontario Court of Appeal arguing that leaving the apartment after 30 seconds without committing an offence constituted "evidence to the contrary", which was capable of displacing the statutory presumption.

The Ontario Court of Appeal however, disagreed. The Court stated:

> It is clear on the authorities that the point of entry is the time at which the accused's intention is to be ascertained for the purpose of the offence of break and enter with intent under s. 348(1)(*a*)… The application of the s. 348(2)(*a*) presumption at that point, in the absence of evidence to the contrary, supplies the proof of the requisite intent.
>
> The proposition that the fact the accused did not commit an offence *after* entering the premises constitutes "evidence to the contrary" was rejected in *R. v. Nicholas [and]*R. *v. Singh*,…. While neither case is entirely on all fours with the case at bar, we are not persuaded in this case that the fact the accused left the apartment without committing an offence could amount to "evidence to the contrary" and thereby displaces the presumption.
>
> We agree with the submission of the [Crown] that the purpose of the combination of the offence of breaking and entering with intent and the presumption created by s. 348(2)(*a*) is to deal precisely with the situation where the accused has broken and entered, yet committed no offence. Here, the [accused] offers nothing more than the fact no offence was committed. To say that that constitutes evidence to the contrary would be to ignore the presumption and essentially gut it of any meaning. [references omitted, paras. 5-7]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Police Decision Making

"[I]t is very easy in the cool, clear, light of day for this court to calmly and coolly analyze and make decisions about the actions of police officers who were making split second decisions in the heat of the moment." - New Brunswick Provincial Court Judge McCarroll, *R. v. LeBlanc*, 2006 NBPC 37

TRUNK & GLOVE BOX SEARCH JUSTIFIED AS INCIDENT TO ARREST

R. v. Shankar, 2007 ONCA 280

Two police officers on patrol saw a vehicle being driven at 2:29 am without its taillights on. The vehicle was pulled over and the accused was asked for his licence, registration, and insurance. He provided a licence but could not spell the name on it properly. He also produced a handwritten note and a photocopied registration. He gave an address of a possible crack house and fit the description of a crack dealer operating from there. The accused was subsequently arrested for attempting to mislead the police about his identity. They physically removed him from the car and he told police they were not allowed to search it.

When they patted him down they discovered he was wearing two bullet proof vests. He said he needed them because someone wanted to kill him. Police secured the accused in the back of a police car and searched the vehicle. In the trunk they found a semi-automatic pistol with a fully loaded 30 round clip and in the locked glove box they found a hunting knife and a fully loaded nine-shot revolver in a shoulder holster.

At trial in the Ontario Superior Court of Justice the police said they had two purposes in searching the car: 1) to find documentation relating to the accused's true identity and 2) for public safety (to search for weapons). The trial judge concluded the officers could have obtained a search warrant quickly without creating safety issues. In his view, the extended search of the vehicle was not reasonably necessary in the circumstances and breached the accused's s.8 *Charter* rights. However, he found the officers acted in good faith throughout the encounter and admitted the guns into evidence under s.24(2). The accused was convicted of two counts of possessing a loaded firearm, possessing a prohibited device, driving while disqualified, and public mischief.

"The common law power to search incident to arrest endures under the Charter. The power flows from a legal arrest, and there need not be separate reasonable and probable grounds that the search will yield evidence or weapons. However, the scope of the power is constrained by its source, the legal arrest."

The accused appealed to the Ontario Court of Appeal arguing the guns should have been excluded as evidence because the police did not act in good faith; they were ignorant of the scope of their powers. This increased the seriousness of the *Charter* breach and the admission of the firearms would bring the administration into disrepute. The Crown, on the other hand, asked the appeal court to reconsider the s.8 issue, arguing the search was proper as an incident to arrest.

Justice Gillese, writing the opinion of the Ontario Court of Appeal, first reviewed the power of search incident to arrest. She stated:

> The common law power to search incident to arrest endures under the Charter. The power flows from a legal arrest, and there need not be separate reasonable and probable grounds that the search will yield evidence or weapons. However, the scope of the power is constrained by its source, the legal arrest. The main purposes of search incident to arrest have been articulated by the Supreme Court of Canada as follows:
>
> - to ensure the safety of the police and the public;
> - to prevent the destruction of evidence; and,
> - to discover evidence of the offence or offences for which the accused was arrested.
>
> In order for a search to be incidental to an arrest, the police must have one or more of the valid purposes in mind when the search is conducted, and there must be some reasonable basis for the belief that the purpose will be served. In Caslake, Chief Justice Lamer stressed that this is not a standard of reasonable and probable grounds but, rather, a common sense observation that an objective or purpose cannot be valid if it is not reasonable to pursue it in the circumstances. In making this observation, the Chief Justice cautioned that "[t]he police have considerable leeway in the circumstances of an arrest which they do not have in other situations"... [citations omitted, paras. 11-12]

In this case there was no argument that the accused was lawfully arrested; the police subjectively believed they had grounds to arrest the accused and there was ample objective justification for the arrest. Further, "the search of the car flowed directly from the lawful arrest and was prompted by the nature and circumstances of the arrest." In concluding that there was no s.8 breach, Justice Gillese wrote:

> Having lawfully arrested the [accused] for attempting to mislead the police, it was proper to check the car for documents pertaining to his true identity. Furthermore, the circumstances of the arrest and taking the [accused] into custody gave rise to real concerns about safety, which made it appropriate to check the car for weapons. The officer's concern about public safety arose from the bullet-proof vests that the [accused] was wearing, the [accused's] comments about people wanting to kill him, the time of night, and the fact that he believed that the [accused] was involved in the crack cocaine trade.

While a fairly extensive search of the vehicle was conducted in this case, in my view, it was reasonable in the circumstances. Those circumstances… include the following:

- The search followed a determination by [the officer] that it was merited in order to locate weapons and/or discover evidence as to the [accused's] true identity.
- It was conducted pursuant to valid state objectives, i.e. public protection and the discovery and preservation of evidence which could be located at the scene of the arrest, and not for any oblique or improper motive.
- The search was relatively non-intrusive. It began with an inspection of the interior of the car, under the seats, and proceeded logically from there to the trunk and the glove box.
- There is a diminished expectation of privacy in a motor vehicle.
- There was nothing abusive in the manner in which the search was conducted. No damage was done to the car, no individuals were interfered with, and the seizures were selective and related to the purpose of the search.
- Immediately upon finding the first gun, the Emergency Task Force was called so as to properly secure the guns and make them safe. [paras. 15-16]

Furthermore, even if there was a breach of s.8, the evidence was admissible under s.24(2). The officers acted in good faith; they reasonably believed they were entitled to search the car.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Dangerous Driving: Falling Asleep

"[A] sleeping driver is in a state of non-insane automatism and cannot be convicted of dangerous driving on the basis of acts of driving committed while in that state, since such acts are involuntary and cannot form the *actus reus* of the offence. However, such a driver may be convicted of dangerous driving if the trier of fact is satisfied beyond a reasonable doubt that the driver embarked on driving or continued to drive in circumstances in which he knew or ought to have known that it was dangerous to do so because there was a real risk that he would fall asleep at the wheel." - British Columbia Court of Appeal Justice Smith, *R. v. Jiang*, 2007 BCCA 270

PROVIDING S.10(b) RIGHTS PARTWAY THROUGH INTERVIEW PROCESS DID NOT FIX BREACH

R. v. Lewis, 2007 ONCA 349

The accused was arrested as he was leaving his apartment for the vicious attack of two young men. He was advised of his right to counsel and immediately told the arresting officer he wanted to talk to his lawyer. The officer told him he could do so at the police station. The accused was transported to the police station and again advised of his right to counsel. Although he did not make a second request to speak to a lawyer, he was not provided with the opportunity to do so in response to his earlier request.

The accused was placed in an interview room and searched. The lead investigator in the case questioned him for 20 minutes, between 4:05 pm and 4:25 pm. The accused initially denied being present at the crime scene but then admitted to being in a fight without weapons. He also agreed to a photo-lineup to identify an outstanding suspect and to being recorded while doing so. No recording of the interview was made. The accused then repeated his request to speak to a lawyer, which was provided. After speaking to duty counsel the accused participated in the videod photo-lineup and then made a statement which was audiotaped. He admitted he was at the scene and punched one victim.

At trial in the Ontario Superior Court of Justice the judge admitted the statements following the accused's arrest that were video and audiotaped. The jury convicted the accused of two counts of attempted murder and two counts of robbery. He was sentenced to seven years in prison after being credited three years for pre-trial custody.

The accused then appealed to the Ontario Court of Appeal arguing, in part, that the two recorded statements were taken in violation of his s.10(b) *Charter* right to counsel. He submitted that both statements taken after he spoke to his lawyer were part of a process that began with the interview that proceeded his access to counsel. In the accused's

view, the statements should have been excluded under s.24(2). The Crown, on the other hand, contended that the two statements admitted into evidence by the trial judge were provided to police after the accused had spoken to a lawyer.

Justice Goudge, authoring the unanimous judgment for the Ontario Court of Appeal agreed with the accused. He stated:

> [T]here can be no doubt that the inculpatory statements made by the [accused] to the police between 4:05 p.m. and 4:25 p.m. were taken in violation of his s. 10(b) rights. He had already expressed his wish to exercise his right to consult a lawyer but had not been given an opportunity to do so. Once he made this request the police were obliged to refrain from eliciting incriminating evidence from him until he was afforded that opportunity.
>
> The Crown relies on the fact that the two statements admitted into evidence, the video statement and the audio recording, were given after the [accused] subsequently spoke to counsel…
>
> In my view, this does not immunize them from the earlier *Charter* breach…
>
> In this case there was a close temporal connection between the taking of the original statement between 4:05 p.m. and 4:25 p.m. in breach of the [accused's] s. 10(b) rights, and the taking of the two recorded statements that were concluded less than three hours later. Moreover, the three statements were all part of the same interrogation process. The [accused] remained in the custody of the same police officers during that time and their objective throughout was to obtain statements from the [accused]. The inculpatory audio recording is essentially a repeat of the first statement made by the [accused] prior to obtaining legal advice. The police made no attempt to sever any connection between these two…"The absence of any attempt by the police to make a 'fresh start' after the [accused] had spoken with counsel further cements the connection" between the statements.
>
> I would therefore conclude that the video statement and the audio recording were obtained in a manner that infringed the [accused's] right to counsel. [references omitted, paras. 29-33]

"Once [the accused] made this request [to speak to a lawyer] the police were obliged to refrain from eliciting incriminating evidence from him until he was afforded that opportunity."

As for whether the evidence was inadmissible under s.24(2), Justice Goudge concluded the statements were conscriptive, the s.10(b) breach serious, and the admission of the statements would undermine the fairness of the trial and bring the administration of justice into disrepute. The accused's appeal was allowed, his conviction quashed, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

s.24(2) *Charter*: "Obtained in a Manner"

"The evidence will be "obtained in a manner" that infringed a *Charter* right if on a review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct. The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three. The connection must be more than tenuous." - Ontario Court of Appeal Justice Doherty, *R. v. Plaha*, (2004) Docket: C35157 (OntCA)

INCIDENTAL SEARCH NOT UNREASONABLE BECAUSE UNRELATED EVIDENCE FOUND

R. v. Duong, 2007 BCCA 227

The accused was pulled over in his van after he attempted to solicit the sexual services of an undercover police officer posing as a sex trade worker. He was arrested for communication for the purpose of prostitution and searched. Police found a wallet with a driver's licence, two cellular telephones, a small calculator, and some keys. His van was also searched and a white plastic shopping bag containing $5,700 in cocaine and $15,000 cash was found on the driver's side floor. A gift bag found

near the driver's seat contained a kilogram of cocaine valued at $25,000. The accused was then arrested for possessing cocaine for the purpose of trafficking.

At trial in British Columbia Provincial Court the accused conceded he was lawfully arrested but argued the police were only allowed to pat him down and were not allowed to search his pockets or the van. The officer said he conducted a cursory search of the van, looking for items that could comprise a "sex assault kit", such as duct tape, zap straps, and weapons to assault or kidnap sex trade workers. The trial judge ruled that the search was reasonable even though there was no reason to suspect the accused might possess items that could be used to harm sex trade workers. He held that assaults on sex trade workers by customers are serious and relatively common and that a search around the driver's seat of a vehicle driven by a person arrested for communication for the purpose was lawful and reasonable when the search was undertaken to look for weapons. The evidence was admitted and the accused was convicted of possessing cocaine for the purpose of trafficking.

"[The officer's] search incidental to arrest, which was for a validly articulated purpose such as safety of the public or the police, did not become unreasonable by virtue of the discovery of evidence relating to offences other than those for which the [accused] was being investigated."

The accused appealed to the British Columbia Court of Appeal arguing, in part, that the police had no justification in searching either his person or the van. He submitted that the officer did not have the necessary subjective or objective grounds to reasonably believe there were weapons, escape aids, or a rape kit in the van or that the accused was connected to assaults or kidnappings of sex trade workers. Therefore, in his view, the searches were not truly incidental to arrest and were unreasonable under s.8 of the *Charter*.

Justice Kirkpatrick, authoring the unanimous judgment of the British Columbia Court of Appeal upheld the accused's conviction. The officer had a valid reason related to the arrest for conducting the searches. The accused "was lawfully arrested in an area notorious for the sex trade," said Justice Kirkpatrick. "The numerous types of unlawful behaviour connected with the sex trade warranted care in the search of the [accused] and his van." She continued:

> Furthermore, in my opinion, the trial judge did not err in his conclusion that the search of the [accused] and the van he was driving fell within the permissible limits articulated in *Caslake*. As [the officer] explained in his evidence, persons arrested for this offence often carry multiple sets of identification which may require further investigation as to the true identity of the arrested person. In addition, I consider that there was a reasonable basis for [the officer's] search. It is true that he did not have specific knowledge that the [accused] was known to carry weapons, or that anyone had been abducted in the area, or that the [accused] or the van had been involved in any unlawful conduct. However, that is not the test. The test, as stated in *Caslake*... is whether there is "some reasonable basis for doing what the police officer did".
>
> In my opinion, the occurrence of a limited police search of the arrested individual and his vehicle, in furtherance of the stated objectives in *Caslake* - officer safety, preservation of evidence, and discovery of evidence - was supported by [the officer's] evidence and the other evidence tendered on the *voir dire*. [The officer's] search incidental to arrest, which was for a validly articulated purpose such as safety of the public or the police, did not become unreasonable by virtue of the discovery of evidence relating to offences other than those for which the [accused] was being investigated... [paras. 26-27]

Even if the search breached s.8 exclusion of the evidence would not have been warranted under s.24(2) of the *Charter*, Justice Kirkpatrick ruled. The accused's appeal was dismissed.

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

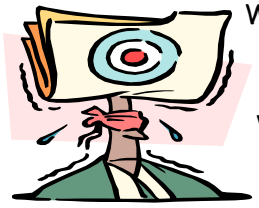
LEGALLY SPEAKING:

Search Incident to Arrest

"In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the [following] purposes ... (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation." - Supreme Court of Canada Chief Justice Lamer, *R. v. Caslake*, [1998] 1 S.C.R. 51.

"CHOKE UNDER PRESSURE?"

Insp. Kelly Keith, Atlantic Police Academy



Why is it that some athletes choke under pressure while others seem to get better? What was it that made Michael Jordan better in the last minutes of the game?

There is far more money put into sports research than law enforcement research. However, we can learn plenty of valuable lessons from tapping into this resource. Just as some athletes choke when the pressure of the game is high, law enforcement officers also have this same issue. There are many factors that can contribute to this, but lets take a look at this issue from a sports perspective and relate it to law enforcement.

Sporting competition promotes psychological and bodily responses similar to the "fight or flight" response. If the event is beyond one's perceived ability, anxiety is the inevitable outcome.

Stress can be viewed as positive or negative. We all know people who fight stronger when more stress is added while others fold or buckle under the pressure. If we simply understand that the "fight or flight" body reactions are the body preparing to do well , it assists us in viewing it as a positive.

Generally, the higher the level of competition, stress and anxiety increases; individual performances tend to be more stressful and bring out greater anxiety. Both in sports and law enforcement the greater the chance of getting hurt, the greater the anxiety. As well, anxiety is also increased if the expectation of success is high.

Anxiety can be recognized on the cognitive level (by particular thought processes), the somatic level (by physical responses) and/or on the behavioural level (by certain patterns of behaviour).

If you believe in yourself and have positive expectations of success, you will be more confident and subsequently you are likely to perform close to your best. If you do not believe in your abilities or are not confident in your success, your performance will suffer.

It is believed that if athletes set their own goals rather than have goals imposed upon them by a coach or team manager, their confidence will increase and their anxiety will be reduced. The perceived support of a coach can assist the athlete in better coping with the psychological demands of competition. In order to reduce anxiety it is better for the coach to encourage athletes to beat their own performance rather than seek superiority over their peers.

We all have body responses to stress and anxiety. If you can recognize your own responses to stress and anxiety, it will assist you in properly handling them. Once you recognize your body responses you can start to take action against stress and anxiety by:

1. Remember your "winning feeling" and link your emotions to this feeling. Before your next competition, put yourself into this state of emotion and concentrate on the "winning feeling";

2. Combat breathe, combat breathe and combat breathe some more! Empty all the air in your lungs, replacing bad air with the good. Do this multiple times; and

3. When you start feeling a negative or unwanted thought (cognitive anxiety) such as "I just don't want to be here today", picture a large red stop sign in your mind's eye or change the channel in your head. You can then follow this with a positive self-statement such as "I am going to hit it hard right from the off!" Thought-stopping can be used to block an unwanted thought before it escalates or disrupts performance. The technique can help to create a sharp refocus of attention keeping you engrossed in the task at hand.

It is normal to experience stress and anxiety in any competition. What separates those that are successful from those that are not is how they handle it. Don't allow stress and anxiety to make you "choke" under pressure!

Reference: Peak Performance e-newsletter.

ROAD RULES:

High Occupancy Vehicle Lanes

Division 42 of BC's *Motor Vehicle Act Regulations* outlines the rules with respect to High Occupancy Vehicles. Section 42.03(2) states that "A driver of a vehicle that is not a high occupancy vehicle must not use a high occupancy vehicle lane on a freeway." A "high occupancy vehicle" is a bus or a vehicle under 5,500 kg GVW that is carrying the minimum number of persons specified for that lane. Of course, like most legislation, there are exceptions to the rules. The following drivers may drive in a high occupancy lane without the minimum number of persons required:

- Emergency vehicles
- Peace officers on active duty
- Motorcycles, taxis, handy dart vehicles
- Marked vehicles responding to a disabled vehicle or another emergency on the freeway (eg. tow truck)

Note-able Quote

"The young man knows the rules, but the old man knows the exceptions." - Oliver Wendell Holmes

COURT MUST KNIT EVIDENCE TOGETHER AS A WHOLE WHEN ASSESSING GROUNDS

R. v. Todd, BCCA 176

A police officer found the accused asleep in his car that was stopped at a green traffic light with the engine running, the car in gear, and loud music playing. After the officer pounded on the driver's window at least four times, the accused rolled down the window, releasing a smell of alcohol. The accused produced a "Save On More" card when asked for his driver's licence and the officer observed that he had "glassy eyes". A breath demand was made, appropriate warnings given, and the accused was arrested. At the police station, the arresting officer again observed the accused's eyes were glassy, detected a strong odour of alcohol coming from his breath, noted he was a little unsteady on his feet, and saw that his face was flushed slightly. The accused provided two breath samples and was charged with impaired and over 80mg%.

At trial in British Columbia Provincial Court the accused was acquitted. The trial judge, in part, ruled that the officer did not have objectively reasonable and probable grounds for the breath demand. He looked at individual indicia of impairment and found a possible alternative explanation for each:

- Pounding on the window four times to awake the accused-the music could have been so loud that the person inside (awake or asleep) may have thought "the bass was a little heavy on the music";
- Production of the "Save on More Card"-the person merely produced the wrong card; there was no evidence of fumbling the card or staring at it intently before handing it over;
- Glassy eyes-the driver could have been driving for a long time or could have been crying from a recent emotional experience; and
- The officer never made any inquiries of the driver as to why he fell asleep or ask any questions about liquor consumption.

The Crown appealed to the British Columbia Court of Appeal arguing, among other grounds, that the trial judge erred in concluding the officer did not have

objectively reasonable and probable grounds for the breath demand. The appeal court judge agreed with the Crown and ordered a new trial. In his view, the trial judge erred in considering alternative explanations for the indicia of impairment that were not in evidence and that "individual pieces of evidence must not be examined in isolation but must be considered in the context of the totality of the evidence."

The accused then appealed to the British Columbia Court of Appeal submitting that the appeal court judge erred in allowing the appeal. Justice Chiasson, rendering the decision of the British Columbia Court of Appeal, agreed with the appeal judge's findings. He found that the trial judge erred in reviewing and discounting each indicia of impairment observed by the officer. The proper test is to look at the evidence as a whole, not each piece by itself and speculate on other possibilities.

Justice Saunders also commented on the trial judge's piecemeal approach. She said:

> [T]he trial judge addressed specific components of the evidence, but does not appear to have stepped back after, to knit it together as a whole. Had he done so, the whole necessarily would have included reference to the feature of the undisputed evidence, which was the observed odour of alcohol emanating from the car when the window was rolled down, that was not referred to either in the ruling on the reasonable and probable cause for the demand and the subsequent exclusion of the breathalyzer test results, or in the reasons for acquittal on the impaired driving charge.
>
> On the issue of conjecture, the trial judge also engaged in out-loud wondering, creating explanations for the officer's observations that had no foundation in the evidence tendered. There was, for example, no evidence that [the accused] had been driving for 10 hours or just had an emotional experience that made his eyes glassy. Yet the trial judge proffered these as potential explanations for that observation in his ruling on the breathalyzer demand issue. [paras. 36-37]

The accused's appeal was dismissed.

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

WARRANTLESS WEAPONS SEARCH: SAFETY SHOULD NOT DEPEND ON GUESSWORK

R. v. Peacock-McDonald, 2007 ONCA 128

Two police officers attended at the accused's residence in response to her complaint concerning noise from her neighbours. As a result of talking with and observing her, the officers concluded that she was suicidal. Accordingly, they took her to the hospital for an evaluation by a physician as to whether she should be detained under s.15 of Ontario's *Mental Health Act* (*MHA*) for a psychiatric assessment.

Within ten minutes of their arrival at the hospital, one of the police officers obtained a firearms licence that was in the accused's possession, together with the keys to her house and her firearms' cabinet. The officer then left the hospital to return to search the accused's home for her firearms. The police officer staying at the hospital was informed at about the same time that the attending physician intended to sign an involuntary admission form under the *MHA* requiring the accused's detention for the purpose of a psychiatric examination. The officer returning to the accused's home was not told of this decision before he left the hospital.

The officer attended and entered the accused's residence without a warrant to search for her firearms, relying on s.117.04(2) of the *Criminal Code*. He seized seven firearms in total, all of which were registered and properly stored by her at the time of the seizure. The officer then returned to the hospital where he learned of the *MHA* authorization for the accused's detention. She was transported to a psychiatric facility for an evaluation, arriving about three hours after the search of her home. She was subsequently released less than forty-eight hours later.

The police applied under s.117.05(1) of the *Criminal Code* for a hearing concerning the forfeiture of the seized firearms. The accused, however, argued the requirements of s.117.04(2) had not been met and therefore the warrantless search was not justified.

She claimed the application judge therefore lacked jurisdiction to hear the forfeiture matter. She also submitted that the search was unreasonable and violated her rights under s.8 of the *Charter*.

In the Ontario Court of Justice the application judge held the conditions to invoke s.117.04(2) of the *Criminal Code* had been satisfied and no breach of s.8 had occurred. Since the search was lawful, he had jurisdiction to proceed with the forfeiture hearing. The application judge granted forfeiture and gave the accused 30 days to transfer ownership of the firearms or they would be forfeited to the Crown.

The accused appealed to the Ontario Superior Court of Justice and the search was found to have violated the accused's rights under s.8 of the *Charter* because she had been detained under the *MHA* for at least 72 hours observation which would have abated her being a danger to herself or anyone else. However, the appeal judge found the evidence of the firearms admissible under s.24(2) and ruled the application judge had jurisdiction to conduct the forfeiture order and dismissed the appeal.

The accused again appealed to the Ontario Court of Appeal arguing the appeal judge erred in holding the application judge had jurisdiction to hear the matter and that the test for forfeiture under s.117.05(1) had been met. In her view, a s.117.05 forfeiture hearing may only be conducted where the firearms in question were validly seized with or without warrant under s.117.04. She submitted, in part, that the preconditions for a warrantless search under s.117.04(2) were not met and the firearms therefore, were not validly seized under that section.

Although warrantless searches are presumptively unreasonable under s.8 of the *Charter*, s.117.04(2) authorizes a search and seizure for weapons without the need for a warrant if there are reasonable grounds to believe it is not desirable in the interests of safety for a person to possess a weapon and there are grounds to get a warrant, but it is impracticable to obtain the warrant because of a possible danger to safety.

Justice Cronk, writing the Ontario Court of Appeal's opinion, concluded it was impracticable in the circumstances for the police to obtain a warrant

BY THE BOOK:

s.117.04 (1) *Criminal Code*

Where, pursuant to an application made by a peace officer with respect to any person, a justice is satisfied by information on oath that there are reasonable grounds to believe that the person possesses a weapon…and that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess the weapon…the justice may issue a warrant authorizing a peace officer to search…and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

S.117.04(2) *Criminal Code*

Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person or any other person, for the person to possess any weapon…the peace officer may, where the grounds for obtaining a warrant under subsection (1) exist but, by reason of a possible danger to the safety of that person or any other person, it would not be practicable to obtain a warrant, search for and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

s.117.05(1) *Criminal Code*

Where any thing or document has been seized under subsection 117.04(1) or (2), the justice who issued the warrant authorizing the seizure or, if no warrant was issued, a justice who might otherwise have issued a warrant, shall, on application for an order for the disposition of the thing or document so seized made by a peace officer within thirty days after the date of execution of the warrant or of the seizure without a warrant, as the case may be, fix a date for the hearing of the application and direct that notice of the hearing be given to such persons or in such manner as the justice may specify.

before searching for the accused's firearms. She stated:

> The appellant submits that once she was detained under the MHA, any "possible danger" to herself or others was negated because one of two events would then occur. First, she could be admitted to a psychiatric facility under the authority of a Form 1, thus removing the possibility of any immediate danger to herself or any other person arising from her possession of the firearms. Alternatively, she could be released following her examination by a physician, thereby establishing that she was not a danger to herself or others. In either event, two requirements for a warrantless search under s. 117.04(2) – a possible danger arising from the appellant's possession of the firearms and the impracticability of obtaining a warrant – would not be met. In this case, the first scenario applied, that is, the examining physician signed a Form 1 for the appellant's detention. The appellant therefore argues that the police officers had sufficient time to obtain a warrant, no immediate possible danger arose from her possession of the firearms, and s. 117.04(2) of the Code could not be invoked to justify a warrantless search.
>
> I disagree. The appellant…was suicidal when the police took her to the hospital for an examination. The application judge accepted [the officer's] testimony that when they arrived at the hospital, [the officer] was concerned that the appellant would "shore herself up" and deny that she was suicidal, causing the hospital to release her. The application judge found that [the officer] had "a specific concern" for the appellant's safety because she was a high suicide risk and, further, that he had "a concern for the general public" because the appellant had firearms at her residence and it was uncertain whether she would be detained for a psychiatric assessment. [para. 20-21]

Justice Cronk also considered the ruling of the appeal judge that the accused's s.8 *Charter* rights had been violated because of the apparent 72 hour *MHA* detention. She found this reasoning to be flawed in two ways:

> First, a Form 1 authorization for the detention of a person under the MHA is not a detention "for at least 72 hours of observation" by a physician. Section 15(5) of the MHA authorizes the detention of a person in a psychiatric facility under a Form 1 signed by a physician for a period "not more than 72 hours". Thus, the appellant's detention was not for a period of "at least" seventy-two hours. To the contrary, the length of her detention was uncertain. She could have been released within minutes or hours of her initial detention at the hospital. This possibility ultimately materialized when the appellant was released from the hospital in less than forty-eight hours.
>
> Second, the detention of the appellant pursuant to the MHA did not have the effect of "abating" or "negating" the possibility of the appellant being a danger to herself or others for a period of seventy-two hours. As I have said, the appellant could have been released from the hospital at any time after her initial detention under a Form 1. In this important sense, therefore, a possible danger to the appellant's safety and to the public persisted when [the officer] conducted the search.
>
> Moreover, nothing on this record suggests that there was any realistic opportunity for the police to obtain a warrant in the time that elapsed between the appellant's arrival at the hospital and the completion of the search carried out by [the officer]. The Officer testified that the time required to obtain a search warrant for a residence could vary from "as little as four or five hours to two days or more sometimes of trying to confirm your grounds…and articulate it". He also said that he did not know for sure whether the appellant was going to be assessed until he got back to the hospital after seizing her firearms and that, if she were released, it would be too late to seize them.
>
> In my view, when public safety issues are implicated, as in this case, the police should not be required to speculate upon the timing of the release from hospital of a person in the appellant's position in the hope that they might secure a warrant for the seizure of firearms in the possession of the detainee before that release. Matters of public safety, when firearms are involved, should not depend on guesswork; nor are they a 'race to the swiftest'. [paras. 26-29]

"Matters of public safety, when firearms are involved, should not depend on guesswork; nor are they a 'race to the swiftest'."

And further:

> The evidence before the application judge clearly demonstrated that, at the time of the search, the appellant's continued possession of the firearms posed a possible danger to herself and to others. The imminence of this existing possible danger was not diminished by the fact of her initial detention for medical examination under the authority of s. 15 of the MHA. Because the length of the appellant's detention under the MHA was uncertain, I am not persuaded that it was practicable, having regard to public safety and the safety of the appellant, for [the officer] to first seek a warrant before conducting a search of the appellant's residence. [para. 32]

The preconditions for a lawful search under s.117.04(2) had been satisfied and there was no s.8 *Charter* breach. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Reasonable Grounds: Breath Demand

"[The arresting officer's demand for breath samples at the roadside based on reasonable grounds] was a continuing demand that remained in force until complied with. The fact that there was a subsequent demand made by the breathalyzer technician without reasonable and probable grounds and that the [accused] refused that demand does not invalidate the earlier demand nor change the character of the [accused's] ongoing refusal to comply. Section 254(3) of the Criminal Code does not require multiple demands. Moreover, in our view, the subsequent demand was no more than a good faith attempt by the breathalyzer technician to give the [accused] a further opportunity to comply." - Ontario Court of Appeal, *R. v. Townsend*, 2007 ONCA 332

Note-able Quote

"I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It's when you know you're licked before you begin but you begin anyway and you see it through no matter what." - Harper Lee

BOLF:
UPCOMING SUPREME COURT OF CANADA JUDGMENTS

There are a number of Supreme Court of Canada decisions that police officers should keep a look out for.

Dog Sniff

R. v. Brown (Alberta Court of Appeal—as of right)

Police officers were patrolling a bus terminal as part of an operation involving investigators monitoring the traveling public in order to identify and arrest drug couriers, among others. The team was watching passengers disembark from an over-night bus. One officer noticed the accused and monitored his movements. In the foyer of the bus terminal, the officer started a conversation with the accused and identified himself as a police officer. The officer called to the police dog and she made an immediate passive indication of the presence of drugs. The accused was charged with possession of cocaine for the purposes of trafficking and possession of heroin. The accused alleged at trial that his s. 9 *Charter* rights were breached when the police held a conversation with him in the foyer of the bus depot and that his s. 8 *Charter* rights were breached when, during the course of that conversation, a sniffer dog was used to detect drugs.

The trial judge and the majority of the Alberta Court of Appeal held that the accused was neither arbitrarily detained nor unlawfully searched. The majority dismissed his appeal. Relying partly on the Supreme Court of Canada ruling in *R. v. Tessling* the majority concluded that there was no "reasonable expectation of privacy" in relation to the odours emanating into the public sphere from the accused's bag. Justice Paperny, in dissent, concluded that while the accused was detained "physically and psychologically", the standard of review on appeal required deference to the trial judge's finding in this respect. On the s.8 issue, she concluded that the accused had a reasonable expectation of privacy in his luggage and the odours emanating from it and,

therefore, the dog sniff was an unreasonable search within the meaning of s. 8 of the *Charter*.

Questions for the Supreme Court of Canada include:

- Whether the police dog sniffing the accused's backpack violated his right under s. 8 of the *Charter* to be secure against unreasonable search or seizure;
- Whether the trial judge erred by failing to find that the accused was subject to an unreasonable search and seizure and the evidence ought to have been excluded from trial pursuant to s. 24(2) of the *Charter*; and
- Whether Justice Paperny in dissent was correct that a search occurred—that the accused had a reasonable expectation of privacy.

Reasonable Grounds

R. v. Rhyason (Alberta Court of Appeal—as of Right)

The accused conceded that the car he was driving struck and killed a 17-year-old pedestrian who was crossing the street at a marked, lit crosswalk at a controlled intersection. He had been drinking. The arresting officer detected an odour of alcohol on the accused's breath and demanded a breath sample even though he showed no balance or slurring problems. The officer testified: "Well, my observations impaired, or excuse me, of alcohol consumption indicia, as well as my belief that the victim was deceased, and based on the fact that he had stated he was the driver....I formed the opinion that [the accused] had consumed alcohol in such a quantity that impaired his ability to operate a motor vehicle, and subsequently caused the death of—of the victim." The breath samples showed the accused had more than the legal limit of 80mg%.

The trial judge found him guilty of operating a motor vehicle while having more than 80mg%. The trial judge also found that his impairment contributed more than *de minimis* to cause the accident. The majority of the Alberta Court of Appeal dismissed the appeal. Justice Slatter dissented, would have allowed the appeal and ordered a new trial on the basis that the trial judge did not apply the correct legal test in deciding whether there were reasonable and probable grounds for the breath sample.
Questions for the Supreme Court of Canada include:

- Whether the trial judge applied the correct test to the issue of reasonable and probable grounds; and
- Whether the trial judge erred in convicting the accused of impaired driving causing death based on an erroneous interpretation of impairment of the ability to drive.

Dog Sniff

R. v. A. M. (Ontario Court of Appeal—by Leave)

The police accepted a long-standing invitation to bring sniffer dogs into the accused's high school to search for drugs. The police had no knowledge that drugs were present in the school and would not have been able to obtain a warrant to search the school. The sniffer dog was trained to detect marihuana, hashish, cocaine, heroin and crack cocaine. The police searched the whole school while the students were confined to their classrooms. In a gymnasium, they found a pile of backpacks but no students. The sniffer dog reacted to the accused's backpack. Without obtaining a warrant, the police opened the backpack and found marihuana and magic mushrooms. The accused was charged with possession of cannabis marihuana and psilocybin for the purpose of trafficking. At trial, he challenged the admissibility of the evidence. The drugs were subsequently excluded and the charges against the accused were dismissed. A unanimous Ontario Court of Appeal upheld the trial judge's ruling.

Questions for the Supreme Court of Canada include:

- Whether the accused's rights under s. 8 of the *Charter* were breached; and
- Whether evidence was properly excluded at the accused's trial for possession of drugs for the purposes of trafficking.

Right to Silence

R. v. Singh (British Columbia) (By Leave)

An innocent bystander was standing just inside the doorway of a pub when a group of people were arguing outside the pub and a stray bullet shot by someone in the group struck the bystander, killing him. The accused was arrested and charged with second degree murder. During the second of two police interviews following his arrest, the accused

made admissions to the police which the Crown sought to introduce into evidence at trial in order to identify him as the shooter. He was given proper *Charter* warnings and spoke to counsel before the interviews. During the interviews, he repeatedly asserted his right to silence. He repeatedly told the police that he did not want to talk, that he had nothing to say, that he knew nothing about the shooting, and that he wanted to return to his cell. Each time the accused raised his right to silence, the interviewing officer said that he had a duty or desire to place the evidence before the accused and he continued the interview. The trial judge admitted the statements into evidence, holding that the police did not breach the accused's right to silence by continuing to question him after he had asserted his right to silence. The British Columbia Court of Appeal upheld the decision to admit the admissions into evidence and the accused's conviction for second degree murder.

Questions for the Supreme Court of Canada include:

- Whether it is a violation of s. 7 of the *Charter* for a police officer to attempt to persuade a detained person, who has asserted a right to remain silent following the exercise of the right to counsel, to break his or her silence; and
- Whether a voluntary statement to police may be excluded on the basis that the accused's right to silence was violated.

Use of Firearm

R. v. Steele (British Columbia) (By Leave)

A woman saw three intruders in the backyard of a neighbour's dwelling house, challenged them and frightened them away. The accused's thumb print was found at the scene of an attempted break and enter. Ten days later, four individuals broke into the same house. They awakened three residents. One intruder said "Don't move ... We have a gun ... Where are the drugs?" Another said "Where are the drugs? ... Get the gun ... Get the gun." Another said "Get the gun out." The intruders fled. None of the residents identified the accused as one of the intruders or testified that they saw a gun, although they testified that they saw some of the intruders holding objects about the size of a gun. The residents gave the police a description of the get-away car and a few minutes after the break and enter, the police stopped a vehicle matching the description. Four individuals, including the accused, were inside the vehicle. The police found a loaded pistol in the vehicle.

The trial judge held it was a reasonable inference that the occupants of the vehicle were the intruders and that they had the gun with them during the break and enter. The accused was convicted of multiple offences, including use of a firearm while committing an indictable offence, for which he was sentenced to a one-year jail term to be served consecutively to all other sentences. The Crown conceded on the appeal that it also was a reasonable inference that the gun might have been in the get-away vehicle during the break and enter. Section 85(1)(a) of the *Criminal Code* states that "Every person commits an offence who uses a firearm while committing an indictable offence ...". The British Columbia Court of Appeal held "uses a firearm" includes having a firearm "proximate for future use".

Questions for the Supreme Court of Canada include:

- Whether accused should have been convicted of use of a firearm while committing break and enter of a dwelling house if firearm was located in vehicle outside dwelling house; and
- Whether "use of a firearm" includes a situation in which a firearm is "proximate for future use".

Source: Supreme Court of Canada www.scc-csc.gc.ca

LEGALLY SPEAKING:

Search Incident to Arrest

"It appears to me that the police officers could have obtained a search warrant and had time to do so. But there is no requirement in law that a search warrant be obtained if the search is conducted incidentally to the lawful arrest of the suspect for any of three reasons: to ensure the safety of the police and the public; to protect evidence from destruction; or...for "the discovery of evidence which can be used at the arrestee's trial." - British Columbia Court of Appeal, *R.. v. Munro*, 2005 BCCA 610

THOROUGH KNAPSACK SEARCH JUSTIFIED INCIDENT TO INVESTIGATIVE DETENTION

R. v. Peters, 2007 ABCA 181

Three bike patrol officers responded to a call from a hotel that a man wearing a red jacket and carrying a knapsack with pins and trinkets inside the hotel had a gun. Upon arrival the officers saw the accused fitting the description. No gun was seen but he was wearing a red/orange jacket and had a large knapsack with pins and trinkets on it. One of the officers patted down the accused and searched the knapsack by opening it up and taking a quick look, making sure nothing was obvious. A second officer was not satisfied with the cursory search and felt a small gun or weapon hidden in the knapsack could pose a threat. He did not want to return the knapsack to the accused which might have contained a firearm. The officer then made a more thorough search of the knapsack and found baggies containing marihuana, walkie-talkies, pipes, lighters, and a bottle of isopropyl at the bottom.

"[A]n investigative detention and protective search is authorized by law and is reasonable in circumstances where carrying out proper police duties requires it. The police have the responsibility of protecting the lives of the public, including their own."

At trial in the Alberta Court of Queen's Bench the accused was convicted of possessing marihuana for the purpose of trafficking. The trial judge ruled that there were reasonable grounds for the investigative detention and protective search, which was reasonable in manner and scope. The accused then appealed to the Alberta Court of Appeal. He did not challenge the validity of the initial detention, the pat-down or the cursory search of the upper part of the knapsack, but argued, in part, that the extended detention and deeper search into the knapsack by the second officer breached his s.8 *Charter* rights.

In a memorandum of judgment, the Alberta Court of Appeal upheld the conviction. Since there was no warrant for the investigative detention or protective search the Crown needed to demonstrate, on the preponderance of the evidence, the search was authorized by law, the law was reasonable, and the manner the search was carried out was also reasonable. The Court noted:

> In the Mann case, the Supreme Court of Canada established that an investigative detention and protective search is authorized by law and is reasonable in circumstances where carrying out proper police duties requires it. The police have the responsibility of protecting the lives of the public, including their own. In 2007 it is obvious that a member of the public who, in a public place, has a gun, is a potential threat to the public. It is clear that the risk can be as great from a hidden handgun as from a more obvious rifle. [para. 5]

Here, the Court ruled, the trial judge did not err in finding the officer was fully justified in conducting the thorough search of the knapsack where marihuana, but no gun, was found. The marihuana was found during a lawful protective search and was admissible. Once the marihuana was found, the accused was arrested and the discovery of more drugs was incidental to the arrest.

Complete case available a www.albertacourts.ab.ca

LEGALLY SPEAKING:

Police Questioning & the Right to Counsel

"Whether or not there was detention is of fundamental importance, since the right of someone to be informed of their right to consult counsel arises only if that person is being detained... Care must be taken in not proceeding on the assumption that everyone being interviewed about the commission of a crime is detained on the premise that they might eventually become a suspect and thus entitled under section 10(b) of the *Canadian Charter* to the right to counsel. ... [N]ot every contact between a citizen, even one who is a suspect, and the police, creates in and of itself a situation of fact amounting to detention, with the rights that flow from that status." - Quebec Court of Appeal, *R. v. Gaudette*, 2006 QCCA 1004

www.10-8.ca

17th Annual Abbotsford Police Challenge Run

Saturday September 22, 2007

Register Early and Save!

The Abbotsford Police Challenge is committed to being a family oriented event and for those who don't run there is a 5 km fun run/walk route so no one is excluded from participating. The Police Challenge Run began as a Fund Raiser for the Law Enforcement Torch Run for Special Olympics 16 years ago. Today it has grown to be one of the more prominent community events supporting three charities.

LOCATION

Abbotsford Civic Plaza, adjacent to Abbotsford Police Department, 2838 Justice Way, Abbotsford, BC.

RACE TIME

Both events start at 9:00 am. Warm-up led by Apollo Athletic Club at 8:30 am, Civic Plaza.

ROUTE

The 10km route is a test of your endurance that includes a 1 km hill while the 5km fun run route is a single flat loop.

www.abbotsfordpolice.org

ROAD RULES:

Bicycle Safety Helmets

Section 184 of BC's *Motor Vehicle Act* creates two offences related to bicycle safety helmets. First, under s.184(1) it is an offence for a person to operate or ride as a passenger on a cycle on a highway when not wearing an approved bicycle safety helmet. Second, under s.184(2) a parent or guardian of a child under 16 years old commits an offence if they authorize or knowingly permit the child to operate or ride a cycle on a highway without wearing an approved bicycle safety helmet.

A "cycle" is defined in s.119 as "a device having any number of wheels that is propelled by human power and on which a person may ride and includes a motor assisted cycle, but does not include a skate board, roller skates or in-line roller skates." Approved safety helmet standards and specifications are listed in s.1(1) of the *Motor Vehicle Act*'s *Bicycle Safety Helmet Standard Regulation* and include Canadian Standards Association (CSA), Snell Memorial Foundation, American Society for Testing and Materials (ASTM), and American National Standards Institute (ANSI). Regardless of what standard the helmet is manufactured under, all helmets must:

- have a smooth outer surface;
- be constructed so the helmet is capable of absorbing energy on impact;
- be strongly attached to a strap designed to be fastened under the chin; and
- be undamaged from use or misuse.

Section 2 of the *Bicycle Safety Helmet Exemption Regulation* requires that the safety helmet must have a label showing it meets one of the required standards.

Exemptions

Under s.3 of the *Bicycle Safety Helmet Exemption Regulation* four categories of persons are exempt from wearing a bicycle safety helmet: (1) the wearing of a helmet would interfere with an essential religious practice, (2) operators and passengers of pedicabs or quadricycles, (3) a person issued a certificate by the Superintendent of Motor Vehicles for medical purposes; and (4) a person under 12 years old operating a non-chain driven 3 or 4 wheeled cycle designed for recreational use.

COURTS SHOULD AVOID SECOND GUESSING OFFICER SAFETY

R. v. White, 2007 ONCA 318

Two plainclothes officers were on patrol in an area notorious for criminal activity, including gun and drug-related crimes, when they saw the accused driving a black Acura at about 6 pm. He pulled up to a parking spot close to the front door of a strip club and remained parked there while his girlfriend made three separate trips back and forth from the car to the club in the space of six minutes. After the third trip, the accused's girlfriend re-entered the club and remained inside. Based on their experience, the officers believed they had just observed a "text-book" case of someone either buying or selling drugs and formed the suspicion that the accused was engaged in illicit drug activity. The officers followed the accused in their van as he left the strip club and drove to a nearby gas station.

At the gas station the officers ran a check on the Acura's licence plate and learned it was registered to a man prohibited from driving. Once he paid for his gas, the accused did not return directly to his car but took a circuitous route that enabled him to pass the officers' van and look inside. They believed that this conduct was deliberate and designed to confirm his suspicion that he was being followed by the police. After walking past the officers' van, the accused returned to his car but he did not leave the gas station. He instead went to a Tim Horton's "drive-through" and then returned to the gas station parking lot where he parked his car. He got out of his car and began to walk away from the officers towards the street. He was speaking on his cell phone at the time.

Believing that the accused might try to get away, the officers decided to stop and investigate him for suspected drug activity and driving while prohibited. They got out of their van and an officer approached the accused, overhearing him say "Yeah, they're here now" on his cell phone. The officer immediately identified himself as a police officer and seized the accused's cell phone. It was then learned the accused's brother was the owner of the car. When asked to retrieve his driver's licence from the car, the accused opened the driver's door and leaned across the front seat. He opened the glove compartment with his left hand while putting his right hand under the passenger seat. This action concerned the officers and they put their hands on their guns. A "mickey" bottle of liquor was seen between the driver and the passenger seat and police told the accused he would be charged under the *Liquor Licence Act* and searched. The accused replied that if he was going to be searched, he had "this" and pulled out two bags of marijuana from his pocket, turning them over to an officer. He was arrested for possession of a controlled substance and advised of his right to counsel.

The car was searched and a loaded .38 calibre revolver wrapped in a bandana was found under the front passenger seat. The "mickey" bottle of alcohol and an electric pocket scale located inside the car was also seized along with $80 Canadian and $30 U.S. from the accused at the police station.

During a *voir dire* in the Ontario Superior Court of Justice the officer testified he seized the cell phone for reasons of safety and evidence preservation. The officer suspected the accused was letting others know where he was and what was going on and that it could present an officer safety issue if other people attended the scene to assist the accused, or items such as weapons or evidence could be transferred. The trial judge ruled, in part, that the police violated the accused's s.8 *Charter* rights when they seized his cell-phone during the investigative detention. She stated:

> I find there were no exigent circumstances justifying a warrantless seizure under Section 11(7) of The Controlled Drugs and Substances Act. There was no urgency to seize the cell phone, nor was there any credible evidence of a threat or apprehension that the safety of the officers was at risk because [the accused] had a cell phone on his person. [The accused] was totally compliant and responsive to the officer's detention. He made no threatening gestures with his phone or otherwise. He did not attempt to run, he showed no inclination towards violence. The officer, on his own evidence, perceived no real danger or discomfort in the process until later when the accused put his hand on the floor of the vehicle. The phone call he was on ended when the officer stopped

him. There is no evidence he tried to use the phone after he was detained.

In her opinion the s.8 violation was serious, police conduct "high-handed and an abuse of [their] ancillary powers," and the evidence was excluded under s.24(2). The accused was acquitted on charges of possessing marihuana for the purpose of trafficking, possession of property obtained by crime, possession of a prohibited firearm, possession of prohibited ammunition, and being an occupant of a motor vehicle knowing there was a firearm.

The Crown appealed to the Ontario Court of Appeal arguing the trial judge erred in holding the police violated the accused's rights under s.8 of the *Charter* when they seized his cell phone. Justice Moldaver writing the unanimous opinion of the Court, however, found the police did not violate the accused's s.8 *Charter* right. He wrote:

> Had the trial judge applied the correct principles of law to those findings, she would, in my respectful view, have concluded that [the officer] was fully justified in seizing the [accused's] cell phone when he did and that he did not violate the respondent's s. 8 rights in the process. The critical facts to which I refer are set out below:
>
> - On the evening in question, [the officers] were working in plain clothes in a high risk area of Brampton notorious for all manner of criminal activity, including drug and gun related crimes. Their observation of the [accused] and his girlfriend at the Cannonball Strip Club provided them with reasonable grounds to suspect that the [accused] was engaged in illegal drug activity.
>
> - After they followed the [accused] for about a block to a nearby gas station, the officers observed him taking steps that caused them to believe that he suspected he was being followed by the police. By this time, the officers had reason to suspect that the [accused] was not only engaged in illegal drug activity but also, that he was driving while prohibited. Their beliefs were legitimate and honestly held, and they provided the officers with two separate bases for detaining and investigating the [accused].
>
> - When the officers decided to approach the [accused], he was walking away from their vehicle towards the street and he was using his cell phone. As [the officer] approached and identified himself as a police officer, he overheard the [accused] say "Yeah, they're here now". It was then that he seized the [accused's] phone.
>
> …[T]he trial judge determined that [the officer] was not legally justified in seizing the [accused's] cell phone when he did. In so concluding, she found, among other things, that there were "no exigent circumstances justifying a warrantless seizure" and there "was no urgency to seize the cell phone". If by that, the trial judge intended to limit the right of seizure to situations of immediate danger as opposed to reasonably apprehended potential danger, I am respectfully of the view that she erred. Put simply, the police did not have to wait to seize the [accused's] cell phone until they were set upon by back-up forces summonsed by him. They were entitled to take preventative measures.
>
> The trial judge continued her analysis noting that there was no "credible evidence of a threat or apprehension that the safety of the officers was at risk because [the respondent] had a cell phone on his person".

"In the circumstances, [the officer] had little time to reflect. He had to make a split second decision; a moment's hesitation could have put his life and that of his partner in peril. Courts should keep this in mind when assessing the conduct of officers in the field. When it comes to officer safety and preserving the integrity of their investigation, police officers should be given a good deal of leeway and second guessing should be avoided."

With respect, that misses the point. [the officer] did not seize the [accused's] cell phone simply because he "had [it] on his person". He did so because the [accused] was letting someone know that the police were there. That is precisely the kind of information that [the officer] was worried about, both from the point of view of officer safety and the potential loss of evidence. If the [accused] had not already done so, [the officer] did not want to give him the opportunity to provide his cohorts with more information, such as the location of the gas station and the number of officers present. Nor was he required to do so. If ever there was a case where [the officer] was justified in seizing the phone to prevent (or attempt to prevent) back-up forces,

> sympathetic to the [accused], from arriving at the scene and imperilling police safety and/or obstructing their investigation, this was it. [paras. 44-47]

And further:

> In sum…I have no doubt that [the officer] was fully justified in seizing the [accused's] phone when he did, for the reasons he gave. There was no s. 8 breach here. [The officer] was engaged in a high risk investigation. He and his partner were in plain clothes, in an area of town notorious for drug and gun related crimes. They were investigating a suspected drug dealer who knew that he was being followed by the police and who was "caught in the act" conveying information to someone as [the officer] approached him.
>
> When [the officer] seized the [accused's] cell phone, he found himself in a dangerous and potentially volatile situation. In the circumstances, he had little time to reflect. He had to make a split second decision; a moment's hesitation could have put his life and that of his partner in peril. Courts should keep this in mind when assessing the conduct of officers in the field. When it comes to officer safety and preserving the integrity of their investigation, police officers should be given a good deal of leeway and second guessing should be avoided. [paras. 53-54]

The marihuana, loaded firearm, and ammunition were admissible as evidence. The Crown's appeal was allowed, the acquittals set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **True**—see *R. v. Alkins* (at p. 4 of this publication).
2. (b) **False**—see *R. v. Rodney* (at p. 7 of this publication).
3. (a) **True**—see *R. v. Shankar* (at p. 7 of this publication).
4. (a) **True**—see *R. v. Lewis* (at p. 9 of this publication).
5. (b) **False**—see *R. v. Duong* (at p. 10 of this publication).

USE OF POLICE TAC UNIT NOT EXCESSIVE IN CIRUMSTANCES

Webster v. Edmonton (City) Police Service, 2007 ABCA 23

Police received a call from the complainant about her father, the plaintiff, and made a number of allegations. She alleged the plaintiff was threatening to find her husband with a crew of men and inflict serious bodily harm upon him. He had access to numerous firearms, including shotguns, .22 calibre rifles and big long guns, many of which were illegal. He was under psychiatric care and suffered from depression, anxiety attacks and manic depressive episodes. He was unstable, had a wicked temper, had an unpredictable nature, and his response to police was uncertain, therefore police should exercise caution when approaching him.

The call taker, in addition to entering the information on the computer, also spoke with the supervisor in charge of the communications section. The communications supervisor made direct contact with the complainant to get more information and to corroborate her report. She also directed computer searches to determine whether the police had any prior involvement at the plaintiff's residence and whether he or his wife had prior criminal histories. This resulted in information being provided which disclosed that the plaintiff had a prior criminal history involving the use of offensive weapons.

The communications supervisor communicated directly with a platoon commander who had assumed responsibility for the investigation. He determined that, in light of the nature of the call, it was necessary to involve the police tactical unit in accordance with written policy. The tactical unit was a team specially trained to deal with firearm calls and provide enhanced public safety as well as member safety. Rather than storm the house, the tactical squad created a security perimeter, telephoned the house, and persuaded the plaintiff and his wife to come out and surrender with their hands in the air. The plaintiff was made to kneel down to be handcuffed and the police searched the residence and found a number of firearms, stored improperly in some respects. Those firearms were

seized and disposed of by police arrangement with the plaintiff and he was not charged with any offence in connection with the firearms. Webster was taken to a nearby community police station, his handcuffs were removed, and he remained for about one hour before his release. Webster's wife was not handcuffed but also driven to the nearby community station.

At a civil trial in the Alberta Court of Queen's Bench Webster and his wife sued police, among others, for wrongful arrest and detention and claimed damages for nervous shock, assault and damage to their house. The trial judge found the police, including the Chief and the platoon commander, used excessive force. Additionally, even if the use of the tactical team was initially justified the police were also liable in tort because the plaintiff's detention was unlawful. He said:

> I conclude that in all the circumstances of this case, the use of the tac team was not justified and constituted a significantly greater use of force than was necessary. Within the principles in the Mann decision, the [plaintiffs'] right to security within their home was seriously breached. There was insufficient evidence of danger to [the plaintiff], the public or the police to justify the steps taken. However, even if the use of the tac team might have been justified initially, I am satisfied that the detention of the [the plaintiffs] was not.
>
> When the [the plaintiffs] left their home, with their hands empty and raised, it was immediately evident that they were not a threat to anyone. Nevertheless, the police methodically continued along with the standard procedure of the police manual. They considered that a search for the firearms was mandatory and that it was necessary that the [plaintiffs] be absent from the premises while this was conducted. In addition, the search was left to the tac team who adopted the approach that another dangerous individual could well be lurking in the house. This was carried on in the face of information from [the complainant] that nobody but her parents and a small dog were in the house and confirmation from [the plaintiff's wife] that nobody but she and her husband were there.
>
> [The plaintiff] was treated like a dangerous criminal by being forced to his knees and handcuffed while [his wife] was placed in a police car. They were each taken away in view of bystanders and a TV film crew. In the circumstances, the police could have readily located the weapons through directions voluntarily given by both parties and returned the [the plaintiffs] to their home in short order. Unfortunately, [the platoon commander], who was in charge, never saw the [the plaintiffs] leave their home and nobody appears to have had the authority or the inclination to exercise any independent judgment on the scene. The procedure adopted was inexorable and incapable of any flexibility. I find that it was not justified and resulted in the unlawful detention of the [plaintiffs].

The plaintiff was awarded $6,000 in damages while his wife was awarded $4,000.

The defendants, including the Chief of police and the platoon commander, appealed to trial judge's ruling to the Alberta Court of Appeal arguing the plaintiff was not wrongfully detained or that the police used excessive force when they used the tactical team during this operation. In a Memorandum of Judgment the Alberta Court of Appeal allowed the appeal and dismissed the plaintiff's actions.

"Police officers are not expected to measure the precise amount of force the situation requires. Nor will they be denied the protection of s. 25(1) if they fail to use the least amount of force that would achieve the desired result. Allowance must be made for an officer, in the exigency of the moment, misjudging the degree of necessary force. Accordingly, the immediate decisions a police officer makes in the course of duty are not assessed through the 'lens of hindsight'"

Excessive Force

Police officers will be exempt from liability under s.25 of the *Criminal Code* "if they use no more force than is necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves." In citing a previous judgment (Crampton v. Walton, 2005 ABCA 81), the principles surrounding police use of force were summarized as follows:

> Police officers are not expected to measure the precise amount of force the situation requires...Nor will they be denied the protection of s. 25(1) if they fail to use the least amount of force that would achieve the desired result. Allowance must be made for an officer, in the exigency of the moment, misjudging the degree of necessary force…Accordingly, the immediate decisions a police officer makes in the course of duty are not assessed through the "lens of hindsight"…[references omitted]

In this case the trial judge made three palpable and overriding errors. First, his conclusion was inappropriately based, in part, on hindsight. Second, he was misguided in concluding that the police ought to have obtained more information before employing the tactical team. For example, it was unlikely that the plaintiff's counselling psychologist would have agreed to provide information without his consent. And finally, the trial judge neglected to consider that "the police need not measure the precise amount of force required and must be given allowance for misjudging the degree of force required because of the exigency of the moment. As well, he neglected to consider whether their assessment of the circumstances and danger was reasonably held." The Court stated:

> If the trial judge had not made the above errors, he would have been unable to conclude that the use of the tactical team constituted excessive force. The police assessment of the circumstances was reasonably held and in good faith. They had a report suggesting that the respondent had made threats against [the complainant's] husband; had a criminal record; was under psychiatric care and was unpredictable; and was in possession of numerous firearms including illegal ones. Deployment of the tactical team under these circumstances was required by the Police Service's Policy…
>
> Given the need for public protection in the circumstances known to the police, the use of the tactical team did not constitute excessive force. [paras. 32-33]

The Detention

The Supreme Court of Canada outlined in *R. v. Mann* the circumstances in which a person may be detained for investigative detention:

> The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test.

In this case, the trial judge misapplied the *Mann* principles. The Court stated:

> His conclusion on improper detention was apparently based on his view that [Webster] and his wife were not a threat because they came out of the house with their hands up; the police could have searched the house while [Webster] and his wife remained in it; [Webster] was forced to kneel while he was handcuffed; and a TV film crew and others observed all this.
>
> On the one hand, the trial judge failed to take account of "all the circumstances", as required by Mann. On the other, he took account of circumstances that were irrelevant or beyond the control of the police.
>
> Among the circumstances he neglected to consider were whether it was realistic to expect the police to conduct a weapons search while [Webster] was in the house and, if not, whether it was realistic to keep [him] standing outside the house given the cold temperature that day. He also failed to consider whether [Webster's] privacy interests would be better served if he was taken to the police station rather than left in the glare of publicity.
>
> As for circumstances that he considered, the presence of the media and others was not within the control of the police. This was an irrelevant consideration in his assessment of the overall circumstances.
>
> A proper application of Mann compels the conclusion that the detention was not improper.

> There was a clear nexus between the [Webster's] detention and the officers' reasonable belief that [Webster] was implicated in the criminal activity under investigation (threats and possession of illegal guns). It was not unreasonable for the police to conclude that [Webster] should be absent from the house during the weapons search. The matrix of the circumstances included the weather, the presence of curious onlookers on the one hand, and the relatively short time during which the respondent was detained. These circumstances also supported the reasonableness of the police action. [paras. 37-41]

Complete case available at www.albertacourts.ab.ca

CRIMINAL CODE DISTURBANCE REQUIRES MORE THAN ATTRACTING CURIOSITY

R. v. Walker, 2007 ONCA

At about 6:00 pm the accused, a uniformed patrol officer, was patrolling in a marked police car when he saw the complainant walking. The officer thought the complainant might be a person wanted on an arrest warrant. As the officer attempted to make eye contact, the complainant glanced over at him and then quickly looked away. The officer decided to speak to him and also had concerns, arising from the clothing that the complainant was wearing, that he might be a gang member.

The officer made a U-turn and pulled his police car partially up onto the grassy curb area beside the sidewalk. The complainant was a short distance ahead of the officer but, after the police car pulled up onto the curb area, the complainant stopped, turned around and walked back to the police car. The officer spoke to the complainant who responded in a loud voice. Upon observing the complainant's face at close range, the officer realized that he was not the man wanted on a warrant.

The complainant continued to "vent" at the officer, including the use of insulting language, consisting of accusations of racism. The complainant also asserted that the officer was only questioning him because he was a black male. The officer got out of his police car and asked the complainant to identify himself, but the complainant continued to make comments in a loud voice to the officer. The officer attempted to contact the police dispatcher by his radio but the battery fell out of the unit rendering it inoperable. The complainant told the officer again that he was a racist and suggested that the officer arrest him.

Some residents of the area came out of their houses to see what was going on. The officer told the complainant that he was under arrest for causing a disturbance and told him to turn around so that he could be handcuffed. The officer got the handcuffs on one of the complainant's wrists but the complainant then began to resist. The officer delivered a knee strike to the complainant and forced him to the ground, causing his cheek bone to fracture. Once the complainant was on the ground, the officer completed handcuffing him. The officer placed the battery back into his radio and called for backup and other officers arrived on scene to assist.

At trial in the Ontario Court of Justice the officer was convicted of assault causing bodily harm and given a conditional discharge. The trial judge concluded that the officer left his police car to pursue an investigation into whether the complainant was a gang member which resulted in a detention. She found the detention unlawful. At the time the officer left his car he knew the complainant was not the man wanted on a warrant and further, the officer had no reason to believe the complainant was involved in or had any knowledge of any criminal offence. The trial judge also ruled the officer was not acting in the lawful execution of his duties when he made the arrest. The disturbance that occurred resulted from the officer unlawfully detaining the complainant and therefore the arrest for causing a disturbance was unlawful. There was no justification to use force and the Crown had proven beyond a reasonable doubt that the officer had assaulted the complainant and caused bodily harm.

The officer then appealed to the Ontario Superior Court of Justice alleging the trial judge erred in finding a detention. Had he found no detention, the officer said the trial judge would not have concluded the arrest was unlawful. The Crown submitted that the issue of detention was irrelevant because there was no disturbance and therefore no basis upon which the officer could have arrested the

complainant. Rather, the officer created the disturbance by persisting in unjustifiably questioning the complainant.

The appeal judge ruled that is was open to the trial judge to find a detention and even so, there was no disturbance as defined by the case law. There was no "externally manifested disturbance" even though certain people in the area had their attention drawn to the encounter. Merely attracting curiosity is not the same as causing a disturbance. Further, any degree of disturbance was instigated by the officer. The appeal judge stated:

> The trial judge pointed out that the [officer], once he knew that the complainant was not the man he was seeking and that the complainant was objecting to being questioned, could simply have driven off. Instead, the officer got out of his police car, thereby exacerbating the situation, and persisted in questioning the complainant when he had no reasonable grounds to do so. While counsel for the [officer] contended that the [officer] had the right to ask questions because of the complainant's "bizarre" conduct, the fact is that there was no evidence of such conduct nor was there any evidence to base any reasonable belief that the complainant might have been mentally ill or intoxicated and therefore a danger to the public peace.
>
> I do not quarrel in any way with the point made by counsel for the [officer] that police officers ought not to be subject, in the course of their duties, to verbal abuse or insults at the hands of citizens. At the same time, however, citizens have the right to object to the actions of the police where they have a reasonable basis to believe that an officer may be exceeding his or her authority. This is particularly important in the context of investigative detentions for the reason that Mr. Justice Iacobucci set out in R. v. Mann...where, in discussing some of the dangers associated with such detentions, he noted... " ... the potential for abuse inherent in such low-visibility exercises of discretionary power ..."
>
> It would have the proverbial "chilling effect" on the rights of citizens to object to such abuse by police officers if the consequences of objecting were to be for the objectors to then find themselves charged with a criminal offence such as causing a disturbance. In so concluding, I do not mean to condone the conduct of the complainant regarding the manner in which he chose to express his objections. I, like the trial judge, find his use of insulting language towards the officer disturbing. However, it remains the fact that, however objectionable the conduct of the complainant may have been, on the facts before the trial judge she was entitled to find, as a fact, that it did not rise to the level of causing a disturbance nor could the [officer] reasonably have concluded that it did.

The officer then appealed to the Ontario Court of Appeal. In dismissing the appeal in a short Endorsement, the Court stated:

> Even if there was a "disturbance," in common parlance, there was no "disturbance" within the meaning of the Criminal Code in this case. The trial judge found that the [officer] had no right to continue investigating or questioning the complainant. While the complainant's loud and rude protestations may have been "disturbing" to some, they did not constitute reasonable grounds for the [officer] whose improper actions instigated the exchange to believe there was a criminal disturbance. [para. 5]

Complete case available at www.ontariocourts.on.ca

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