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.

COPS REMAIN TOPS OF TRUSTED JUSTICE PROFESSIONS

For the sixth year in a row, police officers are more trusted by Canadians than judges, lawyers, or law makers. In a May 2007 Leger Marketing report entitled *"Profession Barometer"* (www.legermarketing.com), police officers were once again the most trusted profession in the criminal justice system. The report, which provides trust ratings for 23 professional occupations, saw police officers attain an 84% trust rating, followed by judges at 74%, lawyers at 52%, and politicians (law makers) at 15%.

Police Officers

Police officers improved by three percentage points (+3%) on the trust barometer over last year and are now at a five year high. They are trusted most in Atlantic Canada (87%), but least in Alberta (80%). Ontario saw the greatest gain (+7%) followed by British Columbia (+3%) and Quebec (+2%). Alberta (-5%), the Prairies (-3%), and the Atlantic Provinces (-2%) all saw police trust ratings drop.

Judges

The trust rating for judges dropped four percentage points (-4%) over last year. Judges are trusted most in British Columbia (77%), where their rating jumped two percent (+2%) since 2006. However, their trust ratings dropped in all other regions, including the Atlantic Provinces (-8%), Quebec (-1%), Ontario (-4%), the Prairies (-11%) and Alberta (-2%).

Lawyers

Lawyers now sit at a 52% trust rating, up four percent (+4%) over last year and also, like police, sit at a five year high. Lawyers are trusted most in Atlantic Canada (57%), but least in British Columbia (46%). They saw gains in all regions (Atlantic Canada +5%, Quebec +5%, Ontario +3%, the Prairies +7%, Alberta +3%), except British Columbia where they lost a single point (-1%).

Politicians (Law Makers)

Politicians have remained at the bottom of the rankings for the fifth straight year, with a 2007 trust rating of 15%, up one point from 2006. Politicians are trusted most in Alberta (22%), but least in Quebec, Ontario, and British Columbia, all at 14%. Politicians made gains in Alberta (+7%), followed by the Prairies (+5%), Quebec (+4%), and Ontario (+1%). There was no change in British Columbia while the Atlantic Provinces dropped seven percentage points (-7%).

An American Perspective

The Canadian experience is quite similar to its neighbours to the south. In an August 2006 Harris Poll (www.harrisinteractive.com), when U.S. adults were asked who they would trust to tell the truth, police officers had a 76% trust rating while judges sat at 70%, Members of Congress (politicians) at 35% and lawyers at 27%. All of these occupations saw an increase over a 2002 poll (police officers +7%, judges +5%, and lawyers +3%), except Members of Congress which remained unchanged.

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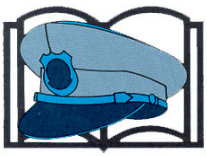
'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"I am a Criminology major and Legal Studies minor at [university]. I find your newsletter to be extremely informative and contemporarily contextual. I would be honoured and privileged if I could be the recipient of the newsletter. I believe that it will aid in my studies while remaining me informed with many and dynamic processes of justice and law." - **University Student, British Columbia**

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"May I be added to your mail out list for the latest editions of the 10-8 newsletter? I find I'm using them more and more to keep up to date and I appreciate the user friendly format." - **Police Constable, Ontario**

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"Can you please add me to your electronic subscription for 10-8...I find your material helps guide the manner in which I complete a report to Crown." - **Police Constable, British Columbia**

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"I have read two of your newsletters and all I can say is WOW. I have been a constable for approximately 6 years now. I find your case law examples to be well laid out and easy to read." - **Police Constable, Manitoba**

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I am a cadet with the Atlantic Police Academy and I just recently had a chance to read your recent edition of In Service...I found the articles very interesting and helpful for me as a new recruit." - **Police Cadet, Atlantic Police Academy**

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"I am the new Training Sergeant. Please forward your publication to me. Thanks and your efforts and commitments to policing are certainly appreciated down here in Ontario." - **Police Sergeant, Ontario**

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"I have received 10-8 a few times and enjoyed reading it. Beyond being enjoyable reading material, I find it offers good case law references." - **RCMP Constable, British Columbia**

IN-SERVICE LEGAL ROAD TEST

The "In Service" Legal Road Test is a simple multiple choice quiz designed to challenge your understanding of the law. Each question is based on a case featured in this issue. See page 27 for the answers.

1. Wiretaps related to criminal organization offences do not require the police to consider the failure of, the likelihood of success, or the impracticability of other investigative procedures.
   (a) True
   (b) False

2. Arbitrary vehicle stops under provincial traffic laws infringe s.9 of the *Charter* but are saved by s.1 regardless of the reason for the stop.
   (a) True
   (b) False

3. Personal "offence-related property" seized pursuant to the *Controlled Drugs and Substances Act* is automatically forfeited if the person is convicted of a designated substance offence.
   (a) True
   (b) False

4. Personal "offence-related property" seized pursuant to the *Criminal Code* is automatically forfeited if the person is convicted of an indictable offence.
   (a) True
   (b) False

5. An arrestee does not have a reasonable expectation of privacy in the soles of his shoes seized by police upon booking.
   (a) True
   (b) False

NEW RCMP COMMISSIONER APPOINTED

On July 16, 2007 Mr. William J.S. Elliot was appointed the 22nd Commissioner of the Royal Canadian Mounted Police. He and his wife Carolyn have four children.

DANGEROUS DRIVER's CAR FORFEITED AS OFFENCE-RELATED PROPERTY

R. v. Adamson, 2007 BCSC 745

The accused pled guilty to dangerous driving causing bodily harm and refusing to provide a breath sample in British Columbia Supreme Court. She had been drinking before she drove into one victim, dragging him under her vehicle 88 feet and seriously injuring him. He sustained a spiral fracture to his left femur and punctured a lung. She then drove into a cyclist, injuring him and shearing his bicycle in half. The cyclist sustained a chipped vertebra, nerve damage, abrasions, and short term memory loss. In addition to seeking a jail sentence and a driving prohibition, the Crown sought forfeiture of the accused's vehicle she was driving at the time of the offence, a 2002 Mercedes Benz Kompressor valued at $26,000.

Section 490.1(1) of the *Criminal Code* requires a court to order forfeiture of property when a person is convicted of an indictable offence and the court is satisfied, on a balance of probabilities, that the property is offence-related property and an offence was committed in relation to that property unless the impact of the forfeiture would be disproportionate. *"Offence-related property"* is property by means or in respect of which an indictable offence is committed or that is used in any manner in connection with the commission of an indictable offence.

The accused argued that the offence-related property provisions target the tools of the trade, attack the means of the crime rather than its ends, and should be limited to circumstances where there is an element of deliberation, such as a vehicle used to commit a bank robbery.

Justice Loo found the forfeiture provisions to be extremely broad and encompassed the vehicle driven in this case. "There is no dispute that [the accused's] vehicle is offence-related property," she said. "It is impossible to commit the offence of dangerous driving without a vehicle." She continued:

> Once the Crown has established that the vehicle is offence-related property…the onus shifts to [the accused] to establish that the impact of the

> forfeiture would be disproportionate based on the criteria in s.490.41(3). That is, [she] must establish that an order of forfeiture of the vehicle would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence, and her criminal record, if any. [para. 56]

In this case the judge found the order for the forfeiture of the vehicle was not disproportionate and ordered it forfeited.

Complete case available at www.provincialcourt.bc.ca

NON SAFETY RELATED USE OF FLASHLIGHT UNREASONABLE

R. v. Grunwald, 2007 BCSC 767

Two police officers set up a roadblock for the purposes of stopping and checking all vehicles for *Motor Vehicle Act* infractions. The accused, driving a pick-up truck with an extended cab and a canopy fitted with dark, tinted windows, was stopped in the roadblock. While one officer checked driving and insurance documents the second officer checked the sticker on the licence plate. While doing so, he smelled an odour of marihuana but did not believe he had enough grounds to arrest on that basis. After confirming the decal was valid, the officer shone his flashlight through the side tinted canopy window and saw a number of garbage bags. One of the bags was partly opened and he could see it contained clear Ziploc bags holding marihuana.

"In summary, I find that visually searching the cargo area by using a powerful flashlight to penetrate the tinted windows constituted an unreasonable search contrary to s. 8 of the Charter."

The officer went up to the accused and told him he was under arrest for possession of a controlled substance and directed him to park his vehicle. He pulled over and stopped, but took off when the officers approached. After a short pursuit the accused was arrested. His truck was searched and police found marihuana, $390,600 in cash, cell phones, a pager, calculators, and notebooks containing phone numbers and calculations.

At trial in British Columbia Supreme Court on a charge of possessing marihuana for the purpose of trafficking, the accused argued, among other grounds, that his rights under s.8 of the *Charter* had been breached when the police used a powerful flashlight to look through the tinted glass and into the cargo area of the pick-up and the evidence should be excluded under s.24(2). The Crown, on the other hand, argued the officer's conduct was not a search at all as recognized in s.8; the marihuana was in plain view and the arrest was lawful.

In assessing whether a breach of s.8 had occurred Justice Joyce made a number of findings, including:

- The officer had no safety concerns when he shone his flashlight into the canopy;
- The officer could not see into the cargo area with his naked eye, unaided by his flashlight;
- The officer did not have reasonable grounds to arrest the accused before he looked into the canopy based only on the smell of marihuana.

Using the totality of the circumstances test, Justice Joyce found the accused did have a reasonable expectation of privacy in the cargo area of his truck that "was covered by the closed canopy and blocked from public view by the darkly tinted windows." He stated:

> [The accused] was present when the search was carried out. It was carried out with regard to the interior of his motor vehicle of which he had possession and control. He had covered the cargo area of his truck with a canopy that had a door that closed and windows that were tinted so as to preclude viewing in normal conditions without the use of a flashlight. It cannot be said that the contents of the cargo area were on public view. [The accused] had taken steps to hide them from view. [The accused] had the ability to regulate access to the cargo area and to exclude others from it. While the technique that [the officer] used to view the interior was less intrusive than physically entering into the space over which the owner sought privacy, he had to resort to using a high powered flashlight, described as being equivalent to a car's headlight, in order to pierce the veil created by the darkly tinted windows. In my view there was an intrusion into [the accused's] territorial privacy. The technology used by the police, while obviously not as intrusive or penetrating as x-ray technology was not the same as looking through a clear glass

> window. It was only by using a device that [the officer] could look through the visual barrier that he had erected between his private space and the public.
>
> .....
>
> In my view, the present case is an example of the use of technology, albeit at a relatively low level, to intrude on the privacy of an individual. [references omitted, paras. 31-32]

Justice Joyce also found the use of the flashlight was distinguishable from cases where courts have allowed officers to shine flashlights into vehicles for officer safety. He wrote:

> In the case at bar, the use of the flashlight was not incidental to the check stop and was not used for the purpose of employing officer safety. [The officer checking the accused's licence and insurance] found it unnecessary to use his flashlight to perform a visual inspection of the interior of the cab for officer safety. He had done that visual inspection and assured himself there were no safety concerns. He was nearly finished with his inquiries related to the purpose for which he had detained [the accused], i.e. to ensure a valid driver's license, insurance, etc. He had only to run the information through the police data systems before [the accused] could be on his way. After [the arresting officer] had checked the insurance tag on the licence plate any lawful duties he had to perform in connection with the purpose for the detention had come to an end. He then proceeded to use his flashlight to undertake a search, not as a proper search incident to the check stop, but as part of a criminal investigation. [para. 37]

And further:

> The search was not incidental to the lawful check stop, nor was it otherwise authorized by law. There were no exigent circumstances. I conclude that the initial visual search with the flashlight was unreasonable and contrary to s. 8 of the Charter. As a result, the arrest was also unlawful because the grounds were dependent upon a Charter violation, and the subsequent physical search of the interior of the vehicle was also unlawful and unreasonable. [para. 41]

The evidence, however, was ruled admissible under s.24(2). Although visually searching the cargo area by using a powerful flashlight to penetrate the tinted windows constituted an unreasonable search contrary to s. 8 of the *Charter*, the subsequent police conduct flowed naturally and reasonably from the discovery of the marihuana. The totality of the breach was not so serious so as to warrant excluding the evidence.

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

ROOFTOP VENT SNIFF VIOLATES s.8 *CHARTER*

R. v. DiPalma, 2007 BCSC 536

Police received a complaint of a suspected marihuana grow operation at a business complex consisting of three buildings and a total of 55 strata units. Vehicle entry to the complex was controlled by a gate that was open in the day but closed at night and required a key fob to open. An officer met with the complainant, who was a member of the strata council, and was shown two black garbage bags containing marihuana clones and shake that was found in a dumpster at the complex. The officer asked if he could go on the roof of one of the buildings to smell the vents. A ladder was obtained, and the officer went onto the roof and checked the vents coming from each of the strata units. An odour of marihuana was detected coming from two vents and a search warrant was obtained for unit 107.

Surveillance was set up on the unit and the accused was seen to enter and exit it. He was pulled over a few minutes later and keys were found on him that were used to open the unit when police executed the warrant. Police found 355 marihuana plants and extensive equipment used in the operation. The accused was charged with producing marihuana.

During a *voir dire* in British Columbia Supreme Court the officer testified he never considered getting a warrant and believed he had lawful permission to climb onto the roof from the strata council member and detect the odour from the vents. He assumed the complainant had the authority to permit him access to the roof.

The Crown argued that the accused did not have a reasonable expectation of privacy in the roof area above the strata unit and therefore could not contest the lawfulness of the search. The accused

was not present during the search, he never exercised control over the roof, did not have exclusive right to determine who had access, and each roof unit was common property. The strata council was responsible for maintaining and repairing the roof and had the right to access it. The accused submitted the roof was not common property but part of his strata lot.

Justice Ehrcke agreed with the accused. "The fact that a limited number of other persons may have a right of access to the roof for the specific purpose of maintenance and repair does not eliminate the owner's claim of a privacy interest," he said. He continued:

> …I find that the owner of each strata lot would have a reasonable expectation of privacy in the roof area of their unit. The fact that the roof of [the accused's] unit could be accessed by the strata council for purposes of repair and maintenance does not detract from the fact that he would have a reasonable expectation that other persons would not be permitted access to his roof for purposes unrelated to repair and maintenance. Accordingly, I find that [accused] does have standing to challenge the lawfulness of the police search of his roof.

The Crown was unable to establish the search was nonetheless reasonable. Justice Ehrecke found there was "no basis for concluding that an individual strata council member would have the authority to grant the police access to the roof for the purpose of carrying out a police search." Nor was there evidence respecting the identity of the complainant. The complainant's statement to police on this point was hearsay and could not be used to prove the truth of that statement. Thus, the accused's rights under s.8 of the *Charter* were breached.

The evidence, however, was admissible under s.24(2). The breach was not highly serious and the police acted in good faith. They did not realize their conduct was unlawful and believed they had valid consent to search. Further, the charges were serious and the evidence was crucial to the Crown's case. The exclusion of evidence would be more damaging on the repute of the administration of justice that its admission. The accused was convicted of both charges.

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

LEGALLY SPEAKING:

Reasonable Grounds: Impaired Driving

"As to the objective components [of reasonable grounds], I am satisfied that the appeal court judge erred in assessing the various indicia on which the constable formed his belief in isolation, rejecting each on the grounds of consistency with other explanations. The indicia must be evaluated in total. Specifically the appeal court judge reviewed the [accused's] submissions that each of these indicia were equivocal or consistent with the behaviour of a driver who was not impaired. Although acknowledging that the circumstances must be taken together, in effect he weighed them separately, and concluded that the totality of the evidence did not overcome the equivocal nature of the parts. In doing so he also omitted reference to the [accused's] failure to respond to the flashing lights of the following police car while driving five city blocks." - Nova Scotia Court of Appeal Justice Chipman *R. v. Andrea*, 2004 NSCA 130

REASONABLE GROUNDS EXISTED DESPITE NO DRUG TRANSACTION SEEN

R. v. Stebeleski & Santangelo, 2007 MBCA 1

A police sergeant investigating a supplier of drugs named Silva received information from an anonymous source that traffickers would place an order to Silva using a coded message on his pager. A dial number recorder warrant was obtained and Silva's pager was monitored. The messages were decoded and police were able to determine the amount of drugs ordered and when the delivery would take place. The police intercepted a message that informed them the accused Stebeleski would meet Silva at 1:00 pm to purchase five ounces of powdered cocaine and six ounces of crack.

The sergeant instructed his officers to stop Stebeleski's vehicle immediately after the vehicle met with Silva and arrest the occupants. Shortly after 1:00 pm the vehicles met and then departed in different directions. However, no actual transaction was seen. Stebeleski was driving and the accused

Santangelo was a passenger. Both were arrested and placed in the back of a police vehicle. Santangelo had a pager and a substantial amount of cash while Stebeleski had a cell phone and cash. A brown paper bag was found resting between the driver's seat and the centre console containing five ounces of powdered cocaine and six ounces of crack. Another cell phone and two score sheets were also found in the vehicle. The vehicle was searched further at police headquarters and more cocaine and a cell phone charger was located.

At trial in Manitoba Court the accuseds were convicted of possessing cocaine for the purpose of trafficking. The trial judge concluded the police had reasonable grounds to make the arrest and the search of the vehicle without a warrant did not violate s.8 of the *Charter*. Both accuseds appealed to the Manitoba Court of Appeal arguing, in part, that their arrests and incidental searches were illegal because the police did not see an actual transaction take place and therefore did not have reasonable grounds to conclude an offence had occurred. It was thus contended that the physical evidence should have been excluded.

Justice Huband, authoring the opinion of the Court, first noted that since the sergeant gave the order to arrest and search he would need the reasonable grounds to believe the accused committed the indictable offence of possessing cocaine for the purpose of trafficking. In holding that the sergeant did have reasonable grounds, Justice Huband stated:

> [The sergeant] was confident that the occupants of the vehicle registered to Stebeleski, who turned out to be Stebeleski and Santangelo, would be found with cocaine as a consequence of a transaction with Silva. Thus, [the sergeant] ordered their arrest and a search of the vehicle incidental to the arrest. His confidence was well placed:
>
> (1) Silva was a known drug dealer.
>
> (2) Silva received coded messages from purchasers on a pager. Police authorities were able to intercept messages on the pager.
>
> (3) The police had broken the code used in pager messages. They were able to identify orders for the supply of drugs emanating from a vehicle registered to Stebeleski.
>
> (4) ... a pager intercept informed [the sergeant] that the occupant or occupants of the Stebeleski vehicle wished to meet with Silva at 1:00 p.m. to purchase a quantity of drugs.
>
> (5) A few minutes after 1:00 p.m., a meeting did take place. The passenger in the Stebeleski vehicle is first to engage Silva in conversation and is joined by the driver. At the conclusion of an 18-minute meeting with Silva, the Stebeleski vehicle and the vehicle driven by Silva depart in opposite directions.
>
> (6) The passenger in the Stebeleski vehicle has the same general appearance as a man seen meeting with Silva and suspected of purchasing drugs from him in the month of August.
>
> In my view, the trial judge was fully justified in concluding that [the sergeant] had reasonable grounds to believe that a transaction had taken place and to order the arrest and the incidental search.... [paras. 14-15]

The accuseds' conviction appeals were dismissed.

Complete case available at www.canlii.org

TELEWARRANT CRITERIA REQUIRES COMMON SENSE APPROACH

R. v. Cam & Phun, 2007 BCPC 0038

Police received a report of electricity theft from BC Hydro and launched an investigation. A search warrant was subsequently obtained and submitted by telecommunication to a justice of the peace. The Information to Obtain said the officer called the Surrey Provincial Courthouse but was told there was no justice of the peace available. He said it was impractical to attend the Burnaby Justice Centre from the Surrey detachment because of distance (25 km), time (45 minutes each way), and manpower considerations (limited resources available). Police found 622 marihuana plants in the basement of the premises and the accuseds were charged with marihuana production and possession for the purpose of trafficking.

Section 487.1 of the *Criminal Code* allows a peace officer who believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant by means of

telecommunication. Under s.487.1(4) an information submitted by telephone or other means of telecommunication must include a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice.

During a *voir dire* in British Columbia Provincial Court the accused attacked the search warrant on a number of grounds, including that it was not impracticable for the police to attend in person. Judge Bowden, however, found it was impracticable for the officer to appear personally before a justice of the peace. He said:

> [I]t is my view that travelling 28 kilometres from the Surrey detachment to the Burnaby justice centre would also be impracticable. From a commonsense standpoint, once it has been established by the police officer that a justice of the peace is not available at the Surrey courthouse, then the impracticability of a personal appearance is established because of the distance and travel time necessary for a personal appearance in Burnaby. Furthermore, I am not to substitute my view for that of the justice of the peace who issued the warrant and based on the reasons stated by [the officer], the justice of the peace could have properly issued a telewarrant.

Section 487.1 had been complied with and there was no breach. The evidence was admissible.

Complete case available at www.provincialcourt.bc.ca

FAMILIAR FRENCH PHRASES:

"*voir dire*"–"to speak the truth". A trial within a trial to decide a particular issue. A hearing which a judge conducts in the absence of the jury to determine if evidence is admissible or some other matter relating to a trial. For example, if the prosecution seeks to admit a confession of the accused, the court must conduct a *voir dire* to determine if the confession was obtained voluntarily.

POLICE OFFICER NOT DUTY BOUND TO PROVIDE PHONE BOOK IN CIRCUMSTANCES

R. v. Chase, 2007 NBCA 39

The accused was stopped by police for speeding and was subsequently arrested for impaired driving. He was read his *Charter* rights and given a demand for breath samples. On arrival at the police station, the accused tried but was unsuccessful in contacting his lawyer of choice. He was told duty counsel was available and the on-call duty counsel was contacted by phone. The phone was given to the accused and the officer left the room. Two breath samples were subsequently obtained with readings of 140mg%.

At trial in New Brunswick Provincial Court the accused was convicted of operating a motor vehicle with a blood alcohol content over 80mg%. He appealed to the New Brunswick Court of Queen's Bench arguing his s.10(b) *Charter* rights were violated because the police did not provide him with a copy of the telephone directory but instead called duty counsel for him. Justice Garnett, however, disagreed. She ruled that the accused chose to speak to duty counsel, took the breathalyser test without protest, and did not testify on the *voir dire*. The accused's appeal was dismissed.

The accused then appealed to the New Brunswick Court of Appeal arguing the implementational duties on a police officer under s.10(b) were breached because the police officer, not the accused, dialled the number of the on-call legal aid lawyer and did not provide a copy of the white and yellow pages. In a unanimous judgment the Court dismissed the application for appeal. There was no evidence the accused was dissatisfied with the officer's conduct or that he would have done something different from what he did.

Complete case available at www.canlii.org

Did you know that the Supreme Court of Canada recently ruled that a roadblock, set up by police within minutes of receiving a 911 call indicating that a number of persons were openly displaying handguns in a strip club's parking lot, was constitutional? see page 34!!!

ROOM-TO-ROOM SEARCH FOR OCCUPANTS LAWFUL

R. v. Chan, 2007 BCPC 39

At about 10:00 pm police officers were dispatched to a report that two males with a long pole were cutting wires in front of a residence. No address was provided but the house was described. Police attended and found a house with a cut wire, hanging down from the side of the house. One officer, using a flashlight, went to the back of the house looking for signs of forced entry. None were found so police went to the front door and rang the doorbell, wanting to ensure the occupants were safe and had the right to be in the house.

The accused came to the door, stepped on to the porch, and closed the door behind him. He said he had not seen any suspicious persons and said the cut wire happened a week ago when a truck hit it. The accused, however, did not answer questions about whether the house belonged to him. Noting that the accused looked cold, an officer asked if they could go inside. While standing in the front foyer, the officers smelled a strong odour of marihuana. The accused produced identification and said he lived elsewhere. Concerned about the possibility of booby traps or other persons with weapons, the officers did a cursory room-to-room search to check for other occupants and ensure officer safety. They also believed they had reasonable grounds to believe there was a marihuana grow operation and wanted to ensure nothing was destroyed before getting a warrant.

"The police also have a duty to investigate suspicious activity and in doing so, they have a license to knock on doors and request information."

Two grow rooms were found and the accused was arrested and transported to the police detachment. The residence was secured and a telewarrant was executed. Police found 457 marihuana plants and charged the accused with marihuana production and possession for the purpose of trafficking.

During a *voir dire* in British Columbia Provincial Court the accused argued, among other issues, that the warrantless entry into the premises violated s.8 of the *Charter*. In his view, the suggestion by the police to go inside the house was a ruse in order for them to investigate the suspected marihuana grow operation. They should have obtained informed consent to enter the residence and advised the accused of his right to counsel under s.10(b). As a result, he contended the evidence obtained should be excluded under s.24(2).

Justice Rae disagreed with the accused and found the police entry into the residence did not violate the *Charter*. She stated:

> The law with respect to a warrantless entry of a residence is clear. The police have a duty to enter a residence to ascertain the safety of the residents when there is a hang up call, and there is no answer to the door or someone answers and says everything is alright. The police are allowed to enter a residence in hot pursuit when they have reasonable and probable grounds to believe there is an offence in progress. This duty is limited to situations where there is a concern for protection of life and the safety of the residents. They are also allowed to enter a residence on the invitation of the resident. The police also have a duty to investigate suspicious activity and in doing so, they have a license to knock on doors and request information.
>
> The argument here really boils down to the motives of the police when they made the suggestion to the accused that they could go inside. If the police had used that suggestion as a ruse to get into the residence because they had a strong hunch that the accused was involved in some kind of criminal activity, then it was an unauthorized entry absent the informed consent of the accused, and his Section 8 and 10 Charter rights were breached. If the court finds that the accused invited the police into the residence, then the initial entry was lawful.
>
> The police say that they literally stumbled onto this marihuana grow operation. They say that their only motive for suggesting they enter the residence was that the accused obviously appeared to be cold and they wanted to further question the accused to ensure that the accused had a valid right to be in the residence and that the occupants, if any, were safe.
>
> They say that the cut wire and the explanation for it given by the accused, which was inconsistent

with the information they had received, required that they confirm the identity of the accused and his right to be at the residence. I find that, given the information the police had at the time, this was a valid and genuine concern. ...

I am satisfied on the evidence that when the police knocked on the door of the residence, they were intent on determining whether the male who answered the door was a suspect or an innocent bystander. They were in the process of determining his identity and whether or not he was entitled to be in the residence at the time. They had not targeted him as a suspect in a criminal investigation. [One officer] noted that it was not unusual for some people to speak with the police on the doorstep after closing the door. He noted that there are sometimes concerns around small children or pets escaping.

The evidence of the police was that the accused appeared visibly cold, and as a convenience, they commented that they could go inside. In the circumstances, given the weather, which I find to have been chilly, and the fact that the accused was inappropriately dressed for the conditions, this does not in my view appear to be an unreasonable suggestion. The evidence of all three officers was that the accused opened the door and indicated to the officers to step inside. There is nothing in the evidence to suggest that the accused felt he was obliged to comply with a police request to enter the premises. There is nothing to suggest that the police were not content to deal with the accused on the doorstep. He wasn't free to leave until the police could satisfy themselves that he had a valid right to be in the residence, in furtherance of their investigation of a possible break and enter in progress. They were entitled to make these enquiries. I am aware of the fact that police officers need to be aware that they do carry some authority when they make these suggestions, and that some people might feel that they are required to comply. However, the suggestion was in the nature of an option, and the evidence of the officers was that the accused appeared to freely open the door and invite them to stand in the foyer. The police did not ask to go into the residence, and once they were inside, they stood in the foyer and did not ask to look around until they detected the smell of growing marihuana.

"Once they were inside the residence, however, the police became immediately aware that they had reasonable and probable grounds to believe there was a marihuana grow operation on the premises. They did a quick room-to-room search for the purpose of police safety, to ensure there weren't other persons in the residence, and to make sure nothing was destroyed before they were able to obtain a warrant. They were entitled to do this."

I find that the accused freely invited the officers into the residence and that it was not an unauthorized entry. Given that it was an invitation freely extended by the accused, to merely step into the foyer and that the police at that point only wished to confirm that he was entitled to be in the residence, I find that there was no breach of his Section 8 and 10 Charter rights.

Defence makes the point that the police did not really believe there was a break and enter in progress because they did not station anyone at the rear of the residence to catch anyone attempting to escape. That argument really plays into what the police said in their evidence. They were simply checking to ensure that the residents were safe and that they were entitled to be in the residence. They were merely following up on a report of a suspicious incident. They had not made a determination that anything untoward was going on inside the residence.

Once they were inside the residence, however, the police became immediately aware that they had reasonable and probable grounds to believe there was a marihuana grow operation on the premises. They did a quick room-to-room search for the purpose of police safety, to ensure there weren't other persons in the residence, and to make sure nothing was destroyed before they were able to obtain a warrant. They were entitled to do this. [paras. 18-25]

The evidence was admissible.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

"Police arrested two kids yesterday, one was drinking battery acid, the other was eating fireworks. They charged one and let the other one off." - Tommy Cooper

DIGITAL RECORDING AMMETER DOES NOT BREACH PRIVACY RIGHTS

R. v. Cheung & Huang, 2007 SKCA 51

Police received information from a confidential source with peace officer and drug investigator experience that two nervous looking oriental males driving an out of province vehicle were seen park in front of a residence and unload four or five strings of black pots bound by rope, a green garden hose, two extension cords, and take them inside. A search of the local utilities services showed the monthly average power consumption was normal.

Then, at the request of police, the utility company placed a digital recording ammeter (DRA) on Cheung's home to monitor the power consumption over a two week period. A DRA measures and records the amount of electricity flowing into the home on an ongoing basis in five to seven minute intervals. This data can then be charted to determine cycles of power consumption.

The results revealed a significantly elevated level of power consumption over a normal residence of that type, and a high cyclical power consumption for 10 and two hour intervals over a 24-hour period. A search warrant at the residence was obtained to search for a grow operation. When police executed the warrant Huang was found inside, along with cash and marihuana. Both accused were charged with producing marihuana, possession for the purpose of trafficking, possession of crime property, and stealing power.

"Placing a box on power company property in order to monitor power consumption is no more intrusive in terms of technique than [obtaining information from a power company or flying over a home and taking a FLIR picture]."

At trial in the Saskatchewan Court of Queen's Bench the accuseds were acquitted. The trial judge found the police violated their s.8 *Charter* rights and the evidence was excluded under s.24(2). In the trial judge's opinion, they had a reasonable expectation of privacy in the information detected by the DRA. The police intruded into the privacy of the home by using the DRA and therefore breached s.8.

The Crown appealed to the Saskatchewan Court of Appeal arguing the trial judge erred in concluding the accuseds had a reasonable expectation of privacy in the DRA readings. The unanimous Court set aside the acquittals and ordered a new trial. Although the accuseds may have had a subjective expectation of privacy it was not objectively reasonable.

The DRA readings may have been probative of an illegal grow operation, however, they did not disclose intimate details about the accuseds' lives. The Saskatchewan Court of Appeal referred extensively to two Supreme Court of Canada decisions where they found a person has no reasonable expectation of privacy in information police had acquired; *R. v. Tessling* (police used a FLIR attached to an aircraft to obtain a heat signature for a residence) and *R. v. Plant* (police checked power consumption records with the utility company). In allowing the Crown's appeal, the Saskatchewan Court of Appeal stated:

> First, we note that the trial judge indicated that the information in this case is considerably more valuable to the police, in detecting the illegal activity taking place in the home, than the FLIR data was found to be in Tessling. In our view, usefulness to the police is not the test. As we have noted, the information obtained from the power company in Plant was also valuable to the police as was the information obtained in Tessling found to be useful. We do not believe, however, that utility to the police is what the Court in Tessling had in mind when it talked about the quality of the information. The focus in Tessling, on the nature and quality of the information, was for the purposes of determining whether information about the biographical core of an individual was revealed. FLIR technology may reach the capacity to tell where and what human beings are doing. It is in that respect that the Court in Tessling was concerned about the quality of the technology. Like the FLIR technology, a DRA is still "off-the-wall" and not "through-the-wall" technology, to use the terminology mentioned in Tessling.
>
> Secondly, we disagree with the trial judge's conclusion that the police technique was intrusive

in relation to the privacy interest either in terms of the method used or the information obtained. As to the method, neither in Plant nor in Tessling was the technique found to be intrusive. In Plant, the information was obtained from the power company. In Tessling, the information was obtained by flying over the home, taking a picture and then assessing the image taken. Placing a box on power company property in order to monitor power consumption is no more intrusive in terms of technique than either of these methods.

"It would be a troubling conclusion if we were compelled to say that the accuseds have an expectation of privacy in information, in which, but for their theft of power, they would have no expectation of privacy."

As to what is revealed, we have already touched on this issue. DRA data, like FLIR data, does not show precisely what is going on in the home. Certain inferences, as to the presence of an illegal marihuana grow operation, may be drawn from this information if it is coupled with other information, but as the trial judge herself indicated, DRA data does not indicate conclusively that such an operation is present. … As Crown counsel acknowledged in oral argument, it is inconceivable that a search warrant could be issued in relation to a marihuana grow operation on the basis of DRA data alone. This is so because there could be legitimate bases for both the amount of power consumption and the consumption pattern shown in this case. Again, in that respect, this case is like Tessling where it was decided that no warrant could ever properly be granted on the basis of a FLIR heat profile alone.

Finally, on the question of whether the DRA data exposed any intimate details of the accuseds' lifestyle or core biographical data, the trial judge herself concluded that it would be "somewhat strained to say that this information falls within the 'biographical core of personal information' that the Charter is designed to protect or that it affects the 'dignity, integrity and autonomy' of the person whose home is the subject of the DRA." Nonetheless, she concluded that the accused had an objectively reasonable expectation of privacy in this data. As we have indicated, we see this part of the analysis being largely answered by Plant. Plant indicates that the information about the pattern of power consumption at issue in that case could not reasonably be said to reveal intimate details of an individual's life because electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of a residence. While the DRA data in this case may be more probative of the existence of an illegal grow operation than the data in Plant, we believe this to be a difference of degree only and not a difference that changes the substantive result of the analysis. We also note that if the power had not been siphoned off by the accuseds illegally, the information that would be necessary for a warrant would have been available in this case in accordance with Plant. It would be a troubling conclusion if we were compelled to say that the accuseds have an expectation of privacy in information, in which, but for their theft of power, they would have no expectation of privacy. [footnotes omitted, paras. 20-23]

Since there was no privacy expectation s.8 was not engaged and therefore there was no reason to address s.24(2).

Complete case available at www.canlii.org

SEATBELT RELATED CHECK LEGITIMATE REASON FOR STOP

R. v. Doell, 2007 SKCA 61

The accused was stopped driving a truck as he was seen leaving the parking lot of a bar because it didn't look like he was wearing a seatbelt. A roadside breath sample was subsequently obtained and the accused was arrested for impaired driving. He was taken to the police station and provided breath samples over 80mg% and was charged accordingly.

At trial in Saskatchewan Provincial Court the accused argued the police used the seatbelt check as a ruse to stop him, it was arbitrary under s.9 of the *Charter*, and therefore violated his rights. The trial judge disagreed and found the reason for the stop was to investigate a possible seatbelt offence. Although the judge would have acquitted the accused if he was charged for not wearing a seatbelt since the police were uncertain whether he was wearing it, they nonetheless had the right and duty to investigate whether the accused had his seatbelt on. There was no *Charter* breach and the accused was convicted of driving over 80mg%.

The accused appealed to the Saskatchewan Court of Queen's Bench. The appeal judge ruled that the police could legitimately stop a vehicle if the officer had a rational basis for thinking the driver was not wearing a seatbelt. However, if the police stop a driver without any particular reason for thinking a driver is not wearing one, the stop is arbitrary and violates s.9 of the *Charter*. In this case, the appeal judge found the officer did not have a rational basis for believing the accused was not wearing his seatbelt, the stop was therefore arbitrary, the certificate of analysis excluded, and an acquittal was entered.

The Crown then appealed to the Saskatchewan Court of Appeal arguing the appeal judge erred in holding the police unjustifiably violated the accused's rights. Justice Richards, writing the opinion of the Court, agreed with the Crown.

Section 40(8) of Saskatchewan's *Highway Traffic Act* allows the police to randomly stop vehicles. It reads; "A peace officer who…is readily identifiable as a peace officer; and…is in the lawful execution of his or her duties and responsibilities; may require the person in charge of or operating a motor vehicle to stop that vehicle." This statutory authority validly limits the rights of drivers in the interests of promoting highway safety if the reason for the stop is related to traffic or vehicle safety. Justice Richards stated:

> Vehicle stops which are random or arbitrary have been found to be justifiable pursuant to s. 1 of the Charter so long as they are conducted for a purpose which relates to "driving a car such as checking the drivers licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle". [R. v. Ladouceur, R. v. Mellenthin] A stop for the purpose of checking for seat belt use falls within that rubric.
>
> Contrary to the reasoning of the summary conviction appeal judge, in the realm of traffic safety there is no requirement that a police officer have a "rational basis" for believing an offence has been committed before stopping a vehicle. If the reason for an arbitrary stop falls within the scope of the matters identified in Ladouceur and Mellenthin, it can be justified pursuant to s. 1 of the Charter. The mere fact that the stop is arbitrary does not determine its legality. [paras. 20-21]

"Vehicle stops which are random or arbitrary have been found to be justifiable pursuant to s.1 of the Charter so long as they are conducted for a purpose which relates to 'driving a car such as checking the drivers licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle'"

This was not a case where police were stopping a driver for a reason unrelated to highway safety. In determining whether a stop is legitimately made for traffic or vehicle safety, a court must focus on the reason for the stop, rather than whether the police had a "rational basis" for it. Justice Richards held the stop was made to check whether the accused was wearing a seatbelt. Stopping a vehicle for a seatbelt related purpose is justifiable under the random stop powers of motor vehicle legislation because it is a legitimate reason related to driving a car:

> In my view, the trial judge made no error in concluding that [the accused] had been stopped for a traffic safety purpose and, more particularly, had been stopped to determine if he was wearing a seat belt. [An officer]l said he had watched [the accused's] truck traveling through the parking lot "and the driver appeared not to be wearing a seat belt". As the truck turned onto Moss Avenue, [the officer] observed "the driver reach across the shoulder and make motions to - as if he were doing up his seat belt". He communicated this to [a second officer].
>
> [The second officer] made the decision to stop [the accused]. He recalled a comment that the driver of the truck was not wearing a seat belt but did not recall whether he or [the first officer] had made the observation. His notes indicated that he could not ascertain for sure whether [the accused] was wearing his seat belt. [The second officer] relied heavily on his notes and was unable to explain why he would have allowed [the accused] to drive a number of blocks before pulling him over if seat belt use had been the issue. Nonetheless, he was clear and consistent that the stop was made to check if [the accused] was wearing a seat belt. [para. 25]

And further:

> Thus, in light of the record as a whole, I see no reviewable error in the trial judge's conclusion that [the accused] was stopped for the purpose of

checking seat belt use. As a result, it does not matter either that the evidence fails to establish [he] was not wearing a seat belt or that the evidence offers an arguably thin basis for suspecting he was not wearing a seat belt. The essential point is this. The stop was made for a purpose contemplated by Ladouceur and Mellenthin and can thus be justified as a reasonable limitation of [the accused's] rights even if it was arbitrary. [para. 28]

There was no *Charter* breach, the Crown's appeal was allowed, and the accused's conviction was restored.

Complete case available at www.canlii.org

AN AMERICAN VIEW:

Police Pursuits

"[W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create. Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by recklessness. Instead, we lay down a more sensible rule. A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." - U.S. Supreme Court Justice Scalia, Scott v. Harris, (2007)

An Oral Argument Snipit:

Justice Scalia: *"[I]f this fellow driving 90 miles an hour is responsible for endangering people, you're proposing a rule that says if there's a 50 percent chance that he'll hurt some innocent person and a 50 percent chance that he'll get hurt if you try to stop him, you shouldn't do anything. I don't agree with that."*

Mr. Savrin [counsel for the petitioner]: *"Well, Your Honor --"*

Justice Scalia: *"I'd stop him. I mean, he's the fellow that's causing the danger, endangerment, isn't he?"*

OFFICER's REASONABLE GROUNDS STANDARD TOO HIGH: EVIDENCE ADMISSIBLE

R. v. MacEachern, 2007 NSCA 69

The accused disembarked a Via Rail train and walked towards the terminal entrance carrying only a knapsack. A police Criminal Interdiction Team was at the station and had a narcotics detecting dog with them. The dog and its handler approached the accused; he slowed and walked an arc around the officer and his dog. The dog was interested in the accused, followed him, and sat behind him at the train station entrance, indicating the presence of a narcotics odour. Then, the dog followed the accused into the terminal and sat behind him a second time.

The dog handler notified another officer of the positive alert. This officer approached the accused who was making travel arrangements with a shuttle bus driver, presented his police badge, identified himself, touched the accused on the elbow, and directed him to the side of the train station to answer some questions. The officer told the shuttle bus driver that the accused was "not going anywhere." He asked the accused for his train ticket, boarding pass, and identification to determine whether he had a one-way pass, paid cash, and purchased the ticket last minute.

The accused was subsequently arrested for possession of narcotics, read his *Charter* rights under s.10(b) and given the police caution. He said he wanted a lawyer. His knapsack was searched and 676 grams of marihuana and 282 grams of cocaine were found. He was re-arrested for possession for the purpose of trafficking and charged accordingly.

At trial in the Nova Scotia Supreme Court the accused applied to have the evidence excluded under s.24(2) of the *Charter* arguing his rights under s.10(b) had been violated. The trial judge concluded that the accused was detained when the officer touched him and said he wasn't going anywhere. Further, the accused testified he believed he had to obey the police. The police, however, failed to advise him of his right to counsel and therefore breached s.10(b). The judge ruled that the post-detention

conversation was inadmissible but the narcotics should not be excluded. He was convicted of two counts of possession for the purpose (marihuana and cocaine) and sentenced to two years.

The accused appealed to the Nova Scotia Court of Appeal submitting that the trial judge failed to find the arrest illegal, that the search breached s.8 of the *Charter* and that the evidence should have been excluded under s.24(2).

Right to Counsel

Justice Fichaud, authoring the judgment for the Nova Scotia Court of Appeal, agreed the accused's rights under s.10(b) were violated. The accused was detained when the police touched him, directed him to the side where he could be questioned, and told the shuttle driver he was "not going anywhere." As well, the accused testified he believed he had to obey the police. "Upon detention, [the accused] was entitled to be informed of his right to counsel without delay," said Justice Fichaud. "The officer must inform the detainee of his right to counsel before questioning him."

"The subjective prerequisite for arrest derived from [the accused's] answers to questions that should not have been asked before [the accused] was informed of his right to counsel under s.10(b). The search of [the accused's] knapsack violated s.8 of the Charter."

The Search

A search will be proper as an incident to arrest only if the arrest is legal. If the arrest is invalid, the search will also be invalid. An arrest under s.495 of the *Criminal Code* will be lawful if there is a proper basis founded on reasonable grounds, subjectively held and objectively verifiable. In this case, the trial judge found reasonable grounds existed from an objective point of view but the officer didn't think he had enough. Justice Fichaud described it this way:

> Section 495 of the *Criminal Code* entitled [the officer] to arrest [the accused] without warrant if [the officer], on reasonable grounds, believed that [the accused] had committed an indictable offence. Both the objective and subjective requirements must exist… The police dog, trained to detect narcotics with proven effectiveness, had twice given a positive indication. [The accused] had shown evasive action. The [trial judge] determined that this gave reasonable grounds for the arrest of [the accused], satisfying the objective test. [The officer] nonetheless said that he did not believe that he had grounds until after he had questioned [the accused]. So the subjective requirement of s. 495 – [the officer's] belief that [the accused] had committed an offence - was assisted by [the accused's] post-detention answers to the questions. Those questions followed the breach of [the accused's] right under s. 10(b) to be informed of his entitlement to counsel. The officers obtained the narcotics in a search incidental to the arrest. [reference omitted, para. 21]

The information the officer obtained post-detention in violation of s.10(b) could not be used to support the officer's grounds. "The subjective prerequisite for arrest derived from [the accused's] answers to questions that should not have been asked before [he] was informed of his right to counsel under s.10(b)," said Justice Fichaud. Since the officer lacked the subjective grounds necessary as part of the reasonable grounds analysis, the arrest was not lawful and therefore the search of the knapsack was not incidental to arrest and violated s.8.

s.24(2) *Charter*

Although the police violated the accused's ss.8 and 10(b) *Charter* rights, the trial judge did not err in admitting the narcotics evidence. The narcotics were non-conscriptive evidence and their admission would not render the trial unfair. The *Charter* breaches were not willful, nor deliberate. Although the police should know the basics of detention ,the officer here said he did not believe he had detained the accused. There were reasonable grounds to detain the accused but the officer had an unreasonably high standard and did not arrest out of an abundance of caution. The offence was serious and the narcotics evidence was critical to the Crown's case. The exclusion of the evidence, rather than its admission, would bring the administration of justice into disrepute.

Complete case available at www.canlii.org

Note-able Quote

"Every act is to be judged by the intention of the agent." - Author Unknown

IMPACT OF FORFEITURE CONSIDERED IN DETERMINING SENTENCE

R. v. Craig, 2007 BCCA 234

Police searched the accused's house and vehicle. The house, an older two level dwelling with 1,000 square feet of floor space, had the entire basement level and portions of the main floor devoted to a 186 plant marihuana grow operation valued at $87,500. There were three growing rooms and one drying room, utilizing 16 electrically-timed industrial growing lights running through a system of electrical ballasts. There was a ventilation system involving intake, exhaust and wall fans, an irrigation system and sump pump taking water to and from the plants, and a large amount of packaging material, scales, score sheets, growing instructions, calendars dating back three years, and a container with about one pound of marihuana packaged in ounce, quarter-pound, and half-pound bags. In her car, police found $22,275 in cash, $2,390 in traveller's cheques, $787 USD, and five pounds of marihuana in quarter-pound bags, as well as "score sheets" documenting marihuana sales. The accused was 52 years old and had no criminal record.

"[T]he forfeiture provisions of the CDSA ... effectively makes the order of forfeiture mandatory upon the Crown proving, on a balance of probabilities, that personal property is offence-related property."

At trial in British Columbia Provincial Court the accused pled guilty to producing marihuana and was given a 12 month conditional sentence, fined $100,000, and a $15,000 victim surcharge. The sentencing judge, also ordered forfeiture of the equipment used to commit the offence but refused to order the forfeiture of the house, worth $460,000, under s.16(1) of the *Controlled Drugs and Substances Act* (*CDSA*).

The Crown appealed to the British Columbia Court of Appeal arguing, among other things, that the sentencing judge erred by failing to order the forfeiture of the house and that the forfeiture should be determined independently from the sentence imposed and vice versa. The accused, on the other hand, disagreed with the Crown and also argued, *inter alia*, s.16(1) of the *CDSA* applied to only criminal organizations and not to independent entrepreneurs like herself.

Forfeiture Provisions

Section 16 of the *CDSA* provides for the forfeiture of "offence related property". Section 2 of the *Act* defines "offence-related property" as any property by means of or in respect of which a "designated substance offence" is committed, that is used in any manner in connection with the commission of a designated substance offence, or that is intended for use for the purpose of committing a designated substance offence. Producing marihuana is a "designated substance offence" and therefore the accused's dwelling house was potentially subject to forfeiture under s.16(1). Justice Ryan summarized the forfeiture provisions of the *CDSA* as follows:

> [T]he forfeiture provisions of the CDSA provide a process whereby offence-related property will be forfeited to the Crown. The process under s. 16(1) effectively makes the order of forfeiture mandatory upon the Crown proving, on a balance of probabilities, that personal property is offence-related property. There are, however, different considerations that guide the forfeiture of real property; in particular, s. 19.1(3) requires the sentencing judge to consider the impact of an order of forfeiture of real property and whether it would be disproportionate having regard to (1) the nature and gravity of the offence; (2) the circumstances surrounding the commission of the offence; (3) the offender's criminal record; and (4) if the real property is a dwelling-house, the impact of forfeiture on those, other than the offender, who use it as their principal residence. [para. 46]

Forfeiture not Limited to Organized Crime

Justice Ryan ruled that there was "nothing in the language of the history of the enactment that suggests the provisions for forfeiture are limited to organized crime." She wrote:

> In the first place, the relevant provision on appeal is not ambiguous and there is no language in the Act that says that its purpose was to apply to organized crime alone. Section 16(1) states that the forfeiture of "offence-related property"

applies to "a person convicted of a designated offence". Read in its grammatical and ordinary sense, the main limitation is that s. 16(1) applies only to interests in property where the property interest has been the instrument of the commission of a designated drug offence; the only other limits are those set out in s. 19.1 when the Crown makes an application in relation to real property. [para. 50]

She did note, however, that the presence or participation of organized crime would be an important factor in determining whether forfeiture would be disproportionate. She stated:

> …ss. 19.1(3) and (4) of the CDSA instruct the court to weigh the impact of forfeiture against the "nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence."
>
> In my view, an evaluation of the "nature and gravity of the offence" would include, but is not limited to, such factors as whether there were weapons on the premises, whether the operation was harmful to the neighbourhood, whether the theft of electricity was involved, the number of plants being cultivated, and the sophistication of the enterprise. The "circumstances of the offence" would include whether it was done because of pressure from other members of the community, the financial circumstances of the offender, whether the operation was undertaken for profit alone, whether the offender lives in the house, and other such matters. The fact that the offender has or does not have a criminal record will also be considered.
>
> Many of these factors will support a forfeiture order where a party is a member of a criminal organization and is operating the enterprise as such. It follows that the presence of organized crime would be a significantly aggravating factor in deciding whether or not to order forfeiture. [paras. 51-53]

Primary Sentence & Relationship to Forfeiture

Forfeiture is an aspect of sentencing and Justice Ryan concluded that the primary sentence and the forfeiture of offence related property should not be each decided in isolation from one another. In other words, the consideration of forfeiture may be considered with the determination of the primary sentence and the primary sentence may be considered by taking into account an order of forfeiture. The decision with respect to the primary sentence and the forfeiture order will have an affect on each other. Justice Ryan stated:

> Parliament's choice of the word "impact" brings a subjective element into the analysis. As I read it, s. 19.1(3) requires the court to ask what effect forfeiture will have on the offender and whether its impact would be disproportionate to the nature, gravity and circumstances surrounding the offence. The term 'impact', in my view, is broad enough to include consideration of a primary sentence. Indeed, a sentencing judge could not adequately assess the impact of forfeiture of real property or a dwelling-house without knowing the personal circumstances of the offender, which include the primary sentence that has been or will be imposed on that offender. [para. 67]

And further:

> In sum, while the idea that forfeiture and the primary sentence should be considered in air-tight compartments is outwardly appealing, it does not accord with the provisions of the CDSA or the jurisprudence. When faced with an application for forfeiture of real property, the sentencing judge may consider the primary sentence in evaluating the impact of forfeiture. Likewise, in determining the overall fitness of the primary sentence, the sentencing judge may consider the existence of an order for forfeiture.
>
> In reaching this conclusion, I am cognisant of the fact that the CDSA does not require the application for forfeiture to take place at the time the primary sentence is imposed, although this is preferable and has typically occurred as a matter of course… Where both do not occur at the same time and an unfit sentence or inappropriate order of forfeiture results, this can be remedied through the traditional remedy of appellate review. [references omitted, paras. 79-80]

"When faced with an application for forfeiture of real property, the sentencing judge may consider the primary sentence in evaluating the impact of forfeiture. Likewise, in determining the overall fitness of the primary sentence, the sentencing judge may consider the existence of an order for forfeiture."

Proper Process For Deciding Forfeiture

The Crown submitted that the effect of considering ss.16(1) and 19.1(3) created a two step process as follows:

1 Once the Crown meets the s.16(1) requirements, a presumption of forfeiture applies. This requires a conviction for a designated substance offence, proof the property is "offence related property", and that an offence was committed in relation to the property.

2 The offender then must displace the presumption by satisfying the court the impact of the forfeiture would be disproportionate. This may require the offender raising or calling evidence relating to the factors set out in ss.19.1(3) or (4).

Although this approach had been accepted by other appellate courts, Justice Ryan rejected it:

> I am of the view that because the governing provision, s. 16(1), is subject to s. 19.1, the order of forfeiture is not automatic. In my view, s. 16(1) requires the court, before making an order of forfeiture with respect to real property, to examine whether the impact of forfeiture would be disproportionate in light of the factors set out in s. 19.1(3) (and s.19.1(4) if applicable).
>
> At that stage the onus will shift to the offender, against whom the order is being sought, to establish that the impact of the order would be disproportionate. The offender need not call evidence. He or she may rely on the evidence called in the Crown's case. Thus, if the Crown's case shows that an offender with no criminal record grew one or two plants of marihuana for his or her own use, barring other circumstances, the offender will have established that the impact of the order is disproportionate. In most cases, however, there will be little in the Crown's case that would demonstrate the subjective impact of forfeiture on the offender. Therefore, speaking practically, the offender will be obliged to call evidence that would satisfy the judge that the impact of forfeiture would be disproportionate.
>
> In my view, the analysis of s. 19.1(3) applies a fortiorari to a "dwelling-house" under s. 19.1(4). That section provides that where the real property is a dwelling-house the court "shall" consider the impact of forfeiture on any member of the offender's immediate family if the dwelling-house was the family member's principal residence at the time of the offence. This imposes a duty on the court to consider the "impact of forfeiture", regardless of whether it is raised by the offender. Again, the evidence of the impact on the family member will normally be within the knowledge of the offender, not the Crown. Therefore, if the offender wishes to contest forfeiture under s. 19.1(4), he or she will be obliged to call evidence on those matters and might include evidence that the dwelling-house is a principal residence. However, this does not require the offender to raise the matter; if the sentencing judge can rely on any evidence adduced by the Crown alone.
>
> To summarize, the CDSA does not impose a two-step process as advocated by the Crown. Rather, with respect to forfeiture of real property pursuant to s.16(1), the onus is on the Crown to establish that a person has been convicted of a "designated substance offence", that the property in question is "offence-based property", and that the offence was committed in relation to that property. If the subject matter is real property, the court, pursuant to s. 19.1(3), is required to go on to consider whether the impact of such an order would be disproportionate, taking into account the nature and gravity of the offence, the circumstances surrounding it, and the criminal record of the offender. At this point the burden shifts to the offender to establish that the impact of forfeiture would be disproportionate. The offender may choose to rely on the Crown's case for proof, or may call evidence in support of his or her position. In addition, if the property is a dwelling-house, the court, pursuant to s. 19.1(4), must consider the "impact of forfeiture" on any member of the offender's family who uses the location as a principal residence.

Outcome

As a result of these and other issues, the British Columbia Court of Appeal allowed the Crown's appeal and ordered the accused's home forfeited in accordance with s.16 of the *CDSA*. The conditional sentence remained, but the accused's $100,000 fine and $15,000 victim surcharge were set aside.

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

BASIS FOR DETENTION CAN BE INFERRED FROM CIRCUMSTANCES

R. v. Williams, R. v. Fleming, 2007 BCSC 184

In Williams, a police officer stopped the accused after observing a traffic violation and detected a strong odour of alcohol from the vehicle and noted he had bloodshot, watery eyes, slurred speech, and a flushed face. Without informing the accused he was detained for investigation of impaired driving, he was asked to walk to the rear of his truck. After doing so, the officer detected a moderate odour of alcohol on his breath and noted he swayed from side to side while standing. Breath samples were subsequently obtained.

In Fleming, a police officer stopped the accused after observing a traffic violation and noted the smell of alcohol on his breath and that he had slurred speech. Without informing the accused he was detained for investigation of impaired driving, the officer asked him if he would consent to sobriety tests to see if he was sober enough to drive. He failed the tests and breath samples were obtained.

During *voir dires* in British Columbia Provincial Court, the accuseds argued that the police violated their rights under s.10(a) of the *Charter* because they were never informed of the reason for their detention. In their view, the officers were obliged to tell them they were detained for investigation of impaired driving once it was suspected they had consumed alcohol, but before they were asked to leave their vehicles for the purpose of pursuing the investigations. Thus, the accused submitted the certificates of analysis should be excluded and acquittals entered.

The trial judges ruled there was no s.10(a) breach, finding that even though they were not expressly told of the reasons for their detention, the accuseds were informed of the reason by the circumstances of the detention. The certificates were admitted and both accused were convicted of over 80mg%.

Both accuseds then appealed to the British Columbia Supreme Court and the appeals were heard together. They submitted the breath demand was invalid because the police officers failed to inform them of the reason for their detentions; investigation of impaired driving. The appeal judge rejected the appeals.

In Justice Edwards' opinion, it was not necessary for the police to specifically inform a suspect of the reasons for detention if it could be inferred from the circumstances that a suspect understood the basis for his detention. In these cases, there was evidence for the trial judge to conclude that the circumstances were such that the accuseds understood the reasons for their detention; they were "suspected of impaired driving and the police were pursuing an investigation based on that suspicion." There were no *Charter* breaches and the certificates were admissible. The accuseds' appeals were dismissed.

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

VATICAN RELEASES DRIVERS' TEN COMMANDMENTS

In June, the Holy See Press Office at the Vatican released a document entitled *"Guidelines for the Pastoral Care of the Road."* Cardinal Martino expressed the view that the "Church and State, each in its own field, must work to create a generalized public awareness on the question of road safety and promote, using all possible means...an adequate education among drivers, travelers and pedestrians."

The document makes 84 statements about driving including, "Cars particularly lend themselves to being used by their owners to show off, and as a means for outshining other people and arousing a feeling of envy. People thus identify themselves with their cars and project assertion of their egos onto them. When we praise our cars we are, in fact, praising ourselves, because they belong to us and, above all, we drive them. Many motorists, including the not so young, boast with great pleasure of records broken and high speeds achieved, and it is easy to see that they cannot stand being considered as bad drivers, even though they may acknowledge that they are".

And, "It is quite common when accidents occur to blame the state of the road surface, a mechanical

problem or environmental conditions. However, it should be underlined that the vast majority of car accidents are the result of serious and unwarranted carelessness – if not downright stupid and arrogant behaviour by drivers or pedestrians – and are therefore due to the human factor.

The ***"Drivers' Ten Commandments"*** are listed as follows:

I You shall not kill.

II The road shall be for you a means of communion between people and not of mortal harm.

III Courtesy, uprightness and prudence will help you deal with unforeseen events.

IV Be charitable and help your neighbour in need, especially victims of accidents.

V Cars shall not be for you an expression of power and domination, and an occasion of sin.

VI Charitably convince the young and not so young not to drive when they are not in a fitting condition to do so.

VII Support the families of accident victims.

VIII Bring guilty motorists and their victims together, at the appropriate time, so that they can undergo the liberating experience of forgiveness.

IX On the road, protect the more vulnerable party.

X Feel responsible toward others.

"Drivers on the road should be fully aware, without dreading such a situation, that an accident may occur at any time. Despite the generally high quality of today's roads in developed countries, it is foolish to drive "thoughtlessly" as if such dangers did not exist. Our attitude when driving should be the same as if we were using dangerous tools, and therefore being very careful." - Guidelines for the Pastoral Care of the Road Source: www.vatican.va

WAITING DRIVER DID NOT RELINQUISH CARE & CONTROL

R. v. Lequereux, 2007 BCSC 845

The accused caused a rear-end traffic collision, turned off his car, got out and waited for police to arrive. A police officer attended the scene, performed investigatory tasks and identified the accused as the driver. He was standing beside his car with his keys and two witnesses at the scene were able to identify him as the driver. The officer served a ticket on the accused followed by a request for an approved screening device (ASD) breath sample. He failed the ASD test, which occurred 35 minutes after the accident, and a breathalyzer test was subsequently performed at the police detachment. He blew over the legal limit and was charged.

At trial in British Columbia Provincial Court the trial judge excluded the results of the breathalyzer test based on the ASD failure. In the judge's view the accused had relinquished care and control when he turned off his car, got out, and waited for police; therefore the demand for the breath sample at the roadside and the breathalyzer sample at the detachment violated the accused's *Charter* rights. The Crown appealed to the British Columbia Supreme Court.

The appeal judge found the trial judge erred. In Justice Russell's view, turning the car off, getting out, and waiting for police was only part of the evidence in assessing care and control. There was no evidence the vehicle could not be driven and the accused retained the keys on his person. Furthermore, a "police officer need not actually observe the person upon whom the demand is made to be in care and control of the motor vehicle at the time the demand is made." The words "has care and control" found in s.254(2) of the *Criminal Code*, the provision that allows for ASD demands, is to be given past signification. The appeal judge found the accused had retained care and control of his vehicle, the demand for a breath sample was lawful, and the certificate of analysis admissible. The matter was remitted to Provincial Court for a rehearing.

Complete case available at www.provincialcourt.bc.ca

INVESTIGATIVE NECESSITY NOT REQUIRED FOR ORGANIZED CRIME WIRETAPS

R. v. Doiron, 2007 NBCA 41

Following a pub fire causing about four million dollars in damage the arsonist pled guilty and cooperated with police. He told police that the accused, a lawyer, offered him $35,000 if he refused to testify against an owner of the pub who the arsonist claimed hired him to set the pub on fire. The police sought a judicial authorization allowing them to record the arsonist's and the accused's conversations in the institution the arsonist was incarcerated. As a result of these conversations and other evidence, the accused lawyer was charged with attempting to obstruct justice.

At trial in the New Brunswick Court of Queen's Bench the Crown adduced evidence of several phone calls between the pub owner and the accused captured during a separate investigation. A Quebec court had signed a year long wiretap authorization against 40 people alleged to be members of criminal organizations, such as the Hells Angels and the Damners. The pub owner and his brother were two of the named individuals. The accused was subsequently convicted of attempting to obstruct justice and sentenced to four and a half years in prison.

The accused appealed to the New Brunswick Court of Appeal arguing, among other grounds, that the absence of an investigative necessity requirement in the legislative scheme for wiretaps related to organized crime matters makes the law unreasonable and therefore breached his s.8 *Charter* right protecting him from unreasonable search and seizure. Thus, he submitted, any order made pursuant to these provisions was invalid and the evidence inadmissible.

Justice Deschenes, authoring the judgment of the New Brunswick Court of appeal, first examined the necessity requirements of wiretap legislation. Section 186(1) of the *Criminal Code* allows the police to seek an authorization to intercept private communications only if a judge is satisfied, among other things, that "other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed, or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures." This has commonly been labeled an "investigative necessity requirement."

Section 185(1)(h) requires the swearing officer to include their belief regarding this necessity requirement in the affidavit for the wiretap. However, ss.185(1.1) and 186(1.1) state that the necessity requirement does not apply when the application for authorization is in relation to a criminal organization or terrorism offence. In other words, the authorizing judge need not take the investigative necessity requirement into account when making an order for an intercept in these circumstances.

Justice Deschenes concluded that the legislation was not rendered constitutionally invalid in so far as there was no investigative necessity requirement for intercepts related to organized crime. He stated:

> …I believe that the necessity requirement is not a *constitutional requirement* for court-ordered electronic surveillance in cases involving organized crime, and that its absence from the legislation does not violate the right guaranteed by s. 8 of the *Charter.* [para. 33]

And further:

> In short, … the investigative necessity requirement under s. 186(1)(*b),* dispensed with by Parliament in situations where the authorization sought involves criminal organizations, is not a constitutional requirement. In my opinion, the legislative provisions allowing the state to seek and the authorizing judge to grant an order authorizing wiretapping without the need to apply the investigative necessity criterion are not unreasonable and do not violate rights guaranteed by s. 8 of the *Charter.* [para. 46]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

Note-able Quote

"Good judgment is the outcome of experience ... and experience is the outcome of bad judgment." - Vivian Fuchs

VEHICLE FORFEITURE MANDATORY

R. v. Paziuk, 2007 SKCA 63

The accused was found in possession of 241 ecstasy tablets and some marihuana while driving his truck. He was convicted of possessing a controlled substance for the purpose of trafficking under s.5(2) of the *Controlled Drugs and Substances Act* (*CDSA*) in Saskatchewan Provincial Court and sentenced to nine months in jail with a 10 year firearms prohibition. The sentencing judge, however, refused to order forfeiture of his truck, valued at about $20,000. He did not find the truck to be an integral part of the offence. The accused was not trafficking out of the truck but merely used it as a method of transportation. Furthermore, the sentencing judge held forfeiture would be disproportionate to the offence.

The Crown appealed the sentencing judge's order to release the truck to the Saskatchewan Court of Appeal. Justice Lane, stating the opinion of the Court, first examined the forfeiture provisions of the *CDSA*. Section 16 of the *CDSA* requires a court to order the forfeiture of property if a person has been convicted of a designated substance offence and the court is satisfied, on a balance of probabilities, that the property is "offence-related property" and an offence was committed in relation to that property. Section 2 of the *CDSA* defines "offence-related property" as including property "that is used in any manner in connection with the commission of a designated substance offence."

Forfeiture is, however, limited if other innocent parties with a valid interest in the property apply for an order of restoration of the property. These innocent parties must be the lawful owner of the property or be legally entitled to possession or it if it were to be forfeited. If an innocent party is successful in their application for restoration, a court may, at its discretion, order the property returned to the innocent party. As well, if the offence-related property is real property or a dwelling house, there is a proportionality test that enters into the forfeiture analysis.

In holding the truck was subject to forfeiture Justice Lane stated:

> It is clear the truck is "offence-related property" in that it was used in connection with the commission of a designated substance offence. The sentencing judge failed to consider the definition in the *Act*. Upon conviction, the first step he ought to have taken was to determine whether the property was "offence-related property" within the meaning of the *Act*. The sentencing judge was then required, pursuant to s. 16, to order the property be forfeited because the section mandates the same, subject to sections 18 to 19.1, by the use of the words "shall...order that the property be forfeited...." [para. 10]

And further:

> There is no reference to proportionality in regard to personal property and it is only in regard to forfeiture of real property that the judge can take into account the impact of an order of forfeiture and whether it is proportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record of the person charged or convicted.
>
> Thus, in relation to a dwelling house, the Court may take into account the impact that an order of forfeiture may have on the immediate family of the person charged or convicted of the offence provided the dwelling house was a member's principal residence at the time the charge was laid and continues to be the member's principal residence, and if the member is innocent of any complicity in the offence or of any collusion in relation to the offence (s. 19.1(4)).
>
> Parliament clearly intended that the proportionality test does not apply to personal property under the provisions of the *Act*...[paras. 13-15]

This automatic forfeiture of personal property is different than the forfeiture provisions of the *Criminal Code* which provide for a proportionality test for both personal and real property. In allowing the Crown's appeal of forfeiture and ordering the truck forfeited, Justice Lane stated:

> ...The sentencing judge had no discretion but was required to order forfeiture and erred in failing to do so. He further erred in considering proportionality as a factor to be considered when dealing with the forfeiture of personal property.

Complete case available at www.canlii.org

s.16 CDSA FORFEITURE GRID

Property Type	Forfeiture Requirements	Forfeiture Status

Personal property
 	
(moveable property such as lights, ballasts, venting, vehicles, etc.)
 	
 
	• Person convicted of designated substance offence
	• Court satisfied on balance of probabilities
	  • Property is "offence-related property"
	  • Offence committed in relation to that property
		Forfeiture mandatory
		
		"the court shall"

Real property
 	
(immoveable property, real estate, land and buildings erected on it)
	• Person convicted of designated substance offence
	• Court satisfied on balance of probabilities
	  • Property is "offence-related property"
	  • Offence committed in relation to that property
		Forfeiture discretionary
		
		s.19.1(3) Court "may decide not to order the forfeiture" after considering whether the impact of forfeiture is disproportionate to the:
		  • nature & gravity of offence
		  • circumstances surrounding commission of offence
		  • criminal record of person convicted
		
		s.19.1(4) If real property is a dwelling-house, court must also consider the impact of forfeiture on any member of person convicted's immediate family using dwelling as principal residence and whether the immediate family member appears innocent of involvement in the offence.

s.16 CDSA Legal Lingo

"offence-related property" means ... any property ...

(a) by means of or in respect of which a designated substance offence is committed,

(b) that is used in any manner in connection with the commission of a designated substance offence, or

(c) that is intended for use for the purpose of committing a designated substance offence

"designated substance offence" means (a) an offence under Part I, except subsection 4(1), or (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a)

Part I offences include:

- trafficking in a controlled substance,
- possessing a controlled substance for the purpose of trafficking,
- importing a controlled substance,
- exporting a controlled substance,
- possessing a controlled substance for the purpose of exporting, and
- production of a controlled substance included in schedules I-IV

POLICE CONDITIONAL RELEASE: ATTACKING CONDITIONS ON A BREACH CHARGE

There are essentially three options available to the police after an arrest is made. First, they may release the arrestee without conditions. Second, they may hold the arrestee in custody and detain for a bail hearing before a court. Or third, the police themselves may release the arrestee with conditions.

The *Criminal Code* allows police officers to release persons from custody who have been arrested with or without warrant. Section 503(2) provides authority for police to conditionally release, by way of a promise to appear or a recognizance, an arrestee not brought before a justice. In addition, the police officer may require that the person enter into an undertaking with one or more of the following conditions:

(a) to remain within a territorial jurisdiction specified in the undertaking;
(b) to notify the peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;
(c) to abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, or from going to a place specified in the undertaking, except in accordance with the conditions specified in the undertaking;
(d) to deposit the person's passport with the peace officer or other person mentioned in the undertaking;
(e) to abstain from possessing a firearm and to surrender any firearm in the possession of the person and any authorization, licence or registration certificate or other document enabling that person to acquire or possess a firearm;
(f) to report at the times specified in the undertaking to a peace officer or other person designated in the undertaking;
(g) to abstain from
(i) the consumption of alcohol or other intoxicating substances, or
(ii) the consumption of drugs except in accordance with a medical prescription; or
(h) to comply with any other condition specified in the undertaking that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

There is very little case law in this area, but the case law that does exist appears to limit the police powers of release, unlike a justice's power which is relatively broad. However, there seems to be two different views on whether an accused can attack the conditions of release at a trial on charges of breaching a condition. Some courts have ruled that an accused can challenge the legitimacy of a police undertaking in an effort to impeach the effectiveness of a condition, while other courts have ruled that that rule against collateral attack applies to police undertakings, as part of the judicial process, like it does to court orders.

Rule Against Collateral Attack

The rule against collateral attack was described by Justice McIntrye in *R. v. Wilson*, [1983] 2 S.C.R. 594 as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

In short, once a court order is made its integrity cannot be impeached nor can it be overturned in a proceeding other than within the original action or an appeal from it. A "direct attack", on the other hand, is an attempt to amend, correct, reform, or vacate a judgment in a proceeding instituted for that purpose.

Collateral Attack Permissible?

In *R. v. Khan*, [2003] O.J. No. 5301 (OntCJ) an officer in charge released a person with the condition that he "not to be in the front seat of any vehicle." This condition was purportedly authorized under s.503(2.1)(h) of the *Criminal Code*. He was subsequently found by police sitting in the front seat of his car in the parking lot of his residence.

The Crown argued that the "victim" to the offence could be any member of the public and the condition was therefore authorized under subsection (h). It was also submitted that the conditions were sensible and in the interests of public safety. Justice Pringle of the Ontario Court of Justice, however, concluded that the release powers of the officer in charge must be strictly interpreted. In this particular case, condition (h) "does not include reference to potential victims or a broad concern for public safety." The judge stated:

> When I consider the history of this amendment to the Criminal Code in conjunction with the scheme set out for judicial interim release, I am fortified in my conclusion that a specific, narrow interpretation of s. 503(2.1)(h) is appropriate. Each of the provisions in 503(2.1)(a) through (g) are very narrow, including such conditions as depositing a passport, abstaining from communicating with a specific victim or witness, reporting to the police, or the like. The only provision that might be broadly read is the one that is in issue here, which permits the officer to specify "any condition" that he or she considers necessary to ensure the safety and security of any victim of or witness to the offence. [para 15]

And further:

> A specific and limited power of the officer-in-charge to release a person charged with an offence fits within the scheme that Parliament has enacted regarding judicial interim release. While the scheme requires early release on specific conditions whenever possible, it does not purport to give to police officers unfettered discretion to decide how to protect the public interest. Police officers are not judicial officers, and they do not exercise the same powers as a justice of the peace or a judge for the purpose of release. According to the scheme of release set out in the Code, if there are broad concerns for the public interest, the person charged cannot be released by a peace officer or officer-in-charge, and must be taken before a justice: see section 497(1.1) and 498(1.1). [para. 19]

In finding the condition not authorized under s.503(2.1), the judge acquitted the accused of breaching his undertaking.

Similarly, in *R. v. Skordas*, 2001 ABPC 118, the accused was released on numerous offences, including two drug offences contrary to s.5(2) of the *Controlled Drugs and Substances Act*. His undertaking included conditions "not to be in possession of any cell phone or pager or with any person who had a cell phone or pager." He was charged with failing to comply with his undertaking after a cell phone was found in his residence. Crown Counsel argued that subsections 503(2.1)(c) and (h) allowed this condition. Justice Allen of the Alberta Provincial Court, however, found there was no authority for police to issue such a condition. He held:

> In my view, the emphasis in s. 503(2.1)(c) is on protection of the victim, witness or other person identified in the undertaking. The condition in the case at bar has not been directed to protect named individuals of this nature. Doubtless, a byproduct of such a condition would be to prevent the accused from any reversion to the alleged drug trafficking which led to the undertaking. However, this is an incidental consequence and not one that conforms with s. 503(2.1)(c).
>
> The basket clause found in s. 503(2.1)(h) does not support the condition either. Certainly, the section provides that "any other condition" can be put in an undertaking; but, that wide phrase is narrowed considerably by the entire context of that subsection (h). The context is "that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim or witness". So, this section is also directed toward the protection of specific named persons. Also, it is specifically referable to safety and security concerns. For similar reasons, as set out in my analysis above of the other subsection, the cell phone condition is not directed toward the end of protecting a victim or witness. Nor is it, on its face, done for safety and security of those persons. [paras. 9-10]

The judge found the cell phone prohibition condition invalid and the accused was acquitted.

Collateral Attack Impermissible?

In *R. v. L.Y.* [2002] N.W.T.J. No. 90 (NWTCrt) the accused was arrested for break and entering a post office which occurred at about 3 am. He was released on a Promise to Appear and a police issued undertaking with a curfew. He was then subsequently charged with breaching the police imposed curfew but attacked its legitimacy in the Territorial Court of the Northwest Territories. The judge held that the accused could not mount a collateral attack

against the undertaking issued by the police. In concluding that the rule against collateral attack applies to undertakings entered into before peace officers and officers in charge, Justice Bruser stated:

> Peace officers have statutory powers given to them by parliament. Those powers may be exercised by a peace officer as part of the lawful process of the administration of justice and, I add, a necessary part of it; otherwise, people such as this young offender would necessarily have to be detained in custody until they could be dealt with before a Justice of the Peace or Judge either by personal attendance or by another means of doing so.
>
> The applicable provisions of section 499 and section 503 were made by parliament so that people like [the accused] could be swiftly released back into the custody of their parents, instead of being detained and brought before a Justice of the Peace or Judge. [paras. 38-39]

And further:

> The rationale behind the rule [against collateral attack] is a powerful one. It serves to maintain the rule of law. It serves to preserve the reputation of the administration of justice. The Supreme Court of Canada has not said that it only preserves the reputation of courts. It has not said that the powerful rationale is only to maintain judicial process. If it had meant that, the Supreme Court of Canada would have said so. [para. 41]

The accused was convicted of breaching his undertaking.

In *R. v. Ciupak*, [2003] O.J. No. 4146 (OntCJ) the accused was arrested for breaching his judicial interim release by driving an ATV on a highway even though he had a condition not to drive a motor vehicle. He was then released on a police undertaking with a condition "not to operate any motor vehicle." The accused brought a motion that the condition "not to operate any motor vehicle" was not valid. In the Ontario Court of Justice the court found the condition imposed may have been appropriate for a judicial officer to make, but was "not one envisaged…under the ambit of the legislation on a promise to appear." Judge Palmer stated:

> …Section 503(2.1)(h) states, after a listing of specific authority to do specific things in an undertaking or a release on a promise to appear, it says "to comply with any other condition specified in the undertaking that the peace officer of officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence". The Court has to remind itself that the words of the Criminal Code ought to be interpreted strictly and it is abundantly evident from the words and I think quite clear from the wording, that that authority to impose a condition under that particular section requires the necessity of ensuring the safety and security of any victim or witness to the offence.
>
> I am quite prepared to find as fact of the motion that the officer believed in his own mind that the condition he imposed was appropriate because of the circumstances of the offence for which he was releasing the defendant. I do find, however that paragraph h does not warrant the term that was placed in the promise to appear. While I find the officer did it with no malice, in thinking he was doing the right thing, the Court must interpret these criminal statutes by the words that are there and in my view the condition that was imposed on the promise to appear, does not fit within the definition of section eight, nor indeed within the conditions of any of the other subsections. [paras. 3-4]

The breach charge was dismissed, but the Crown appealed the ruling to the Ontario Superior Court of Justice ([2004] O.J. No. 3054 (OntSCJ)). Justice Marchand, relying on *R. v. L.Y.*, concluded the lower court erred. He found the judge should not have embarked on an enquiry as to whether the condition imposed by police was valid. In his view, it was not permissible for a court to examine the legality of a condition given the rule against collateral attack. Rather, the *Criminal Code* proscribed a procedure to change a condition of release under s.503(2.1).

Changing a Condition

Under s.503(2.1) a person subject to a police undertaking can apply to a justice to replace the order with a judicial undertaking. Of course, the justice or judge is not bound by the original conditions imposed by police and may change, add to, or remove conditions the court deems necessary. This process can be engaged any time before or at an

appearance on the Promise to Appear. Section 503(2.2) reads as follows:

> S.503(2.2) Criminal Code
> A person who has entered into any undertaking under section 2.1 may, at any time before or at his or her appearance pursuant to a Promise to Appear or recognizance, apply to a Justice for an order under subsection 515(1) to replace his or her undertaking, and section 515 applies with such modification as the circumstances require to such a person.

If the prosecutor wants to change or add a condition they may also apply before or at the appearance for a judicial undertaking under s.503(2.3).

Conclusion

It appears the law is unsettled on whether police conditions can be challenged at a trial on a breach charge. Some courts seem to say that it can be done while others take the position that a collateral attack cannot be made. Nonetheless, officers should carefully consider the circumstances of an offence and the offender and tailor the release conditions accordingly.

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **True**—see *R. v. Doiron* (at p. 21 of this publication).
2. (b) **False**—see *R. v. Doell* (at p. 12 of this publication). The reason for the stop must be related to highway traffic matters (such as checking licences, sobriety, vehicle condition, etc).
3. (a) **True**—see *R. v. Paziuk* (at p. 22 of this publication). There is no requirement to consider proportionality for personal "offence-related property" under the *CDSA*.
4. (b) **False**—see *R. v. Paziuk* (at p. 22 of this publication). The *Criminal Code* provisions for personal "offence-related property" forfeiture requires a proportionality assessment.
5. (a) **True**—see *R. v. Blake* (at p. 29 of this publication).

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.

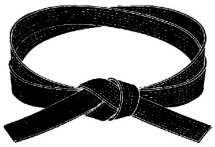
ROUTE

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

TIMIDITY: 6TH DEGREE BLACK BELT?

Insp. Kelly Keith, Atlantic Police Academy



How is it that someone that is a 6th degree black belt in karate comes into a use of force class and shows one of the highest levels of timidity amongst all recruits? I recall a student who came into use of force classes and was downright cocky about his ability and openly told anyone that would listen that he held a 6th degree black belt in Karate. When he was put through reality-based training where recruits are hit and yelled at, he folded his tent and became prey.

Let's get something straight – I think karate and many other point fighting arts are excellent activities and great exercises. However, this being said, I also understand that a student that trains in these arts is not preparing themselves for a real fight. To make this jump, one must stress inoculate, gradually expose themselves to the reality of a real fight where punches and kicks are not for points, but for keeps. Fancy kicks and punches generally do not work, and there is no referee to stop and start things. I am sure any of us who went to the skating rinks and played pick-up hockey know of many people who were great at this type of hockey but could not duplicate these skills in true game conditions.

Some thoughts:

- Fancy techniques look great, but basic ones work. Complicated moves fall apart when someone is punching you in the face.
- Are your moves strength dependant? Strength dependant moves are great if we get to pick our opponents. However, in law enforcement, this unfortunately is not the case. There are no weight classes, rules to prevent injury, nor referees in our confrontations. We must attempt to work on techniques that do not rely on brute strength.
- One size does not fit all. Anyone who knows me knows this is my pet peeve in how we sometimes like to train law enforcement officers. This is downright wrong and does not stand the reality test in any way, shape, or form. We must work on techniques that fit our individual strengths, and physical attributes, not the ones the instructor is comfortable teaching.
- Do the techniques work on dynamic attacks or just when you have a compliant opponent who leaves their hand out after throwing a punch? Reality is taken out of the situation if the opponent is working on the same moves you are and knows what you are going to be doing so they can block it. In a real fight we generally do not know what our opponent is going to strike us with. Steven Seagal wrist joint locks look awesome in movies – ever tried them when someone is not leaving his hand out or punching you with their other hand?
- Will your techniques work in different environments? It is a very good thing to have a plan. If you are not able to work around obstacles such as locked doors, small hallways, tables, hills, snow, etc. you will lose in real life. To win you must be able to adapt to all conditions and it cannot faze you.
- Are your techniques re-active to a specific attack method? Real fights generally have a flow to them that encompass different ranges and different tactics. We have to get away from only teaching an officer to do one thing if the opponent does a certain attack in a certain way. If all you do is train this way, you'll lose. Good fighters either consciously or un-consciously understand principle-based fighting, which is all based around the principles of the different ranges and tactics. If an opponent moves his foot one way instead of another, it may mean you push rather than pull, or the suspect got tired of punching so he charged you. No big deal! The tactic just changed so must we!!!

We must train ourselves and others in law enforcement this same way. For example, we cannot train a police officer to win a gunfight by standing still and shooting at a piece of paper. If we do, we are teaching basic gun handling skills which is no different than stick handling in hockey. It is only one of the fundamental skills, which we must understand and perform before moving on. If we stop our firearms training at the marksmanship level are we truly preparing the officer for a gunfight? I suggest that teaching an officer to stand still and hit a paper target is even farther from reality than training the officer to kick and punch a bag. At least a bag

supplies resistance. If we stop our gun training at marksmanship - teaching to stand still, taking your time, not seeking cover or getting out of the way of a bullet or suspect running at us with a knife - we are indeed hampering the officer's ability to win, which should be everyone's ultimate goal. It is not uncommon to see timidity in point fighters such as karate; nor is it uncommon to see good marksman who are timid.

Tactical firearms and reality-based training is a large piece of a law enforcement officer's training that we must keep expanding. With reality-based training, we are training an officer to be in a gunfight or a physical altercation – WITH PROPER SAFETY PRE-CAUTIONS IN PLACE). There is nothing real about it if we don't at some time during their training exchange gunfire or strikes. In reality-based training I do not allow the officer to be tested to die! I don't need to train an officer how to die, we can learn that all by ourselves, we do it every week (no disrespect meant!!). We need to train officers to fight and win even though they are shot or struck!!!

About the Author - Insp. Kelly Keith is a 20 year veteran of law enforcement. He presently teaches Physical Training, Use of Force and Tactical Firearms to Corrections, Law and Security, Conservation Officers and Police Cadets at the Atlantic Police Academy. Kelly is a second degree black belt in Jiu-Jitsu and a Certified Personal Trainer, Strength and Conditioning Instructor, and a Certified Sports Nutrition Specialist. He can be reached by email at KKeith@pei.sympatico.ca

LEGALLY SPEAKING:

Police Decision Making

"This is a situation wherein the police were reacting to an event unfolding at that very moment. In such circumstances, there is a danger that post-event analysis by armchair quarterbacks in the bar and bench will apply unrealistically high standards of perfection to situations were split-second decisions have to be made." - Yukon Territorial Court Chief Judge Faulkner, R. v. Blake, 2005 YKTC 62.

NO PRIVACY INTEREST IN SHOES REMOVED FROM ARRESTEE

R. v. Blake, 2007 YKCA

The accused was arrested by police for a property related offence and transported to cells. Before being placed in a cell, the officer took some of the accused's clothing, including his shoes, as was standard police practice. The officer looked at the soles of the shoes, noticing they were similar to a shoe impression left at a computer store break and enter. The officer had recently viewed an email where a photograph of a shoe impression that had been left at the scene of a break and enter at a computer shop was attached. He compared the photograph to the shoes and believed they were the same. The officer then seized the shoes and placed them into an exhibit locker so they could be examined by the police identification section.

At trial in Yukon Territorial Court on a charge of breaking and entering the computer store, the accused argued his rights under s.8 of the *Charter* were violated when the police seized his shoes and and examined the soles. The evidence, he submitted, should be excluded under s.24(2). The trial judge agreed that the "search" was unreasonable, but admitted the evidence any way. In his view, the accused was in lawful custody and had a diminished expectation of privacy. The officer acted in good faith, had reasonable grounds, and the evidence was important to the break and enter case. The accused's application to exclude the evidence was dismissed and he was convicted of break and enter.

The accused then appealed his conviction to the Yukon Court of Appeal contending the trial judge erred in admitting the evidence of footwear impressions. He submitted that the officer was not acting in good faith because he was on a fishing expedition when he turned the shoes over to look at the soles. As well, he suggested the soles were not in "plain view", the officer could only obtain the evidence through a proper "investigation," and the *Charter* breach was serious; it was deliberate, wilful, and flagrant. The Crown, on the other hand, contended that the examination of the shoe soles

was not a "search" for *Charter* purposes. They were in the lawful possession of the police and the visual observation and comparison of the soles did not engage s.8 because the accused had little or no privacy expectation in his effects when he was arrested.

"Once removed, the shoes were out of his control. As he had no reasonable expectation of privacy in the soles of his shoes, s. 8 was not engaged."

In finding that the accused did not have a privacy expectation in his shoes and therefore s.8 was not triggered, Chief Justice Finch stated:

> In my opinion, the [accused] here had no reasonable expectation of privacy in the tread on the sole of his shoes. Counsel for the [accused] clearly conceded that [the officer] had lawful authority to require the [accused] to remove his shoes in the interests of his own safety. [The accused] was wearing the shoes in public at the time of his arrest in relation to the Yukon Inn offence. [The officer's] examination of the shoes, after they had been removed from the accused, did not affect the [accused's] bodily integrity, nor the autonomy or dignity of his person. Once removed, the shoes were out of his control. As he had no reasonable expectation of privacy in the soles of his shoes, s. 8 was not engaged.

The accused's appeal was dismissed and the conviction upheld.

Complete case available at www.canlii.org

Editor's note: Judges of the Yukon Court of Appeal are judges from the British Columbia Court of Appeal. The Yukon Court of Appeal sits once a year in Whitehorse while other Yukon appeals are also heard at other British Columbia court locations.

EXPERIENCE COUNTS IN REASONABLE GROUNDS ANALYSIS

R. v. Juan, 2007 BCCA 351

A police officer arranged by telephone to purchase nine ounces of cocaine from a drug trafficker known as "Joey" for $8,100 in a shopping mall parking lot. While the officer waited in her vehicle in the parking lot, the trafficker arrived with two passengers, including the accused who was seated in the front passenger seat. The trafficker went to the officer's vehicle and showed her the cocaine. The officer then exited her vehicle purportedly to obtain money from the trunk, when she signalled other officers who converged on the scene. The trafficker ran and threw a plastic bag, but he was taken to the ground and handcuffed.

Four other officers went to the trafficker's vehicle to deal with the passengers. The accused was forcefully removed from the vehicle and searched. Police found a plastic baggie in his left front pants pocket containing nine grams of cocaine packaged in various ways with a street value of approximately $1,040.

At trial the trial judge ruled the accused's arrest was unlawful. The judge found that the police collectively had the subjective belief he was committing an indictable offence while sitting in the front passenger seat of the vehicle, however he held the grounds for arrest were not objectively justified. The judge then went on to conclude the detention was a lawful investigative detention but that only a pat-down search was permissible and the search that occurred went beyond the legitimate scope of a search incident to investigative detention. The search was therefore unreasonable under s.8 of the *Charter* and the evidence was excluded under s.24(2).

The Crown appealed to the British Columbia Court of Appeal arguing the arrest was lawful and the search that followed was also legal. Justice Thackray, writing the opinion for the unanimous appeal court, agreed. He first discussed the requirements for a lawful arrest and noted several principles, including:

- Reasonable grounds has both a subjective and objective aspect;
- Subjectively, the officer must have reasonable grounds on which to base an arrest. This subjective element is the officer's own personal belief; and
- Objectively, a reasonable person standing in the shoes of the officer would also believe that reasonable grounds for making an arrest exist. The reasonable person is presumed to have the

knowledge and experience of a knowledgeable and experienced police officer.

In this case the officers testifying had considerable experience. Their evidence was that in their opinion anyone travelling in the trafficker's vehicle was involved in the transaction at some level such as security, being a lookout, holding the drugs, or being the supplier of the drugs. The officers stressed that this drug transaction was significant; it involved the sale of nine ounces of cocaine valued at $8,100 to an undercover officer.

"The test set forth is to establish that "a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest." This does not mean that the beliefs of police officers are not necessarily objective."

In holding that "no reasonable persons put in the shoes of the officers could logically come to a conclusion other than that held by the officers," Justice Thackray stated:

> The test set forth is to establish that "a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest." This does not mean that the beliefs of police officers are not necessarily objective. However, in that their conclusions might be perceived to have a bias or prejudice they must be subjected to a test of whether a reasonable person standing in the officers' shoes would have come to the same conclusion.
>
> [……]
>
> In the case at bar the judge concluded that the officers' testimony supported the subjective grounds, but not the objective grounds. He based this on a finding that the arrest was "simply because [the accused] was a passenger in the vehicle." That conclusion overlooked both the experience of the officers and, most significantly, their knowledge as to the customs of the illegal drug trade and their testimony with respect to the transaction in question. Matters of security involving protection of the principal were known by the officers to be important and often resulted in other people accompanying the principal. The officers knew this was a high level illegal commercial drug transaction and that principals do not take "innocents" along to testify against them in the case of an arrest, but rather only people who are trusted. The officers were aware that [the accused] was involved in such a "purposeful trip." [paras. 27-28]

The police subjectively believed the accused was involved in an illegal drug transaction and had the objective grounds to support the arrest. The search that followed was incidental to the lawful arrest and the evidence was admissible. The accused's acquittal was set aside and a new trial was ordered.

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

UNFOLDING EVENTS PROVIDED SUFFICIENT CORROBORATION OF RELIABLE INFORMER's TIP

R. v. Silver, 2007 YKCA 4

A drug officer received information from a reliable informant that the accused would be driving a silver Subaru with a black hood and make drug deliveries to "crack shacks" and hotels in Whitehorse. The officer knew the accused was connected to the drug subculture and had previously seen him drive a Honda with a black hood, registered to a known local cocaine dealer. As well, the officer knew the accused was wanted on an outstanding arrest warrant for cultivating marihuana in British Columbia.

Later that day, while looking for the vehicle, the officer saw a silver vehicle with a black hood travelling toward downtown where the known cocaine-vending sites were located. The officer could not identify the driver but radioed ahead to have the vehicle stopped by a uniformed officer. The vehicle was stopped and after it was confirmed that the accused was the driver, he was arrested for the offence of possession for the purpose of trafficking and searched. A pat down search at the roadside revealed a loaded .45 calibre handgun. A short time later, at the detachment, a strip search revealed nine packages of crack cocaine weighing 59.3 grams hidden in the accused's underwear that had been modified with a storage pocket.

At trial in Yukon Territorial Court the judge ruled that the officer receiving the tip had articulable cause to direct other officers to stop the vehicle and detain its occupants after he saw the vehicle fitting the description. He also found the police had reasonable grounds to arrest the accused and conduct the search. The accused was not arbitrarily detained nor unreasonably searched. The evidence was admissible and the accused was convicted of possessing cocaine for the purpose of trafficking, possessing a loaded firearm without a licence, and possessing a firearm with its serial number removed.

The accused appealed his conviction to the Yukon Court of Appeal arguing, in part, that the police did not have reasonable grounds to stop the vehicle and make the arrest and search. He conceded that the tip was received from a proven reliable informant, but submitted the information was conclusory only, the police should have obtained more detail, and they did not corroborate the tip in any form.

Justice Low, stating the opinion for the unanimous Yukon Court of Appeal, found the circumstances as they unfolded provided sufficient corroboration to meet the reasonable grounds standard. He stated:

> In my opinion, the combination of what the police knew about the [accused], the substance of the information given by the informer, as well as that person's proven reliability, the distinctive appearance of the vehicle the [accused] was said to be driving regardless of its manufacture, and the direction in which the vehicle was being driven when first seen, combined, once it was determined that the [accused] was the driver, to render the search of the [accused] and the seizure of the contraband reasonable. It would have been advisable for [the drug officer] to have obtained from the informer a little detail as to how he knew about the [accused's] activity. But the sighting of the [accused] in a vehicle that matched the distinctive feature of the vehicle description provided by the informer, plus the direction of travel, amounted to sufficient corroboration of the informer's report to meet the test in Debot.
>
> As the trial judge noted, this was a developing situation. There was no time to obtain a warrant. In my opinion, the arrest, search and seizure were all objectively and subjectively based upon reasonable and probable grounds....[paras. 13-14]

The trial judge did not err in applying the law to the facts he found and ruling the critical evidence admissible. The appeal was dismissed.

Complete case available at www.canlii.org

LEGALLY SPEAKING:

Reliability of Informant Information

"In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, ...the "totality of the circumstances" must meet the standard of reasonableness. Weakness in one area may, to some extent, be compensated by strengths in the other two." - Supreme Court of Canada Justice Wilson, R. v. Debot, [1989] 2 S.C.R. 1140.

BUY THE BOOK

s.254(3) *Criminal Code*

Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable...such samples of the person's breath as in the opinion of a qualified technician...are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

Note-able Quote

" *There is nothing so easy to learn as experience and nothing so hard to apply.* " - Josh Billings

ABORTED BREATH SAMPLE WOULD NOT ASSIST DEFENCE

R. v. Melville, 2007 ONCA 520

After a proper breathalyzer demand the accused provided a breath sample into an intoxilyzer, registering a reading of 93mg%. The qualified technician then waited 15 minutes, as was standard practice, and attempted to obtain a second sample. The instrument began to analyze the sample. The reading increased in small amounts but dropped precipitously, causing the technician to abort the sample, decide it was unsuitable, and demand a further sample. The third sample yielded a reading of 103mg%, but the police never kept a printout of the aborted analysis. The accused was convicted in the Ontario Court of Justice on a charge of over 80mg%.

The accused appealed to the Ontario Court of Appeal arguing that the failure of the police to keep a printout or other record of the aborted analysis violated his rights under s.7 of the *Charter*, thereby invalidating the analysis of the two good samples upon which his conviction was based. In a unanimous endorsement, the appeal was dismissed. The Ontario Court of Appeal held:

> The language of s. 254(3) of the *Criminal Code* … contemplates that a qualified technician may in the course of administering a test, determine that a sample is unsuitable in which case a demand for a further sample may be made under the scheme. In this case, the qualified technician made the assessment based on her training that the second sample provided by the [accused] was not suitable for analysis. Whether she was ultimately, as a matter of science, right or wrong in that assessment is irrelevant. Under the statutory scheme, she was entitled to make that assessment in good faith. Her good faith was not challenged in this proceeding.
>
> Once it is accepted, as it must be on the authorities, that the qualified technician was entitled to reject the second sample as inadequate, the results of the partial or aborted analysis of that inadequate sample could not have potentially assisted the [accused] in any way in his defence on the "blowing over" charge. [references omitted, paras. 4-5]

The accused's conviction stood.

Complete case available at www.ontariocourts.on.ca

HIT & RUN: DRIVER MUST BE AWARE OF ACCIDENT BEFORE LEAVING

R. v. Noseworthy, 2007 NLCA 45

A pedestrian walking along the side of a road was struck a glancing blow by a passing vehicle that did not stop. He was knocked to the ground but was not seriously injured. Investigating police determined that the accused was the driver of the truck that struck the pedestrian. He was charged with dangerous driving, hit and run, and breach of probation.

At trial in Newfoundland Provincial Court the accused denied that his truck had struck the pedestrian, although other evidence suggested that it had. The trial judge found that the accused would have been aware, at some point, that he had struck the pedestrian. The trial judge acquitted the accused of dangerous driving, but convicted him of hit and run and breach of probation. His appeal to the Supreme Court of Newfoundland was unsuccessful. He then appealed to the Newfoundland Court of Appeal.

Justice Rowe, stating the opinion of the Appeal Court, first noted that for a person to be convicted of hit and run under s.252(1)(a) of the *Criminal Code* the Crown needs to prove that the person was aware they had been involved in an accident at the time they failed to stop. "If [the accused] became aware he had struck a person only after he had left the scene of the accident, then he would not be guilty of contravening s.252(1)(a)," said Justice Rowe.

"At some point", the term used by the trial judge, was broad enough to include a time after the accused left the scene, such as five minutes later. By using this term, the trial judge made it unclear whether he was convicting the accused on the basis he was aware of the accident when he left the scene or became aware it after he left. Since there was evidence consistent with the accused being aware of the accident at the time he left the scene as well as evidence consistent with him becoming aware only after he left the scene, the appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

FIREARM BLOCKADE CONSTITUTIONAL

R. v. Clayton & Farmer, 2007 SCC 32

Police received a 911 call at about 1:22 am from a male located in a donut shop across the street from a large strip club. The caller, who identified himself by name, told police there were about 10 black males, casually dressed, congregating outside the strip club and that four of them had handguns. The caller also described four vehicles by colour and model (a tan Lexus, a black Jeep Cherokee, a black GMC Blazer, and a white Acura Legend) associated with the group of men. When asked to check, the caller confirmed there was still a crowd in the parking area but that one of the vehicles had left. The gun call was dispatched and police officers responded.

The first officers on scene saw a group of men outside the club, but no weapons. Two officers positioned themselves at the parking lot's rear exit at 1:26 am, intending on stopping and searching any vehicle and its occupants leaving the lot. At 1:27 am the first vehicle—a black Jaguar—arrived, but it did not resemble the description of any of the reported associated vehicles. Police nonetheless pulled their car in front of it, blocking the exit. Both men were black—Farmer was driving and Clayton, a passenger, wore driving gloves on this warm night. Police told them they were investigating a gun call and asked them to step out of the vehicle.

Clayton complied, but was evasive when questioned and appeared nervous, while Farmer exited with some reluctance-it took three requests to get him out of the car. An officer placed his hand on Clayton to direct him to the back of the car, but a struggle ensued and Clayton fled towards the strip club. Police pursued and Clayton was apprehended trying to enter the club. A bouncer identified him as one of the males having a gun. He was handcuffed and police found a loaded handgun in his pocket. Farmer, who remained at the car, was also searched. A loaded handgun was found tucked in the back of his pants. Both men were charged with numerous firearms offences.

At their trial in the Ontario Superior Court of Justice both men were convicted after the judge ruled the evidence admissible. In his view, the initial brief detention of the vehicle to screen cars leaving the area was permissible at common law. However, the officers intended on searching the men from the moment the vehicle was stopped without having a reasonable and individualized suspicion they were involved in a crime. Continuing the detention by removing them from the car to search them resulted in their rights to be secure from arbitrary detention and unreasonable search violated. Despite the breaches, in the judge's view the exclusion of the guns would bring the administration of justice into greater disrepute than to admit them.

Farmer and Clayton then appealed to the Ontario Court of Appeal. Justice Doherty, writing the unanimous judgment, found the *Charter* rights of both accused had been seriously infringed. There was neither statutory authority for the roadblock nor any reasonable individualized suspicion that could justify an investigative detention as described by the Supreme Court of Canada in *R. v. Mann*. Nor was this a case involving a roadblock similar to the type used by police for highway safety matters. As such, any authority for the type of roadblock undertaken in this case would have to find mooring in the ancillary police power doctrine (*Waterfield* test).

At common law, the ancillary power doctrine recognizes that police conduct interfering with a person's liberty can be justified if the police were (1) acting in the course of their duty and (2) their conduct was a justifiable use of police powers associated to that duty. In assessing whether police conduct is justified a number of factors must be considered, including:

- the duty performed,
- the liberty interfered with,
- the nature and extent of the interference,
- the extent to which some interference with liberty is necessitated to perform the duty, and
- the importance of the duty to the public good.

In this case, Justice Doherty held that the police had a duty to investigate and prevent crime and stopping the car was done while acting in the course of that duty. However, he found the police conduct did not pass the second prong of the ancillary power doctrine—the justifiability factors. Here, the roadblock engaged the criminal process against the targets of it by determining whether the occupants

of a stopped vehicle were involved in criminal activity. The detention and searching of all vehicles and occupants leaving the parking area was a profound interference with individual autonomy and privacy. "Being stopped by the police, questioned about guns, told to exit the vehicle, and made to stand against the vehicle in a public place while the police examine the inside of the vehicle, can be a frightening and humiliating experience," said Justice Doherty.

Although he agreed that the use of roadblocks to investigate crimes and apprehend criminals might be a justifiable intrusion on individual liberties in some cases, this was not one such case. Since the police did not have grounds to suspect any specific person, a roadblock could only be justified if there were reasonable grounds to believe a serious crime had been committed and the roadblock may apprehend the offenders. Here, the description provided by the 911 caller was detailed. The perpetrators were described as black males, casually dressed, and the specific make and models of four vehicles connected to the men were provided.

Rather than limiting their stops to persons in vehicles that resembled the description provided by the 911 caller, the police cast too wide a net in stopping all vehicles leaving the parking area without having reasonable grounds to believe stopping motorists not matching the description would result in apprehending the perpetrators and recovering the guns. Had the police narrowed or tailored their focus consistent with the information provided, the accused's vehicle would not have been stopped and it would have been free to pass.

Since the police could not justify stopping all vehicles under the ancillary power doctrine, the stop was unlawful and the accuseds were arbitrarily detained. Questioning them at the vehicle and the examination of the vehicle's interior also violated their rights under s.8. However, unlike the trial judge, the appeal court ruled the handguns inadmissible as evidence. The *Charter* violations were characterized as significant. The police intended to stop and search all vehicles and their occupants. The accuseds were "entitled to proceed on their way [but] found themselves in a potentially demeaning and frightening confrontation with police." The fact Clayton and Farmer were in possession of handguns did not minimize the breach—"criminals do not have different constitutional rights than the rest of the community," said Justice Doherty.

The Court was also very critical of police training. Not only did the police fail to consider the relevant factors in assessing the ancillary power doctrine, they did not consider and balance the demands of their duties against interfering with individual liberties. Nor did they have an appreciation for the scope of their search powers. Police ignorance of the limits of their ancillary powers was institutional and related to their training. The handguns were ruled inadmissible, the appeal was allowed, the convictions were quashed, and acquittals were entered on all charges.

The Supreme Court Weighs In

The Crown appealed the Ontario Court of Appeal ruling to the Supreme Court of Canada. Although all nine judges allowed the appeal and reinstated the accuseds' convictions, they were divided on how they reached that result. The majority (six judges) ruled that the police did not arbitrarily detain the accused and the resultant searches were reasonable. The minority (three judges) found the detentions were arbitrary but saved by s.1 of the *Charter.* They also found the searches were reasonable. Both the majority and minority did, however, recognize that it was important to address each stage of the police interaction, including the initial detention, the continued detention, and the searches.

The Initial Detention

Justice Abella, writing the opinion for the majority, first determined whether the police were acting within the scope of their common law powers when they detained the accused. A lawful detention at common law, she noted, is not arbitrary. In applying the criteria for the Waterfield test, the majority agreed the police were acting in the course of their duty to investigate and prevent crime when they stopped the car, passing the first prong of the analysis. As for the second prong, the justifiability criteria, the majority parted company with Justice Doherty and found the police conduct in stopping all vehicles leaving the parking lot was a justifiable use

of police powers associated with their duties. Justice Abella wrote:

> The justification for a police officer's decision to detain…will depend on the "totality of the circumstances" underlying the officer's suspicion that the detention of a particular individual is "reasonably necessary". If, for example, the police have particulars about the individuals said to be endangering the public, their right to further detain will flow accordingly. As explained in *Mann*, searches will only be permitted where the officer believes on reasonable grounds that his or her safety, or that of others, is at risk.
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> The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.
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> In my view, both the initial and the continuing detentions of Clayton and Farmer's car were justified based on the information the police had, the nature of the offence, and the timing and location of the detention.
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> The police set up the initial stop in response to a 911 call identifying the presence of about ten "black guys", four of them with guns. The police described what they were doing as setting up perimeter surveillance posts to secure the confined geographical area where the offence they were investigating had reportedly taken place. The police had reasonable grounds to believe that there were several handguns in a public place. This represented a serious offence, accompanied by a genuine risk of serious bodily harm to the public. The police were entitled to take reasonable measures to investigate the offence without waiting for the harm to materialize and had reasonable grounds for believing that stopping cars emerging from this parking lot would be an effective way to apprehend the perpetrators of the serious crime being investigated. [references omitted, paras. 30-33]

"The police had reasonable grounds to believe that public safety was at risk, that handguns could be in the possession of those leaving the parking area, and that stopping cars leaving that area could result in their apprehension. The steps taken by the police in this case in stopping the car, based on the information they had, were reasonable and reasonably tailored to the information they had."

The majority found that "requiring the police to stop only those vehicles described in the 911 call imposes an unrealistic burden on the police in this case, and one inconsistent with their duty to respond in a timely manner, at least initially, to the seriousness of the circumstances." In holding that the initial detention was not arbitrary, Justice Abella stated:

> The police had reasonable grounds to believe that public safety was at risk, that handguns could be in the possession of those leaving the parking area, and that stopping cars leaving that area could result in their apprehension. The steps taken by the police in this case in stopping the car, based on the information they had, were reasonable and reasonably tailored to the information they had.
>
> In the totality of the circumstances, therefore, the initial detention in this case was reasonably necessary to respond to the seriousness of the offence and the threat to the police's and public's safety inherent in the presence of prohibited weapons in a public place, and was temporally, geographically and logistically responsive to the circumstances known by the police when it was set up. The initial stop was consequently a justifiable use of police powers associated with the police duty to investigate the offences described by the 911 caller and did not represent an arbitrary detention contrary to s. 9 of the *Charter*. [paras. 40-41]

The Continued Detention

As noted, the majority concluded that the continued detention was lawful because the officers determined that Clayton and Farmer matched the race of the suspects in the 911 call (they were black) and that Clayton, a passenger, was wearing leather gloves on a non "glove weather" (warm) night and gave strange and evasive answers on being questioned. As

well, the vehicle came from the scene of the reported crime, it was the first vehicle to leave the parking lot within minutes of when the crime was reported, and that it avoided leaving by the front exit, where the other officers were arriving, instead heading towards the rear exit. Justice Abella stated:

> Taken together, these facts, objectively, gave rise to the reasonable suspicion that the occupants of the Jaguar could be in possession of the handguns reported in the 911 call, and that, as a result, the lives of the police officers and of the public were at risk, justifying their continued detention. This constellation of circumstances was such that the police were required to, and did, respond quickly and appropriately to the information they had about the possession of guns by individuals in this particular parking lot. They treated the two occupants as equally likely to be connected to the serious crime under investigation. They were reasonable in taking this approach once they saw that both individuals, in a car that had just left the crime scene, matched the general description they had.
>
> I accept…that had the police stopped the vehicle and discovered that the occupants did not correspond to the description given by the 911 caller, they would have had no reasonable grounds for the continued detention of the occupants. For example, had the caller described individuals who were white, the police would not have had reasonable grounds for the continued detention of non-white occupants. On the particular facts of this case, however, based on their subsequent observations, there were reasonable grounds…for the police to conclude that the two occupants of the car they had stopped were implicated in the crime being investigated. [paras. 46-47]

The Searches

Searches of both the occupants were justified for safety reasons as an incident to their detention. "The search was necessarily incidental to the lawful investigative detention and…there was no violation of s.8," said Justice Abella.

The Minority View

Like the majority, the minority also would allow the appeal and restore the accused's convictions, albeit for different reasons. Justice Binnie, authoring the opinion for the minority, found the police had no particular grounds against the accused and the blockade, designed to stop all motorists leaving the strip club regardless of description, was arbitrary. As the minority noted, it was important to distinguish between what the police knew at the time of detention and what they knew after the detention when they had an opportunity to observe the vehicle's occupants. Before they stopped the car, the police had no individualized suspicion of the accused or their vehicle nor did they use other criteria to tailor the roadblock. Instead, the roadblock was set-up to stop all vehicles leaving the strip club thus it was ruled arbitrary. These arbitrary detentions were, however, saved by s.1 of the *Charter*.

In the s.1 analysis, the minority opined that "the protection of society from the flaunting of illegal handguns in a crowded public place is clearly pressing and substantial." The roadblock, which would stop all vehicles, was also a rational response to the 911 gun call. Randomly stopping only some vehicles would not have served the purpose of the blockade. And finally, the blockade was properly tailored to the circumstances. Although it was a complete blockade, it was a brief imposition on motorists leaving the parking lot. Justice Binnie stressed the difference between the type of stop in this case and an investigative detention based on reasonable suspicion:

> A *Clayton and Farmer* stop is not the same thing as a *Mann* investigative detention although it may (or may not) lead in that direction. A *Clayton and Farmer* stop of all vehicles is established for screening purposes. A *Mann* inquiry may then be undertaken *only* if reasonable grounds for individualized suspicion emerge. I conclude that the common law at issue in this case satisfies the requirement of proportionality (in fact "tailored" is more or less a synonym for proportionality). In such circumstances, anything less than a full blockade would not serve the purpose which has already been found to be pressing and substantial. Moreover, for the reasons mentioned, the law's salutary effects exceed its deleterious effects. [para. 118]

The minority ruled that the police had the power at common law to set up the roadblock when they have reasonable grounds to believe that a serious firearms offence was committed and that the roadblock may apprehend the perpetrators. Here, the police arrived within five minutes of the 911 call,

limited their roadblock to the parking lot of the strip club where individuals would be leaving through one of two available exits, and had reasonable grounds to believe a serious crime had been committed and the perpetrators might be apprehended by means of the roadblock. As well, the police were entitled to question the vehicle's occupants to determine if they had information about the incident. A decision would then be made to let the vehicle go or detain it for further investigation if an individual suspicion (articulable cause) existed. This power of detention was used to screen cars for further inquiry.

The minority also held the searches lawful:

> As to s. 8, *Mann* holds that in a lawful detention situation the police may undertake a pat-down search if the officer believes "on reasonable grounds that his or her safety, or the safety of others, is at risk"…. The issue on the proper scope of the search is clouded in this case because (unlike *Mann*) the presence of handguns not only constitutes a police safety issue but constitutes the evidence of the offence being investigated. It is not possible to say here, as it was in *Mann*, that the police went too far when their search proceeded beyond safety considerations to evidence collection. Here, the two purposes were intertwined and not separable. Nevertheless, I would affirm that after the police officers had observed the [accuseds] and engaged in conversation with them, the police had authority here to conduct a pat-down search *incidental to their continued detention*. It would be illogical to hold that a pat-down search is justified where the detention relates to a non-violent offence (as in *Mann*) but not where the police are facing serious issues of personal safety when responding to a gun call... Equally, it would be illogical to be solicitous of the safety of individuals who may or may not be at risk at the calling end of the 911 call (*Godoy…*) but not of the safety of the police who, in the course of roadblock duty, are putting themselves, at least potentially, in harm's way. If evidence of the crime emerges in the course of a *valid* pat-down search incidental to the detention for the purpose of police safety, the evidence will be admissible…. [para. 104]

"If evidence of the crime emerges in the course of a valid pat-down search incidental to the detention for the purpose of police safety, the evidence will be admissible."

Once the accused were stopped the police acquired grounds of reasonable individualized suspicion to convert the initial blockade stop into an investigative detention under Mann. In addition to the initial information police had, they determined after the stop that Clayton was black and was wearing gloves on a warm night, suggesting a concern about leaving fingerprints. This provided the necessary grounds for police to remove him from the car and search him. However, he bolted and was subsequently apprehended and searched. Clayton's gun was found and was properly admissible as evidence. The search of Farmer was similarly reasonable, within the bounds of an investigative detention. Justice Binnie sated:

> I think that it would have been foolhardy for the police, in the context of a gun call, to leave Farmer, possibly armed, in the car while they went about their business with Clayton. Nor could the police be expected to allow Farmer to drive away. If Farmer, left alone in the driver's seat, had taken a shot at the police, there would have been legitimate questions raised about police training and police judgment and the unreality of a law that led to such an avoidable result. The [accuseds] were travelling together and the concerns about officer safety raised by the glove-wearing, possibly gun-flourishing Clayton gave rise to a sufficient concern about the driver to warrant a pat-down search of Farmer for officer safety incidental (at that point) to Farmer's continued detention.

The Crown's appeal was allowed and the accused's convictions were restored.

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

LEGALLY SPEAKING:

Psychological Detention

"[A] "psychological" detention includes three elements: a police direction or demand to an individual; the individual's voluntary compliance with the direction or demand, resulting in a deprivation of liberty or other serious legal consequences; and the individual's reasonable belief that there is no choice but to comply." Ontario Court of Appeal Justice Laskin, R. v. Grant (2006)

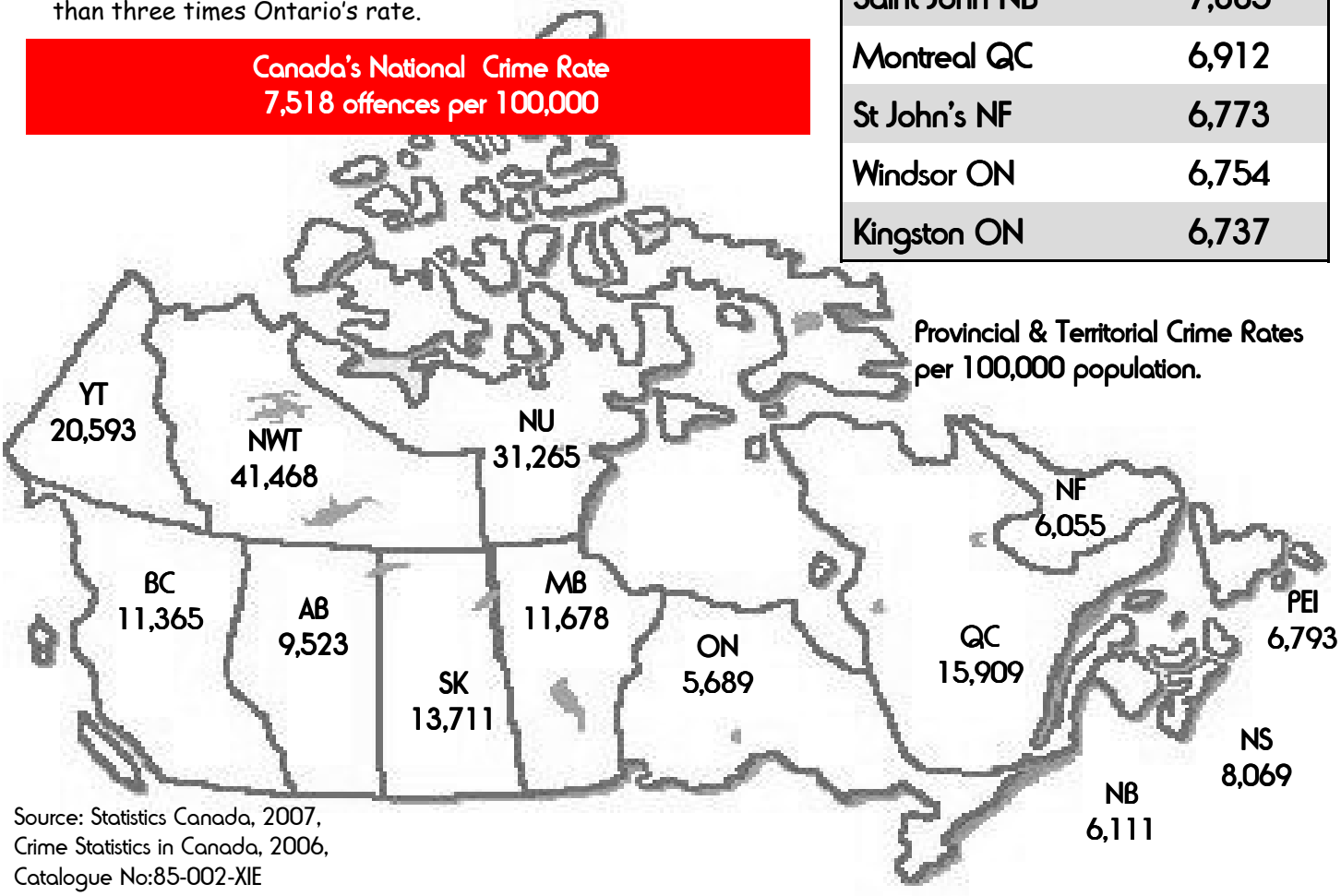
2006 CANADIAN CRIME STATISTICS

Statistics Canada recently released its report entitled *"Crime Statistics in Canada, 2006"*. Highlights include:

- National crime rate dropped by 3%.
- National homicide rate dropped by 10%.
- B.C.'s homicide rate rose by 6%.
- Youth crime rate increased by 3%. Youth homicide rate rose by 17%. It is now at its highest level since data was first collected in 1961.
- Total drug offences increased by 2%. Marihuana offences dropped by 4%, but cocaine offences rose by 13% and other drug offences, which include crystal meth and heroin, rose by 8%.
- B.C. had the highest provincial drug offence rate at 617 per 100,000. This was more than twice the next highest rate (Saskatchewan at 275) and almost five times Newfoundland's and P.E.I.'s rate (127 and 128 respectively).
- Impaired operation rate (including over 80mg% and refusal) dropped by 6% nationwide. All provinces saw a decrease in impaired operation rates except P.E.I., which remained unchanged, and Newfoundland, which increased by 17%. Saskatchewan had the highest provincial impaired rate at 474 per 100,000, more than three times Ontario's rate.

Canada's National Crime Rate
7,518 offences per 100,000

Criminal Code Crime Rates for Census Metropolitan Areas (CMA) 2006 - Top 15	
CMA	Crime Rate
Regina SK	12,415
Saskatoon SK	12,209
Abbotsford BC	11,224
Winnipeg MB	11,085
Vancouver BC	10,609
Edmonton AB	10,079
Victoria BC	10,066
Thunder Bay ON	9,031
Halifax NS	8,715
London ON	8,137
Saint John NB	7,885
Montreal QC	6,912
St John's NF	6,773
Windsor ON	6,754
Kingston ON	6,737



Source: Statistics Canada, 2007, Crime Statistics in Canada, 2006, Catalogue No:85-002-XIE

The Future of Police Leadership

One World, One Voice, One Purpose

POLICE LEADERSHIP 2008 CONFERENCE

April 14-16, 2008

The British Columbia Association of Chiefs of Police, the Ministry of Public Safety and Solicitor General, and the Justice Institute of British Columbia, Police Academy are hosting the Police Leadership 2008 Conference in Vancouver, British Columbia, location of the 2010 Winter Olympics. This is Canada's largest police leadership conference. The conference is held every two years and attracts international, national and regional speakers and delegates.

The theme for this year is:

The Future of Police Leadership
One World, One Voice, One Purpose.

The subtitle of the conference 'One World' recognizes the globalization of law enforcement and crime, 'One Voice' recognizes the convergence of communications and technology, And 'One Purpose', to break down some of the institutional barriers and recognize law enforcement's primary goal of crime reduction and prevention.

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