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

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On August 2, 2007 43-year-old Constable Robert Plunkett of the York Regional Police Service was injured when he was run down by a vehicle during an airbag theft investigation in Markham, Ontario.

Constable Plunkett was struck by a car and dragged while performing undercover surveillance during an investigation near the Pacific Mall in the Steeles Avenue and Kennedy Road area. He was taken to hospital, where he died from his injuries.

Constable Plunkett was a 22 year veteran of the York Regional Police Service. He is survived by his wife and three children.

On October 6, 2007 30-year old Royal Canadian Mounted Police Constable Christopher Worden was shot and killed while responding to a complaint at a home in Hay River, in the Northwest Territories, at approximately 5:00 am. Dispatchers lost radio contact with him after he arrived at the scene, and then sent additional units to check on him. The responding constables found Constable Worden suffering from gunshot wounds. The suspect was later apprehended.

Constable Worden had served with the RCMP for 5 years. He is survived by his wife and eight-month-old child.

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

OFFICERS PAY TRIBUTE TO FALLEN

On Sunday September 30, 2007 hundreds of law enforcement officers from Canada and the United States attended a memorial service at the British Columbia Law Enforcement Memorial located on the grounds of the Legislature in Victoria, B.C.

They are our heroes. We shall not forget them.

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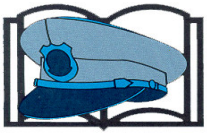
'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"The newsletter is exactly what I have been looking for to keep me abreast of legal developments etc. in law enforcement. Can I get you to add me to your mailing list?" - **Police Constable, Ontario**

****

"I love the newsletter and use it very often to disseminate information to our officers. It is awesome, keep up the great work. The guys in training know how hard it is to keep up on this stuff and we appreciate all your hard work" - **Police Constable, Training Bureau, Ontario**

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"I've been receiving your publication from my Inspector and really enjoy the material you present." - **Police Staff Sergeant, Staff Planning, Ontario**

****

"I have read your issues on several occasions and think they are awesome. They have been very useful at work. Keep up the excellent work." - **Police Constable, British Columbia**

****

"I am a Crown Prosecutor. Another prosecutor sent me a copy of your newsletter which I found very interesting and helpful. Please add me to your e-mail list." - **Crown Prosecutor, Alberta**

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"As someone who is considering a future career in law enforcement after a successful one in the military, I find your newsletter to be very informative. It is an interesting read by itself, but I find it a more prudent read to understand what real policing entails. It gives wonderful insight to the part of the law enforcement career not often considered by the general public, or even those considering a career in the same field. Bravo-Zulu for your good work and most interesting publication." - **Citizen, British Columbia**

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I go online and look for [your newsletter] every couple of months. It is an invaluable tool." - **Military Criminal Investigator, Nova Scotia**

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 21 for the answers.

1. Every inducement to an arrestee held out by a person in authority, no matter how strong, will render a statement involuntary under the confessions rule.
   (a) True
   (b) False

2. No-knock forced entries pursuant to a general police practice, without any consideration to exigencies such as evidence destruction or safety concerns, will nonetheless always be reasonable under s.8 of the *Charter*.
   (a) True
   (b) False

3. If counsel of choice is not available within a reasonable amount of time, an arrestee will be expected to exercise their right to counsel under s.10(b) of the *Charter* by calling a different lawyer.
   (a) True
   (b) False

4. Once an officer decides to arrest a person if they were to flee, that person is always "detained" for the purposes of s.9 of the *Charter.*
   (a) True
   (b) False

5. The circumstances of an accident can be taken into account when an officer is forming their reasonable grounds to arrest a person for impaired driving.
   (a) True
   (b) False

6. Strict pre-trial house arrest can form part of a minimum mandatory sentence once the accused is convicted.
   (a) True
   (b) False

www.10-8.ca

BC's 25 Top Stolen Vehicles (2006)

Rank	Make	Model
1	Chrysler (Dodge/Plymouth)	Caravan/Voyager
2	Honda	Civic
3	Ford	F-Series (F150,F250,F350)
4	Honda	Accord
5	Chrysler (Dodge/Plymouth)	Neon
6	Dodge	Ram
7	Jeep	Cherokee
8	Toyota	Camry
9	Nissan	Pathfinder
10	Acura	Integra
11	Mazda	B2200/B2600 Pick-up
12	Nissan	240
13	Toyota	4 Runner
14	Dodge	Dakota
15	Dodge	Durango
16	GMC	Sierra
17	Chrysler	Intrepid
18	Dodge	Spirit
19	Plymouth	Acclaim
20	Ford	Taurus
21	Ford	Explorer
22	Ford	Mustang
23	VW	Passat
24	GMC	G3500
25	Chevrolet	Cavalier

Source: www.icbc.com

DID YOU KNOW...that Canada's motor vehicle theft rate was 487 per 100,000 population in 2006, down 2% from 2005. BC's rate was 682 while the Abbotsford Census Metropolitan Area (CMA) was 1,155, the Vancouver CMA 745, and the Victoria CMA 380. Manitoba had the highest motor vehicle theft rate at 1,376 with Winnipeg topping out the CMA rates at 1,932 stolen vehicles per 100,000. Source: Statistics Canada, 2007, Crime Statistics in Canada, 2006, Catalogue No:85-002-XIE

NOT EVERY INDUCEMENT WILL RENDER STATEMENT INVOLUNTARY

R. v. Spencer, 2007 SCC 11

The accused was arrested while driving a vehicle associated to three robberies. The vehicle was registered to his girlfriend, later arrested for one of the robberies. A handgun and property (watches and jewellery) from a robbery was found after police executed a search warrant at their shared residence. The accused asked a police officer what was going to happen to his girlfriend and was told they would both be charged with possession of the handgun and the jewellery. The accused offered to confess if the police went easy on his girlfriend. The interrogating officer said he could not make such a deal but could hear his story and make recommendations. The accused also asked to see his girlfriend. After the accused confessed to some of the robberies, he was allowed to visit his girlfriend. He then confessed to more robberies and was subsequently charged with 18 counts of robbery.

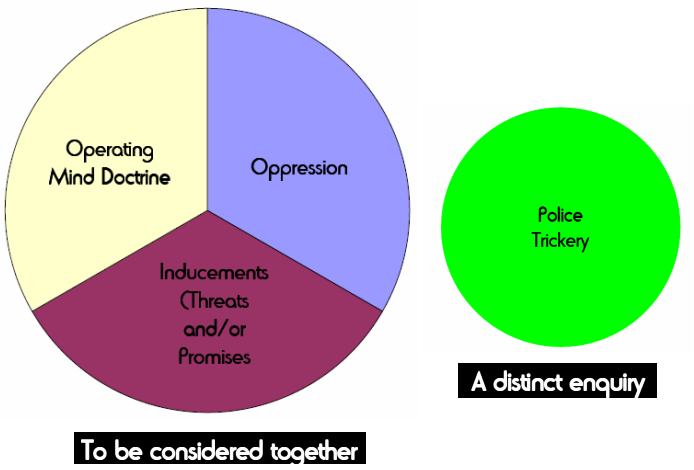
During a *voir dire* in British Columbia Supreme Court the trial judge ruled the statements were voluntary and therefore admissible. He found there were no threats or *quid pro quo* offers made in response to the accused's repeated requests for his girlfriend's leniency. Nor was he promised that she would not be charged. He merely appealed to the accused's common sense and knowledge of the criminal justice system. Allowing the visit with his girlfriend was a small inducement, but not strong enough to raise a reasonable doubt about whether the accused's free will was overborne. The accused was convicted.

The accused appealed to the British Columbia Court of Appeal arguing his statements were inadmissible because they were not made voluntarily; he was induced to confess by hope of leniency for his girlfriend and promised a visit with her. In a 2:1 judgment, the appeal was allowed, the statements ruled inadmissible, and the convictions were overturned. The majority found the trial judge applied the wrong test and considered irrelevant factors, such as who proposed the deal, the accused's attitude and demeanour, and whether the police and the accused were on a the level playing field. The lone dissent found the trial judge did the correct analysis, both legally and factually.

The Crown then appealed to the Supreme Court of Canada. In a 6:2 judgment, the Supreme Court reversed the Court of Appeal's decision. Justice Deschamps, writing the Court's majority opinion, concluded the trial judge correctly applied the law and his finding that the confession was voluntary was entitled to deference.

Statement Voluntariness

Under the common law statements made by an accused to a person in authority are inadmissible as evidence unless the Crown proves beyond a reasonable doubt that they were voluntary. In deciding whether a statement is voluntary a court must consider several factors including:



Promises

Promises considered in the voluntariness analysis need not be directed at the accused to have a coercive effect, as was the allegation in this case. A *quid pro quo* offer is the most important consideration when an inducement is alleged, however, it does not occupy "centre stage" — voluntariness does. Although important, *quid*

LATIN LEGAL LINGO:

"*quid pro quo*"- something for something; what for what; a mutual consideration; that which a party receives or is promised in return for something promised, given, or done; getting something of value in return for giving something of value; securing an advantage or receiving a concession in return for a similar favour; for example, an express or implied promise that, in return for a suspect's confession, the officer would do something such as reduce charges or suggest a lighter sentence.

pro quo is neither an exclusive factor in assessing nor one determinative of voluntariness. Rather, the determination will be contextual and the court must be sensitive to the particularities of the individual. Thus, not every *quid pro quo* held out will necessarily render a statement involuntary. The *quid pro quo* must be strong enough to raise a reasonable doubt about whether the will of the individual has been overborne.

"While a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to that particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement," said Justice Deschamps.

In this case, the trial judge considered all of the relevant circumstances and properly applied the law. Justice Charron stated:

> In my view, the trial judge made no error of law in concluding that no offer of leniency was made in respect of [the accused's girlfriend] and that the withholding of a visit to her until at least a partial confession was made was an inducement that was not strong enough to render the accused's statements inadmissible. It was a relevant factor that the accused had not "lost control of the interview to the point where he and [the officer were] no longer playing on a level field"…. In Oickle, [Justice Iacobucci] explicitly recognized that "[t]he absence of oppression is important not only in its own right, but also because it affects the overall voluntariness analysis".
>
> It was also relevant to the particularities of the [accused] that, according to the trial judge, he was aggressive and a "mature and savvy participant", and that he unsuccessfully attempted many times to secure "deals" with the police. While none of these factors are determinative, it was not an error for the trial judge to consider them in his contextual analysis. [paras. 20-21]

Another View

The minority took a different position. In their view, the will of the individual need only be overborne in the sense that they would not otherwise have given a statement except to avoid pain or achieve promise gained. There is no need that they lost any meaningful independent ability to choose to remain silent. The minority agreed that threats or promises (explicit or implicit) need not be aimed at the accused, but could be directed to someone closely related to them such as telling a mother her daughter would not be charged with shoplifting if the mother confessed to a similar offence.

Justice Fish, writing the minority's judgment, concluded the police made a "compound *quid pro quo*—an implicit but unmistakable threat [to bring criminal charges against his girlfriend unless he confessed] accompanied by an implicit but unmistakable promise [recommend no charges against his girlfriend if he confessed]." He then immediately admitted to the robberies. The minority would have affirmed the Court of Appeal's ruling overturning the accused's conviction.

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

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

NO-KNOCK DECISION BASED ON INFO KNOWN TO POLICE PRIOR TO FORCING ENTRY

R. v. DeWolfe, 2007 NSCA 79

As a result of receiving information from three separate sources, police obtained a warrant to search the accused's residence, believed to be a crack shop. They were also told he kept a young pitbull at the residence to act as a deterrent for police and rival drug dealers. The warrant was executed shortly after 2:00 am by hard entry. Police used a battering ram to break down the door while contemporaneously yelling "police—search warrant." The accused's wife was found in bed without her clothes on. The police seized 0.2 grams of cocaine wrapped in tinfoil in the accused's pants pocket, 26 grams found above a dryer vent, digital scales, and $680 in cash. He was charged with possessing cocaine for the purpose of trafficking

At trial in Nova Scotia Provincial Court the accused argued, in part, that the method of police entry — making a hard entry into the premises — was unreasonable and violated his s.8 *Charter* rights. In the judge's view, the police made a hard entry because that was their policy and practice for drug searches in the area. "As a result of this practice, the police … neglected to exercise their discretion

as the events of the early morning hours unfolded," said the trial judge.

She ruled the police should have re-evaluated their no-knock decision when they found the residence in darkness and tried the door to see if it was unlocked. "An 'unannounced' entry into a family home by seven officers in the middle of the night would have been a sufficient and significant intrusion … and would have served to provide the required shock value being sought." As well, the trial judge noted, no dog was found at the residence and police should have had a female officer present, expecting to find the accused's wife naked in bed. The evidence was excluded under s.24(2) and the accused was acquitted.

"At common law, in the ordinary case, before forcing entry into a private dwelling, police officers, should give: (1) notice of presence by knocking or ringing a doorbell; (2) notice of authority by identifying themselves as law enforcement officers; and (3) notice of purpose by stating a lawful reason for entry. This rule is subject to an exception for 'exigent circumstances'".

On appeal by Crown to the Nova Scotia Court of Appeal, the Court first examined the "knock and notice" rule:

> At common law, in the ordinary case, before forcing entry into a private dwelling, police officers, should give: (1) notice of presence by knocking or ringing a doorbell; (2) notice of authority by identifying themselves as law enforcement officers; and (3) notice of purpose by stating a lawful reason for entry. This rule is subject to an exception for "exigent circumstances". [para. 16]

And further:

> There is no express reference in the CDSA to "exigent circumstances". As developed in the case law, exigent circumstances are generally found to exist where the police have reasonable grounds to be concerned that prior announcement would: (i) expose those executing the warrant to harm and/or (ii) result in loss or destruction of evidence and/or (iii) expose the occupants to harm.
>
> These same factors - officer or occupant safety or destruction of evidence - are the elements of exigent circumstances where that term is defined in the Criminal Code…(see, for example, s. 529.3 authorizing a warrantless entry into a dwelling house). [paras. 24-25]

As for whether the police in this case had the necessary exigent circumstances justifying a hard entry under the common law rule, the Court found the trial judge erred. The police testified about what they considered in deciding whether to effect a hard entry. These considerations were informed by source information and surveillance, such as:

- the drug dealer's criminal history and associates;
- the number of people expected in the residence;
- whether children would be present;
- the geographical make-up of the search location — the physical layout and location of the general area and premises;
- the presence of deterrent measures — whether there was counter-surveillance, barricades, dogs, and/or weapons; and
- threat assessments with respect to the public near the search location and the officers conducting the search.

As well, the general knowledge of the type of drug investigation is relevant to the assessment of the danger involved, for which the police laid a proper evidentiary foundation. They testified, in their experience, that crack shops involved the following:

- they are sporadic, being established from time to time until taken down by the police or rival drug traffickers. In the chain of distribution, crack shops are a step above street level sales;
- they operate on a 24-hour, 7 day per week basis;
- they are in a location where one can obtain a supply of crack cocaine, typically from a residence utilized for the sale of the drug;
- people are employed to work in shifts, given the fact that the sales take place 24-hours per day;
- it is not uncommon for the operators to erect barricades to deter the police or to protect the supply of drugs from theft or robbery from rival dealers;
- operators of crack shops try to limit the quantity of drugs kept on location to limit losses in the event of police search activity or theft;

- actions by rival traffickers present a real and significant threat to operators of crack shops. In some cases, they impersonate the police to attempt to obtain compliance of the crack shop operator. In other cases, the actions taken by rival traffickers may involve threats, intimidation, assaults, fire bombings, killings, etc.
- crack shop operators will attempt to deter rival traffickers by several methods, including hiring look-outs to warn of approaching police or rivals, obtaining aggressive dogs, such as pit-bulls or Rottweillers, or arm themselves with firearms or other weapons.
- crack shops are known to exist throughout the Halifax Regional Municipality, but Spryfield and the Gottingen/Uniacke street areas are predominant areas for sales of crack cocaine;
- the method of distributing crack in these areas varies for a number of reasons, including whether operators are incarcerated and the extent to which a crack shop may impinge on street level distribution;
- drug trade violence is well known to the Uniacke Square area, and has resulted in numerous baseball bat assaults, countless shootings, including those involving police officers, and at least six murders in that immediate area;
- counter-surveillance is known to exist in the area to alert drug dealers to police presence;
- when occupants of crack shops are alerted to police presence in advance of search activity, officer safety is compromised and the possibility of destruction of evidence increases; and
- experience has established that so-called "hard entries" enhance officer safety and decrease the opportunity for crack shop operators to destroy evidence.

Unlike cases where police force entry under a general no knock policy with no evidence of officer safety or evidence destruction issues, there was evidence in this case suggesting concerns about safety and loss of evidence. The Court stated:

> Here, there was cogent evidence of risks to officer safety arising from the nature of the operation (retail crack distribution); [the accused's] criminal history of threats and weapons charges; the known counter-surveillance in Uniacke Square; and the anticipated presence of a pit bull in the residence. In addition, there was a real chance of the destruction of the relatively small quantity of crack cocaine should the police announce their presence or be detected by counter-surveillance. Finally, the police were worried about occupant safety arising from the possibility of weapons and the presence of children. The judge did not discount this evidence or suggest that it did not provide sufficient reasons for a forced entry. [para. 42]
>
> ……
>
> The judge seems to have concluded that the fact that the police did not re-evaluate the planned forced entry upon arriving at the scene, demonstrates that they were acting only in accordance with a policy to force entry and not due to exigent circumstances.

"The decision to force entry must be made on the information available to the police in advance of the search. Just as the "Crown cannot rely upon ex post facto justifications" ... neither can the defence attack the decision on the basis of circumstances that were not reasonably known to the police."

It is my respectful view that the judge erred in two ways: (i) in failing to consider whether the exigent circumstances which warranted the police planning a forced entry had changed when the police reached the door of the residence; and (ii) by taking into account facts which could not have been known to the police prior to entry and, in any event, which were not relevant to the decision to force entry. The decision to force entry must be made on the information available to the police in advance of the search. Just as the "Crown cannot rely upon ex post facto justifications" ... neither can the defence attack the decision on the basis of circumstances that were not reasonably known to the police.

The judge did not elaborate upon how the fact that the windows of the residence were in darkness when the police arrived negated their legitimate concerns about officer and occupant safety and the destruction of the evidence.

The judge's criticisms of the forced entry were: (i) the police should have tried the handle to the front door of the residence to determine if it was unlocked; (ii) they should have had a female

officer present, anticipating that they might find [the accused's] wife...in bed without clothes on (as it turned out, was the case); (iii) they should have made a less dramatic entry to occasion less stress to the children; and (iv) a dog was not found at [the residence].

The danger to the police in testing the door to the premises is obvious. As [the detective] testified - it risked alerting the occupants (including the dog) to the presence of an intruder and, even if the door knob is unlocked, there may be a bolt, chains or barricades which prevent entry. The occupants would not know whether it was the police or rival drug dealers and might respond with weapons or other deterrent measures. That children were present and would likely be in bed, thus safer, was a factor considered by the police. They were aware that [the accused's] wife lived in the premises. In executing the warrant at 2:20 a.m. it would not be surprising to find the occupants in bed. That [the accused] would be in bed without clothing could not have been known to the police in advance, nor did it have any relevance to their concerns for officer safety and destruction of the evidence. Neither did the fact that the occupants were in bed mean they would not have had an opportunity to destroy the evidence had the police announced their presence and awaited entry. Finally...one of the occupants of [the residence], testified that [the accused] had kept a pit bull in residence, but that the dog was stolen before the search. It is my respectful view that the issues identified by the judge do not contradict the police assessment that there were exigent circumstances warranting a forced entry. [para. 45-49]

The Nova Scotia Court of Appeal concluded the trial judge did not determine whether exigent circumstances existed in this case even if it was the general police practice to effect hard entries. By failing to consider relevant factors and by considering irrelevant factors (information learned after entry) the trial judge erred in holding the manner of search breached s.8 of the *Charter*. The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

Note-able Quote

"Never tire in doing good" - Galatians 6:9

LEGALLY SPEAKING:

Informer Privilege

"Police work, and the criminal justice system as a whole, depend to some degree on the work of confidential informers. The law has therefore long recognized that those who choose to act as confidential informers must be protected from the possibility of retribution. The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court the identity of those who give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers.

. . . . . .

The rule applies to the identity of every informer: it applies when the informer is not present, where the informer is present, and even where the informer himself or herself is a witness. It applies to both documentary evidence and oral testimony. It applies in criminal and civil trials. The duty imposed to keep an informer's identity confidential applies to the police, to the Crown, to attorneys and to judges. The rule's protection is also broad in its coverage. Any information which might tend to identify an informer is protected by the privilege. Thus the protection is not limited simply to the informer's name, but extends to any information that might lead to identification.

. . . . . .

The informer privilege rule admits but one exception: it can be abridged if necessary to establish innocence in a criminal trial (there are no exceptions to the rule in civil proceedings). According to the innocence at stake exception, "there must be a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused". It stands to be emphasized that the exception will apply only if there is an evidentiary basis for the conclusion; mere speculation will not suffice. The exception applies only where disclosure of the informer's identity is the only way that the accused can establish innocence.

. . . . . .

[T]he general rationale for the informer privilege rule requires a privilege which is extremely broad and powerful. Once a trial judge is satisfied that the privilege exists, a complete and total bar on any disclosure of the informer's identity applies. Outside the innocence at stake exception, the rule's protection is absolute. No case-by-case weighing of the justification for the privilege is permitted. All information which might tend to identify the informer is protected by the privilege, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time." - Supreme Court of Canada Justice Bastarache, Named Person v. Vancouver Sun, 2007 SCC 43, references omitted.

ARRESTEE MUST BE DILIGENT IN ACCESSING COUNSEL

R. v. Van Binnendyk, 2007 ONCA 537

The accused was stopped for speeding and the officer noted signs of impairment. The officer read the breathalyser demand, advised the accused about his right to counsel and legal aid, and took him to the police station for breathalyser tests. At the station, he was again told about his right to counsel and legal aid. On both occasions he named his lawyer and said he was "not accepting anyone else." He did not, however, have a telephone number for his lawyer.

The police found a number for the accused's lawyer, called it, and left a message that he was in custody awaiting a breath sample and wanted to speak to him before providing a sample. A call back number was also left on the message. After waiting about an hour, the accused was told his lawyer had not called back and he was asked if he wanted to call another one. He declined. The police advised him that if he changed his mind and wanted another lawyer he could let them know and it would be arranged. The accused never asked to speak with another lawyer and two breath tests were taken, both readings exceeding 80mg%.

"While an accused person has a right to his or her counsel of choice, that right is not absolute. If the lawyer chosen is not available within a reasonable amount of time, the accused person will be expected to exercise the right to counsel by calling a different lawyer."

At trial in the Ontario Court of Justice on charges of impaired driving and over 80mg%, the accused argued the police violated his s.10(b) *Charter* rights and that the breathalyser results should be excluded as evidence. The trial judge ruled that the accused only wanted his lawyer of choice and was not reasonably diligent in exercising his right to counsel. The accused had not established that his s.10(b) right had been violated and he was convicted of over 80mg%. An appeal to the Ontario Superior Court of Justice was unsuccessful.

The accused then appealed to the Ontario Court of Appeal arguing that the lower courts erred in holding that his right to counsel had not been denied. In a unanimous endorsement, the Ontario Court of Appeal disagreed, upholding the lower judgments. The Court said:

> …a person detained by the police must be provided with a reasonable opportunity to exercise the right to counsel and, except in cases of urgency or danger, the police must refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity. The detained or arrested person who is offered the opportunity to contact counsel and asserts his right to a "particular counsel" must, however, exercise that right diligently.
>
> While an accused person has a right to his or her counsel of choice, that right is not absolute. If the lawyer chosen is not available within a reasonable amount of time, the accused person will be expected to exercise the right to counsel by calling a different lawyer…
>
> The [accused] had the onus of proving on a balance of probabilities that his s. 10(b) Charter rights had been violated. The [accused's] onus was to prove that his right to retain and instruct counsel without delay, and to be informed of that right, was breached. In discharging that onus, the [accused] had to prove as well that he acted with reasonable diligence in the exercise of his right to choose counsel. [reference omitted, paras. 9-11]

In upholding the trial judge's ruling that the accused did not make reasonably diligent efforts in exercising his right to counsel, the Court stated:

> Here, the police informed the [accused] about Legal Aid duty counsel, they attempted to contact his counsel of choice and they repeatedly offered to contact a different lawyer if he changed his mind. The [accused] refused all these efforts insisting that he would only speak with his counsel of choice. In this context, including the findings of the trial judge that the police discharged their duty, the [accused] did not prove that he acted with reasonable diligence or that his s. 10(b) Charter rights had been violated. [para. 13]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

DRIVER ONLY NEED UNDERSTAND IMMEDIACY OF DEMAND

R. v. Neitsch, 2007 ABCA 226

The accused was stopped driving by police as part of a Checkstop program. He admitted drinking earlier in the evening and a moderate odour of liquor was smelled coming from the vehicle. A demand for a roadside screening test was read, but the officer did not include the word "forthwith" in the demand. The test was taken and the accused failed. He was arrested and read his legal rights and the breathalyser demand. Two breath samples were obtained and the accused was charged with over 80mg%.

At trial in Alberta Provincial Court the accused argued, in part, that the roadside demand was not proper under s.254(2) of the *Criminal Code* because it did not include the word "forthwith". The trial judge found the absence of the word "forthwith" was not fatal to the demand because the circumstances established that the accused understood the necessity of providing a sample forthwith. He was convicted of over 80mg%.

The accused's appeal to the Alberta Court of Queen's Bench was unsuccessful. The appeal judge ruled the trial judge was correct in concluding that a roadside demand under s.254(2) does not require the officer to utter the word "forthwith" or similar language if the circumstances are such that the accused understands the immediacy of the demand. The entirety of the circumstances surrounding the demand must be considered, including events after the demand, like whether the accused actually complied forthwith. Here, the accused immediately complied with the demand, only five minutes passed from the demand to the test, and he was told he would be charged if he did not comply, which highlighted the immediacy of the situation. The accused's appeal was dismissed.

The accused then appealed to the Alberta Court of Appeal, again arguing that the judge should have only considered evidence contemporaneous with the demand when deciding whether the "forthwith" requirement was met and could not consider all of the evidence surrounding the demand. In a memorandum of judgment, the Court of Appeal held "the word 'forthwith' does not have to be used in order for a police officer to make a valid demand for a screening test pursuant to section 254(2) of the Criminal Code." Furthermore, in determining whether the necessary immediacy of supplying a breath sample was conveyed to a driver, regard need not only be given to the moment the demand itself was made. It is appropriate to consider the broader circumstances to determine whether immediacy has been conveyed, including surrounding circumstances subsequent to the demand. The Court stated:

> When all the critical events occur within a few minutes, it would be highly artificial to consider only the initial conversation between the officer and the driver in deciding whether immediacy has been conveyed. A brief interaction between two individuals does not occur in water-tight compartments. It is not meaningful to take account of a verbal agreement to comply with a demand, without also considering evidence about whether actual compliance followed immediately thereafter. The marginally later facts provide a context for the earlier. In a different case, a driver's initial agreement to comply with a demand, followed by a retraction and refusal to do so, might detract from the conclusion that immediacy was understood. Similarly, a driver's own testimony (if believed) about what he did or did not understand might influence a fact finder's conclusion as to whether immediacy was conveyed.
>
> Here, all the events were part of a continuum, with a context provided by the totality. The [accused] was stopped; the demand was made (which included the [accused's] affirmative response to the question of whether he would comply); he was taken immediately to a nearby machine; and he did comply. All this occurred within about five minutes. Under these circumstances, there was no error in considering all this evidence to conclude that immediacy had been conveyed and that the demand was therefore valid. [paras. 11-12]

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

www.10-8.ca

DOCTRINE OF RECENT POSSESSION NOT MANDATORY

R. v. Choquette, 2007 ONCA 571

The accused and another man were arrested after police responded to an assault complaint. Police found two rifles, stolen 17 days earlier in another city, in the SUV the men were driving. The men were charged with weapons offences, including possession of stolen weapons. At trial in the Ontario Superior Court of Justice the accused was convicted on five weapons charges, including two counts of possessing prohibited weapons knowing they were stolen.

The Crown proved the rifles were stolen before the police seized them and because of the "short time" between the theft and their possession, the judge "deemed" the accused knew they were stolen. The accused was sentenced to two years in prison following the 30 months of pre-sentence custody, but he appealed to the Ontario Court of Appeal arguing the trial judge erred in applying the doctrine of recent possession as proof of knowledge that the guns were stolen.

The doctrine of recent possession allows the judge or jury to draw an inference of guilty knowledge where the Crown establishes that goods were stolen and the accused is in unexplained recent possession of those goods, failing evidence to the contrary. However, no adverse inference can be drawn from possession alone. The possession must be recent and the doctrine will not apply when an explanation is offered which might reasonably be true, even if the judge or jury is not satisfied of its truth. This inference of guilt is not mandatory; but rather it is permissive.

Justice Feldman, authoring the unanimous judgment for the Ontario Court of Appeal, found the trial judge did not consider the doctrine as automatic. Rather, he drew the appropriate inference supported by the evidence. Justice Feldman stated:

> Clearly in this case, as no explanation was offered, once the trial judge was satisfied beyond a reasonable doubt that the [accused] possessed the rifles, he was entitled to draw the inference that the [accused] knew they were stolen, if he was satisfied that the theft was sufficiently proximate in time to the possession and if there was nothing else in the evidence that would cause him not to draw the inference. However, the inference is not mandatory and therefore an accused is never deemed to have knowledge based on the doctrine. It merely articulates a permissible inference that can be drawn based on circumstantial evidence. [para. 11]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Doctrine of Recent Possession

"In summary...the doctrine of recent possession may be succinctly stated in the following terms. Upon proof of the unexplained possession of recently stolen property, the trier of fact may--but not must--draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply." - Supreme Court of Canada Justice McIntyre, R. v. Kowlyk, [1988] 2 S.C.R. 59 [para. 12]

LEGALLY SPEAKING:

Conditional Sentences

"There is no doubt that Parliament intended the imposition of a conditional sentence to be more punitive than probation, and to be more restrictive of the offender's liberty. Thus, except in rare cases, a conditional sentence must carry with it some form of punitive terms, such as house arrest and/or a curfew." - Ontario Court of Appeal, R. v. Chartier, 2007 ONCA 706 [para. 5]

INTERMEDIARY GUILTY OF TRAFFICKING IF COMMITS SPECIFIC ACT

R. v. Wood, 2007 ABCA 65

Two undercover officers met the accused, who was panhandling, and asked about the purchase of "an hour of hard", slang terminology for a gram of crack cocaine. The accused used an officer's cell phone and then the three walked four blocks to a Safeway parking lot. There, a vehicle arrived and the accused took the buy money from an officer, went to the vehicle, and returned with the drugs (walking a block or two). In exchange for facilitating the transaction the accused was given a small piece of crack cocaine (known as a hoot). He was charged with trafficking cocaine under s.5(1) of the *Controlled Drugs and Substances Act* (*CDSA*).

At trial in Alberta Provincial Court the accused was acquitted. The trial judge found the accused only gave incidental assistance, lacked the necessary *mens rea* for trafficking, and his assistance was not necessary for the consumption of the purchase. The Crown appealed to the Alberta Court of Appeal.

Justice Cote, writing the judgment for the Court of Appeal, first examined what trafficking entails. He found it did not necessarily require a sale. Section 2(1) of the *CDSA* defines trafficking as any of a number of acts, including to sell, give, transfer, send, deliver, or offer to do any of these. The *mens rea* component for trafficking is knowledge that it is a controlled substance and intent to commit the forbidden act (such as transporting). Justice Cote stated:

> *[F]or trafficking [the mens rea] is the intent to do the act, such as sell, offer to sell, transport, deliver, or offer to deliver..."*

> Mens rea is a type of intent … [F]or trafficking it is the intent to do the act, such as sell, offer to sell, transport, deliver, or offer to deliver, etc. (It also requires knowledge that the chattel is an illegal drug or substance.)
>
> Very different is motive. That is the ultimate result expected or hoped from the act or transaction, such as making a profit, harming someone, having fun, fooling someone, gaining attention, relieving boredom, getting exercise, gaining admiration of someone, or achieving some political aim.
>
> No particular or any motive is needed for a criminal conviction for trafficking. Indeed, motivation is usually not needed for criminal liability, and is often mysterious or disputed … [references omitted, paras. 36-39]

BUYER-SELLER DRUG TRANSACTION OFFENCE GRID

ROLE	BUYER	INTERMEDIARY	SELLER
Principal	Charge	If commits acts defined as trafficking, such as give, transfer, or deliver, charge trafficking ⇨	Charge
Aiding	possession	⇦ If does not commit acts defined as trafficking, but acts solely to assist buyer, charge simple possession	trafficking
		If does not commit acts defined as trafficking but acts to assist seller, charge trafficking ⇨	

In this case Justice Cote found the accused had personally committed all the elements of a trafficking offence. He said:

> Here, the accused … kept the seller and buyer separate, and shuttled between the two with the money. I will assume that the accused was not himself a seller…. However, it is at least arguable that he "gave" the cocaine to the buying undercover constables. He certainly "transferred" and "delivered" the cocaine. He carried it first across the parking lot, and then part of the distance up [the street] to the park. And he certainly "offered to do" those things (before and at this time). [para. 28]

As for whether the accused could use "buyer's agent" as a free standing defence, the Court rejected this argument. When someone buys illegal narcotics through an intermediary, that intermediary will not be guilty of trafficking if they were merely the buyer's agent or helper (solely aiding the buyer) and did not commit any of the acts defined as trafficking. However, if the intermediary does commit an act defined as trafficking (as the accused did in this case), the fact he was helping the buyer is no defence. "Whom the accused assisted or intended to assist, is irrelevant where the accused personally committed forbidden acts," said Justice Cote.

The Crown's appeal was allowed, a conviction for trafficking was entered, and the case was sent back to Provincial Court for sentencing.

Complete case available at www.albertacourts.ab.ca

BY THE BOOK:

Trafficking

Section 2(1) of the *Controlled Drugs and Substances Act* defines "traffic" in respect to Schedules I to IV substances as including "(a) to sell, administer, give, transfer, transport, send or deliver the substance, (b) to sell an authorization to obtain the substance, or (c) to offer to do anything mentioned in paragraph (a) or (b), otherwise than under the authority of the regulations. "Sell" is also defined as including to "offer for sale, expose for sale, have in possession for sale and distribute, whether or not the distribution is made for consideration."

DETENTION DOES NOT ALWAYS BEGIN AT MOMENT OFFICER DECIDES TO ARREST

R. v. Makhmudov & Marinov, 2007 ABCA 248

The accuseds Makhmudov and Marinov were at a bus depot in Calgary en route from Vancouver to Toronto. A police officer, working as part of a Jetway program at the bus depot, smelled the zipper area of two identical duffle bags, noting a smell of marihuana. One bag was labeled "MERINOV" while the other was marked "KUD". The officer secured the bags in the back of a police vehicle. In an effort to identify the owners of the bags, police implemented an undercover operation by telling passengers there was a problem with some of the bags and asked that they be re-tagged. The two suspicious bags were placed beside the bus and the tags removed or hidden. One officer dressed in a Greyhound bus sweater reviewed passenger bus tickets.

A police officer asked Marinov if any bags were his and that they needed to be tagged properly. He identified one of the suspicious bags as his and told the officer the other belonged to his friend. An officer went onto the bus and asked for the passenger "KUD". Makhmudov identified himself, whereupon he was told that some bags had been improperly tagged. The officer handed Makhmudov a tag and told him to fill it out and place it on his bag. At this point Makhmudov identified the second suspicious bag as belonging to him, filling out a tag and placing it on the bag. Immediately after the bags were identified, the accuseds were arrested and the bags were searched. In each bag police found restricted guns, ammunition, cocaine and marihuana.

At trial in the Alberta Court of Queen's Bench, the trial judge concluded the accuseds were not detained, the arrests were lawful and the interim seizure of the bags without a warrant (placing them in the police car) was done by a police officer acting in the execution of his duty for the purpose of preserving evidence. None of the accuseds rights under ss.7, 8, 10(a), or 10(b) of the *Charter* were breached. The accuseds were convicted for weapons, cocaine, and marihuana offences.

The accuseds appealed to the Alberta Court of Appeal arguing that their movements were being controlled by the police and therefore they were detained. They submitted that detention occurs the moment a police officer forms the state of mind that the suspect will be prevented from leaving, even if the suspect has no knowledge of the officer's intention. Here, the police testified they would have arrested the accuseds if they tried to flee the scene. The accuseds also contended that they were denied their rights under s.10(a) and (b) of the *Charter* as well as their s.7 right to silence. Furthermore, they argued the search of the bags was not justified because there were no reasonable grounds; the smell did not meet the plain view doctrine because it was not immediately apparent. Thus the arrests were not lawful. Finally, the initial temporary seizure of the bags was not authorized because the officer could not point to a specific statute or common law rule authoring the seizure.

"The hypothetical possibility that the [accuseds] would have been detained if they tried to flee, does not establish that they were detained. The [accuseds] were not in the coercive power of the state just because the officers had resolved to arrest them at some future point in time should they have attempted to flee."

In a memorandum of judgment the Alberta Court of Appeal found there were no detentions and the searches were reasonable.

Detention?

Section 9 of the *Charter* guarantees everyone the right not to be arbitrarily detained or imprisoned. However, without a finding of detention there will be no s.9 breach. The Court of Appeal concluded there was no detention because the accused was neither physically nor psychologically detained. The Court stated:

> The hypothetical possibility that the [accuseds] would have been detained if they tried to flee, does not establish that they were detained. The [accuseds] were not in the coercive power of the state just because the officers had resolved to arrest them at some future point in time should they have attempted to flee…
>
> We cannot accept the [accuseds'] submission that the detention begins at the instance the police officer decides that a suspect will be arrested. We can postulate many scenarios where an application of that concept would lead to absurd results. To illustrate, one might consider a situation where the suspect admits to a killing while talking to a person he believes to be a new acquaintance – who is actually a police officer. On the [accuseds'] theory, once the admission of the killing is made and the undercover officer decides to arrest then, or at some future time, he must immediately, without further conversation, advise the suspect that he will be detained and of his Charter rights. He could not otherwise continue the conversation to inquire about the location of the body or a murder weapon. [paras. 15-16]

Since there was no detention, neither the accuseds s. 10 (right to counsel) or s.7 (right to silence) were engaged.

Search?

The initial temporary seizure of the bags was justified under s.489(2) of the *Criminal Code*. The Court held:

> The initial, temporary seizure of the bags was not unlawful. After smelling marijuana, the police officer had reasonable grounds to believe the bags contained marijuana. The officer testified that the seizure was to preserve that evidence. The police officer's lack of knowledge of, and failure to cite the particular provision of the Criminal Code, was not fatal. Section 489(2) permits a police officer in the execution of his duty to seize things that he believes, on reasonable grounds, have been used in the commission of an offence or will afford evidence in respect of an offence. Here, the section was satisfied and the seizure was lawful. [para. 18]

The accuseds' rights under s.8 of the *Charter* were not breached, the arrest was made on ample grounds, and the search was lawfully conducted. The accuseds' appeal was dismissed.

Complete case available at www.albertacourts.ab.sa

Notable Quote

"*Good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's … ignorance as to the scope of his or her authority.*" - Justice Romilly *R. v. Peters*, 2006 BCSC 1560

STOPPING BEHIND PARKED VEHICLE: NO DETENTION

R. v. Lamontagne, 2007 BCSC 652

Just before 1 a.m. a police officer saw the accused's vehicle parked at a 45 degree angle on the roadway facing the centre with the lights on. As the officer slowed down she noticed there was a female standing on the passenger side talking to the driver of the vehicle. Although there was no other traffic, if there had been the parked vehicle would have impeded it. The officer drove by and made a u-turn, pulling in behind the accused's vehicle, and turning on her red and blue strobe lights. She walked up to the car and the accused rolled down his window, The officer asked what he was doing and during the conversation noted signs of impairment; a stench of liquor from his breath, slurred speech, watery eyes, an inability to focus, producing an FAC card after looking through his wallet when asked for his licence. The accused was placed under investigation for impaired driving and read his rights, police warning, and breathalyzer demand.

At trial in British Columbia Provincial Court the officer testified she stopped because she was suspicious (the accused's vehicle was stopped in the middle of the road and there was a lady chatting with the driver), but had no particular offence in mind. She just wanted to know what was going on. The trial judge found the officer detained the accused when she pulled in behind his vehicle and turned on her emergency lights. In his view, the officer came across an abnormal situation which caused her to become generally suspicious. Although she was not performing a check stop or random stop and had no particular offence in mind, the officer wanted to know what was going on and did not arbitrarily detain the accused. The evidence of impairment was admissible and the accused was convicted of impaired driving.

The accused appealed to the British Columbia Supreme Court arguing the trial judge erred in concluding the detention was not arbitrary and that the evidence should not have been admitted. The Crown, on the other hand, submitted that there was no detention at all.

Justice Balance agreed with the Crown. Detentions under ss. 9 and 10 of the *Charter* require some form of compulsion or coercion in response to a direction or demand of a police officer. He stated:

> It is my opinion that the features of the encounter between [the constable] and the [accused] do not amount to a detention within the meaning of s. 9. I would respectfully disagree with the learned trial judge that the activation of the officer's lights on her police vehicle, pulled in behind the [accused's] stationary vehicle, converted the interaction into a detention.
>
> Taking into account the factual context at large, that act by the constable was not a means by which she assumed control over the [accused's] movements by a demand or a direction. Even if the activation of the emergency lights could be said to amount to a direction to remain stopped, there was no evidence that the lights triggered any kind of response on the part of the [accused]. There is no evidentiary foundation to find, or from which to reasonably infer, that the [accused] reasonably believed he was under any compulsion or coercion to respond in any way to this constable.
>
> The [accused's] vehicle was already stopped when [the constable] came upon it. He was operating a stationary motor vehicle, which he had stopped diagonally across a travelled portion of the highway. By parking her vehicle behind the [accused's] and turning on her lights, [the constable] was indicating to the [accused] that she had arrived and was a police officer, but was not assuming control over his movement by demand or direction.
>
> The [accused's] conduct did not change. He was stopped and seated in his automobile before the constable arrived at his window, and he was still stopped and seated in his automobile when she approached him in his vehicle. Nothing changed. [paras. 16-19]

Being no detention there was no need to address whether it was arbitrary. The accused's appeal was dismissed.

Editor's note: The accused's application for leave to appeal was dismissed by the British Columbia Court of Appeal, 2007 BCCA 390.

REASONABLE GROUNDS REQUIRES SUBJECTIVE BELIEF BASED ON OBJECTIVE CRITERIA

R. v. Rhyason, 2007 SCC 39

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

At trial in the Alberta Court of Queen's Bench the accused argued the officer did not have the requisite reasonable and probable grounds needed to demand a sample of his breath under s.254(3) of the *Criminal Code*. In his view, the results of the breath sample should have been excluded. The judge disagreed and concluded that the officer did have the required grounds, although borderline. The trial judge noted there were no obvious signs of impairment and the signs that were evident were equally consistent with emotional distress, but the officer did have a deceased pedestrian, an admitted driver with a smell of alcohol on his breath, and minor evidence consistent with alcohol consumption. Furthermore, the accident itself was a valid component of the officer's grounds even though there was no slurring, no staggering, and no unusual driving before the accident. The breathalyser certificate was admissible and the accused was convicted of over 80mg% and impaired driving causing death.

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

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

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

The Supreme Court Decides

The accused then appealed to the Supreme Court of Canada submitting the trial judge applied the wrong test in determining whether or not the officer had reasonable and probable grounds for demanding a breath sample. He argued the trial judge found that evidence of alcohol consumption alone was sufficient by itself to establish reasonable and probable grounds.

In a 5:4 judgment, the Supreme Court concluded the trial judge applied the correct test and did not find the officer's reasonable and probable grounds was based on alcohol consumption alone.

Justice Abella, authoring the opinion for the majority, first reviewed the requirements for a lawful demand under s.254(3) of the *Criminal Code*. Pursuant to this provision a police officer may demand a breath sample provided the officer believes on reasonable and probable grounds that the person is committing or within three hours has committed, as a result of the consumption of

"[T]he circumstances of an accident can be taken into account, along with other evidence, in determining whether an officer had reasonable and probable grounds to arrest an individual for impaired driving."

alcohol, impaired driving or is driving with a blood alcohol content over 80mg%. The test for reasonable grounds has both an objective (facts, circumstances) and subjective (honest belief) component.

In this case, Justice Abella noted, the trial judge correctly considered the relevant combination of facts:

- The smell of alcohol on the accused's breath;
- Minor signs of impairment (bloodshot eyes and blank stare);
- The accused's admission to driving; and
- The circumstances surrounding the accident. On this point Justice Abella stated:

> …the circumstances of an accident can be taken into account, along with other evidence, in determining whether an officer had reasonable and probable grounds to arrest an individual for impaired driving.
>
> This is not to suggest that consumption plus an unexplained accident always generates reasonable and probable grounds or, conversely, that it never does. What is important is that determining whether there are reasonable and probable grounds is a fact-based exercise dependent upon the circumstances of the case. In this case, the presence of an unexplained accident was one factor [taken] into consideration when determining those grounds existed. [paras. 18-19]

The majority found the trial judge relied on more than evidence of mere alcohol consumption in finding that reasonable and probable grounds for demanding a breath sample existed.

A Different View

The minority, on the other hand, would have allowed the appeal, set aside the accused's conviction, and ordered a new trial. Justice Charron, writing the opinion of the minority, agreed with the majority that if there was only evidence the accused had consumed alcohol, this would not be sufficient to establish the requisite grounds for a demand under s.254(3). As he noted, there is a crucial distinction between consumption and impairment. It is not an offence to operate a motor vehicle after having consumed alcohol. Rather, the officer needs grounds a driver is impaired by alcohol or had consumed so much that their blood/alcohol level exceeded 80mg%.

Here, Justice Charron found the trial judge did not accurately state the legal test for reasonable and probable grounds in his judgment and, if he had, there might have been a different result on the breath samples' admissibility. The combination of objective facts listed by the trial judge (a deceased pedestrian at the accident scene, an odour of alcohol on the admitted driver's breath, and other minor evidence consistent with alcohol consumption) did not satisfy the test. A deceased pedestrian at the accident revealed nothing about the accused's condition and the other facts referred to alcohol consumption only. In addressing the use of the accident to support reasonable grounds, Justice Charron stated:

> …I agree with my colleague that the circumstances of an accident, along with other evidence, can be taken into account in determining whether an officer had the requisite grounds. What defeats the argument here is that the circumstances of the accident did not form part of the evidential basis upon which [the officer] based his demand. Had [the officer] given evidence about his observations of the scene of the accident, and relied on inferences drawn from those observations as part of his basis for making his demand, the situation might have been different. But [the officer] nowhere said that an "accident with no other obvious cause" formed part of his grounds for believing that an offence had been committed. In addition, the evidence reveals that, at the time [the officer] arrested [the accused] and demanded that he provide breath samples for analysis, the officer had been at the scene for about two minutes. Other than being advised that the pedestrian had died, there is no evidence that the officer had received any information about how the accident happened. What is at issue here are the officer's reasonable and probable grounds at the time of making the demand, not the ex post facto inferences that can be drawn from the evidence at trial. [para. 28]

The appeal was dismissed.

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

POLICE POLICY DOES NOT HAVE FORCE OF LAW

Jensen v. Stemmer et al, 2007 MBCA 42

Two police officers arrested the plaintiff after her common-law partner called to report he had been threatened by her. The common-law partner said the plaintiff threatened to kill him, but she denied it. The officers interviewed the two parties separately and brought them together to get one of them to leave the home. An angry exchange occurred and the plaintiff was arrested for uttering a threat and was transported to the police station. While being driven to the police station one of the officers allegedly said, "Just between you an me he's lying, isn't he?", with the plaintiff responding, "Yes, he is."

The plaintiff sued the police for false imprisonment. At trial in the Manitoba Court of Queen's Bench, the jury found the police officers did not have reasonable grounds to make the arrest. They awarded her $8,800 for false imprisonment and an additional $25,000 in punitive damages. The punitive damages were awarded because the jury concluded the arrest was carried out pursuant to a deliberately unlawful policy of the police service.

The defendants (police officers) appealed the decision to the Manitoba Court of Appeal arguing, in part, that there was no basis for the jury to find the officers did not have reasonable grounds to arrest the plaintiff (either subjectively or objectively). Furthermore, they submitted this was not a case in which punitive damages should have been awarded.

The Manitoba Court of Appeal dismissed the defendants' appeal concerning the existence of reasonable grounds, but allowed the appeal on the punitive damages issue. Justice Huband (concurred in by Justice Monnin) delivered the judgment of the Court while Justice Hamilton delivered separate reasons.

The Arrest

Justice Huband ruled that it was easy to understand why the jury concluded the officers did not have reasonable grounds. He wrote:

> ...In my view, the jury was perfectly entitled to conclude that the officers had no genuine belief, on reasonable grounds, that [the plaintiff] had uttered a meaningful threat. Firstly, [the plaintiff] denied having made any threat and maintained that position through her criminal trial and through the civil jury trial. There was no overt reason why the police officers should have doubted her word. Secondly, if the officers were of the belief that she had threatened to kill [her common-law partner], one would have imagined that the arrest would have been made at an earlier stage, rather than seeking a solution which would have resulted in no charges being laid. The officers told the parties to find a solution which would have resulted in separating the parties, at least temporarily, which is inconsistent with a belief that [the plaintiff] had uttered a threat to kill. Finally, there was evidence of the comment by [the officer], which, if accepted by the jury, belies any firm belief that [the plaintiff] had uttered a threat to kill. [para. 25]

Punitive Damages

As for punitive damages, they were inappropriate in this case. Punitive damages are awarded to punish a defendant for their egregious conduct. Here, the jury found the officers did not act recklessly, high-handed, or callous. During their dealings they were polite and respectful and the arrest, although unfortunate, was done in good faith and for no improper motive:

> There was, in short, no conduct on their part which would compare in any way to the circumstances that gave rise to substantial punitive damages… There was no plan or scheme on the part of [the officers] to commit the tort of false imprisonment, but rather, events unfolded in a spontaneous manner. There was no ill motive on the part of the constables. There was no attempt on their part to cover up their participation or to colour the facts as they understood them. [The officers] did not profit from their conduct. Their behaviour throughout lacked all elements of outrageous or egregious or malicious conduct. They were not high-handed or insulting or demeaning to the plaintiff. There are simply no grounds to punish [the officers] by the imposition of punitive damages based upon their conduct. [para. 36]

The police policy, described by the plaintiff as a zero tolerance policy for domestic dispute arrests, was not an aggravating factor that would justify a punitive award for damages. The policy did not

mandate an arrest and charge in domestic situations even if officers did not have reasonable grounds to believe an offence had been committed. Justice Huband stated:

> In my opinion, the document is less clear than it should be, but it is far from a document condoning arrest without a warrant and without the necessity of belief, on reasonable grounds, that an offence has been committed.
>
> The General Order instructs that in the absence of contradictory evidence, a victim's statement alone is sufficient to constitute reasonable grounds for the laying of a charge. No doubt that is so in many cases, but not all. The victim's statement alone must be convincing to the point where the officers genuinely believe that reasonable grounds to arrest and lay a charge do exist.
>
> Similarly, the document instructs that criminal charges must always be laid if there is supporting evidence for a charge. Standing in isolation, the application of this direction could result in charges being laid and an accused arrested whether or not the arresting officers have formed the opinion, on reasonable grounds, that an offence has been committed.
>
> However, these statements within the General Order do not stand alone. The policy statement is very clear that charges are to be laid "when there are reasonable grounds to believe that a domestic assault … has occurred."
>
> To the same effect is the statement late in the document stating that arrest is the preferred response to incidents of domestic violence "where reasonable grounds exist to believe an offence has occurred."
>
> It is also of significance that the arresting officers are instructed to contact Crown counsel if there is doubt as to whether charges should be laid. In other words, the laying of a charge and the arrest of an individual is by no means an automatic process.
>
> In my view, when seen in its totality, the General Order is not an appropriate foundation for the granting of punitive damages. The document attempts to provide instruction and direction to police officers who are dealing with the very difficult social problem of domestic violence. Reading the document in its entirety, I do not think that police officers who are trained not to charge and arrest a citizen unless they have reasonable grounds to do so would conclude that any other standard would apply to a domestic violence setting. The General Order does not cancel the responsibility of arresting officers to be guided by s. 495(1) of the Criminal Code.
>
> Finally, and of more importance than the particular provisions, the document is a policy statement, not a regulation or by-law. It cannot have the effect of changing either the statutory law of the country or common law rules concerning arrests by peace officers. [paras. 47-54]

"...it is well settled that policy directives do not have the force of law. A policy directive, in and of itself, cannot create an actionable wrong upon which damages...can be assessed."

Furthermore the family and domestic violence order was a policy statement for the police department. It was neither a regulation nor a by-law. "It cannot have the effect of changing either the statutory law of the country or common law rules concerning arrests by peace officers," said Justice Huband. He continued:

> The General Order may be described as a policy directive, but it is well settled that policy directives do not have the force of law. A policy directive, in and of itself, cannot create an actionable wrong upon which damages, let alone punitive damages, can be assessed. [para. 55]

The Court found there was no basis for imposing punitive damages and the award was set aside.

Separate Reasons

Justice Hamilton, providing separate reasons, agreed the award for general damages was proper, but the award for punitive damages should be set aside because it was not available to the plaintiff. The tort for false arrest is subsumed by the tort of false imprisonment and occurs when a person is arrested without justification. The tort is a branch of a trespass action and a plaintiff does not need to establish an actual loss to prove their claim. They merely need to prove the defendants caused their arrest or detention and the onus then shifts to the defendants to justify their actions. In this case, Justice Hamilton held the jury was entitled to reach the conclusion they did concerning the officers' reasonable grounds for arrest:

> [T]he jury found that the officers did not believe that [the plaintiff] had committed the offence

> for which she was arrested; that is, uttering a threat against [her common law partner]. In other words, the officers failed to demonstrate the subjective element of the test. I agree…that the jury, based on the evidence before it, was entitled to reach that conclusion. [The plaintiff] denied that she made the threat. The officers attempted to separate [the plaintiff] and [her common law partner] to find another solution to the volatile situation other than arrest. And finally, there was the evidence of [the plaintiff] that she replied in the affirmative when [the officer] asked her the following question during the drive to the police station: "Just between you and me, he's lying isn't he?" [para. 91]

As for the punitive damages award on the basis of the police policy, Justice Hamilton found the policy was appropriately put before the jury as context in assessing the actions of the officers, but it did not have the force of law and could not create "a legally actionable wrong upon which damages, let alone punitive damages, could flow." The judge should have told the jury that the policy was not law. She stated:

> The principle that policy directions, directives, or operations manuals, do not have the force of law has been repeatedly affirmed in the case law. Most notably, it has been affirmed in the realm of the administration of justice, including decisions in the area of both police services and prison operations… [para. 124]

And further:

> …Even if the…Policy has the force of law, I would have come to the same conclusion. The purpose of the…Policy is to provide instruction and direction to police officers who are dealing with the very difficult problem of domestic violence…[T]hroughout the document the police officers are reminded of the need to have reasonable grounds to arrest. The…Policy does not cancel the responsibility of arresting officers to be guided by s. 495(1) of the Code or other applicable law. [para. 129]

The appeal was allowed in part. The verdict for false imprisonment was sustained and the award for punitive damages set aside since there was no foundation in law for it.

Editor's Note: Leave to appeal to the Supreme Court of Canada was dismissed.

Complete case available at canlii.org

WHAT MAKES THE DIFFERENCE IN A CONFRONTATION?

Insp. Kelly Keith, Atlantic Police Academy

Which of the following statements do you think will make the difference between winning or losing a confrontation with a suspect?

1) I can bench press over 300 pounds!
2) I can stand still, close one eye and get a center shot with my handgun at 50 yards!
3) I can run a marathon in under 3 hours!
4) I can do a jumping spinning back kick 3 feet in the air!

Assume that you could do all of these things! Would they, either by themselves or together, make the difference in a law enforcement confrontation? Although they are all admirable feats, it is unlikely for the most part that they would make the difference many people might think they would. Let's take a further look at each one individually.

1. Bench pressing 300 pounds will develop strength, which is good thing. But lets take a look at the exercise in the context of a ground fight. Is pressing someone off of you the same as the strength you develop by bench pressing? I will tell you first hand that there are very different factors involved in escaping from the mount position than sheer bench pressing strength.

   A person who weighs 300 pounds has weight dispersed very differently than a balanced bar with the same amount of plates on each side. With traditional bench press, the bar is decelerated on every movement. Otherwise, the bar would launch from your hands. Should a body on top of you in the mount position be decelerated if you are trying to push that person off? Training for power is simply moving an object through the range of motion as fast as you can with no deceleration! This is why medicine ball training is very valuable. Another way to add some functional training to a bench press exercise is using a beer keg filled with water in which the weight moves around within. But ensure you have a spotter in place.

2. Standing still and closing one eye while shooting long distances has very little practical application in a law enforcement gunfight and in fact may cost an officer their life if the officer does not understand the difference. This feat suggests that the officer has great trigger control, is an above average marksman, and training of this type can be a useful tool in some aspects. This being said, however, is it more important to hit your target in a gunfight or not get hit?

   Statistics tell us that approximately 75 % of gunfights occur within 10 feet. Another fact is that law enforcement officers are generally re-acting to a threat in a gunfight and not initiating it. Similarly, most officers will not close an eye when involved in a gunfight. If you are reactive, should you not be creating muscle memory to move laterally or tactically while drawing your handgun to move to cover, or if no cover is available, to make it difficult for the suspect to hit you.

   There are times when it will be tactically advantageous to move in a forward direction and engage the threat. You need to get comfortable moving while drawing and shooting. Moving laterally is a beneficial movement whether the suspect is coming at you with an edged weapon or a bullet. It is fine to say that you can hit a target with one eye closed, but this is not what generally occurs in a gunfight. So why are we not training with both eyes open at least as much. We need to learn basics but we also need to ensure we are training law enforcement officers for a gunfight, not only for a marksman competition.

3. Running marathons and any long distance events is all about aerobic power. Law enforcement altercations are, for the majority of the time, about anaerobic Power. Law enforcement fights are usually over in well under one minute. Your aerobic power will not have the chance to become a factor in this type of altercation. Crossfit is all about developing your anaerobic power and goes against many of traditional cardio and weight training routines. Their website is great and gives you a work-out every day to accomplish. Check them out at www.crossfit.com.

4. Last but not least, the spinning back kick! Again with the majority of altercations in mind, this kick has very little relevance. If you are going to train to "win" a law enforcement altercation you must keep it simple! Forward motion arm and leg strikes are what we need to concentrate on. The key to training to "win" is to be able to strike and move while you strike a moving target. You will only be able to do this with confidence if you train this way.

The types of training looked at here all have their place. But we need to remember that they might not be as relevant as people might think they are. Sometimes all it takes is a little modification to the exercise, like the bench press, to make it more practical to a real world situation, such as one you might find yourself involved in as a law enforcement officer.

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

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (b) **False**—see *R. v. Spencer* (at p. 4 of this publication).

2. (b) **False**—see *R. v. DeWolfe* (at p. 5 of this publication).

3. (a) **True**—see *R. v. Van Binnendyk* (at p. 9 of this publication).

4. (b) **False**—see *R. v. Makhmudov & Marinov* (at p. 13 of this publication).

5. (a) **True**—see *R. v. Rhyason* (at p. 16 of this publication).

6. (b) **False**—see *R. v. Panday, Yue, & Jalota* (at p. 24 of this publication).

ACROSS THE NATION

BRITISH COLUMBIA

JUST SHY GROUNDS FOR ARREST: COCAINE ADMISSIBLE

BC's top court upheld a conviction after cocaine was found in a vehicle following the accused's arrest. In *R. v. Lieu*, 2007 BCCA 113, the accused was convicted in British Columbia Supreme Court on a charge of possession for the purpose of trafficking after police seized cocaine from his vehicle after his arrest. A police officer collected a number of tips about a drug investigation, coordinated a team of officers to investigate, and prepared and distributed a target sheet respecting the accused. A member of the team subsequently observed him engage in what was believed to be a "dial-a-dope" deal, but could not contact the team coordinator. He went ahead and arrested the accused anyway and a search of the car turned up cocaine. The accused appealed his conviction to the British Columbia Court of Appeal submitting that the cocaine should have been excluded as evidence because the police breached his *Charter* rights. Justice Ryan, delivering the judgment for the unanimous British Columbia Court of Appeal, upheld the conviction. Even if the grounds for arrest held by the arresting officer fell shy of establishing objectively reasonable grounds, they were just short of that proof, and the evidence ought not to have been excluded under s.24(2).

BYE, BYE GROW OP HOUSE

An order forfeiting the home of a husband and wife purchased for $367,000 and used to grow marihuana was upheld. In *R. v. Huynh and Ta*, 2007 BCCA 235, the accuseds pleaded guilty to producing marihuana after police executed a search warrant at a house and found a 679 plant marihuana grow operation. The sentencing judge found the accuseds had been running a large, moderately sophisticated, commercial grow operation on an ongoing basis for a considerable period of time. Even though neither accused had a criminal record, the judge held that forfeiture of the dwelling-house would be proportionate to the nature and gravity of the offence and the circumstances surrounding its commission. Further, the sentencing judge concluded the dwelling-house was not the principal residence of their three children prior to the execution of the search warrant and it was therefore not necessary to consider s.19.1(4) of the *CDSA* and the impact forfeiture might have on the children. The house was ordered forfeited pursuant to s. 16 of the *CDSA*, each accused was given a four-month conditional sentence, a firearms prohibition, and a victim surcharge of $100 was levied. The accuseds appeal of the forfeiture order to the British Columbia Court of Appeal was dismissed. The sentencing judge adopted the appropriate test in making the order of forfeiture and recognized that once the Crown had established that the property in question was offence-related property and that the offence was committed in relation to that property, she was required to go on to consider the factors in s. 19.1(3) and (4) before she could make the order of forfeiture. She was not satisfied that an order of forfeiture would be disproportionate under s.19.1(3), nor was she satisfied that s. 19.1(4) applied.

CRIMINAL ORGANIZATION INSTRUCTION OFFENCE CONSTITUTIONAL

The provisions creating the instruction offence for criminal organizations are not vague nor overbroad to make them unconstitutional. In *R. v. Terezakis*, 2007 BCCA 384, the Crown alleged that the accused was the leader of a criminal organization involved in drug trafficking. He was charged with several offences including instructing the commission of an offence for a criminal organization under s. 467.13 of the *Criminal Code*. At his trial in British Columbia Supreme Court the judge ruled that s.467.13 was unconstitutional because it was too vague and overbroad. In her view, the meaning of the word group within the definition of criminal organization applied to too wide an ambit of persons, even those who may be unaware that one of the group's main activities was serious crime. As well, she opined that the instructing person did not have to be a member of the group. The instructing offence was thus quashed. The Crown appealed to the British Columbia Court of Appeal arguing the trial judge erred. "A vague law prevents a citizen from realizing when he or she is entering an area of risk for criminal sanction. It makes it difficult for the authorities to determine if a crime has been committed and may give too much discretion to law enforcement officials." Justice Mackenzie held that the definition of criminal organization did "not include persons who are not functionally connected to that criminal purpose or activity, irrespective of their links to organizations with legitimate purposes and activities that include persons in the criminal group." Further, "the instructing person must know that he is part of the group and exercising the

authority of the group for the group." Thus, the instructing person's knowledge they are part of the criminal organization, "plus the fact that the instructed offence must be connected to the criminal organization avoids the risk of an overbroad ambit to the offence", and it is therefore not constitutionally flawed.

MUST LOOK AT THE WHOLE, NOT PIECES

A court must look at the totality of the circumstances when assessing the grounds for a search warrant, not each fact in isolation. In *R. v. Nguyen and Nguyen*, 2007 BCCA 264, the police applied for and were granted a search warrant, finding a moderately sized marihuana grow operation in the basement of a residence. The accuseds were convicted of producing marihuana and possession for the purpose of trafficking. They then appealed to the British Columbia Court of Appeal. After arguing the information to obtain the search warrant was flawed, the accuseds also submitted that the remaining information was insufficient to support the warrant. A defence lawyer argued that each of the remaining pieces of information (the smell of marihuana, condensation on the windows, and a marked increase in hydro consumption) could be explained in a way unrelated to a marihuana grow operation. Justice Saunders, for the unanimous appeal court, disagreed stating, "While there could be other explanations for each of the observations, taken as a whole they present support for the warrant."

ALBERTA

FLIGHT HELPS PROVE GUILT

Fleeing a crime scene can be used as evidence of guilt. In *R. v. Callahan*, 2007 ABCA 320, a police officer saw three people running from a strip mall that had been broken into in the early hours of the morning. One was arrested by the officer, another was found hiding under the deck of a nearby house, and the accused was found in a tree about five houses north of the strip mall. No one else was found in the area. The accused was in possession of the keys to an unlocked rental car found in an alley near the strip mall. The car had been rented for him by a friend and there were items in the car that were consistent with shop-breaking tools, including a flashlight which was identical to the type of flashlight found in the premises broken into. The fingerprints of all three men were also found on this car. The accused was convicted on three counts of break-in and breach of recognizance. He appealed to the Alberta Court of Appeal arguing, in part, that the trial judge erred in considering his flight as consciousness of guilt for the break-ins. The Court of Appeal, however, disagreed. The trial judge considered that the accused might be fleeing and hiding because he was in breach of his recognizance, but she dismissed it because it was a minor offence and he was more likely fleeing and hiding to avoid being caught for the break-in. The appeal was dismissed and the convictions were upheld.

SASKATCHEWAN

NO APPEAL FROM s.117.03 FIREARMS FORFEITURE ORDER

There is no right to appeal a forfeiture order under s.117.03(3) of the *Criminal Code*, Saskatchewan's Court of Appeal has found. In *R. v. Hudson*, 2007 SKCA 82, the accused told police the time and place where he proposed to demonstrate the use of an unregistered shotgun. The police attended, seized the shotgun under s.117.03(1) and took it before a Provincial Court judge. The judge ordered the gun forfeited, but the accused appealed the forfeiture order to the Saskatchewan Court of Queen's Bench, further alleging s.117.03 was unconstitutional. The Queen's Bench judge ruled that she had no jurisdiction to entertain an appeal from the forfeiture order and suggested an application for declaration under civil action procedures be pursued in relation to the *Charter* issue. This decision was further appealed to the Saskatchewan Court of Appeal. In dismissing the appeal, Chief Justice Klebuc noted that "appeal courts are solely creatures of statute and have no right to create appeals." In this case, neither s.117.03 nor s.839 of the *Criminal Code* provided the right of appeal from any order made pursuant to it. Nor did a breach of the *Charter* create a right of appeal because it is not an independent source of appellate jurisdiction. The appeal court, however, did not decide whether the civil application respecting the Charter issues was available or appropriate.

MANITOBA

TIME SERVED CANNOT FORM PART OF YCJA DISPOSITION

The Manitoba Court of Appeal has held that a Youth Court cannot make pre-sentence custody part of the youth's

formal sentence. In *R. v. T.(G.A.)*, 2007 MBCA 88, the young person plead guilty to several charges after spending 106 days in custody. The sentencing judge included 90 days of the time served as part of his disposition along with a one year probation order. The Crown appealed to Manitoba's top court arguing the sentence was illegal because a youth sentence comes into force on the date it is ordered or a later date (s.42(12) *Youth Criminal Justice Act* (*YCJA*)). The Manitoba Court of Appeal agreed, stating that a court cannot backdate a sentence under the *YCJA*. The Youth Court can, however, take into consideration time served by a youth, which will mitigate and reduce the sentence on sentencing day, perhaps even eliminating any need for additional custody.

PRESENCE IN BUNKER PROVES INVOLVEMENT

Be careful where you brush your teeth. In R. v. Johnson, 2007 MBCA 14, police found a very large and sophisticated hydroponic grow operation consisting of eight railway cars buried side-by-side underground, with doorways interconnecting them all. There was a farm house on the property and some of the buried units were also used as living quarters. The accused wasn't around when police raided the operation, but they found some evidence he was at the farmhouse, including personal effects in one of the bedrooms, a receipt showing he bought a reverse osmosis machine that was used in the grow-op, and his fingerprint was on a stereo cabinet. In the bunker, police seized a rifle that belonged to him and a toothbrush with his DNA. He was convicted of several drug offences and sentenced to four years in prison. He argued in the Manitoba Court of Appeal that the judge's verdict was unreasonable because the circumstantial evidence against him was insufficient to establish, beyond a reasonable doubt, that he was a party to the grow-op. The Court, however, disagreed. Justice Huband found that once the accused's presence was confirmed in the bunker, a place intended only for those involved in the illicit operation, his involvement in the criminal activity was confirmed. The evidence was inconsistent with any other rational conclusion. The accused's appeal was dismissed.

ONTARIO

BAIL IS NOT JAIL

A five member panel of Ontario's highest court has ruled that bail, even pre-trial house arrest, cannot form part of a mandatory minimum sentence. In *R. v. Panday, Yue, and Jalota*, 2007 ONCA 598, the accuseds were convicted of various serious criminal offences, including ones involving a firearm that have minimum mandatory sentences of four years. While awaiting their trial, they all spent more than 30 months each on strict bail. The sentencing judge gave partial custody credit for their time spent on strict bail (approximately one-for-five), considered it punishment of imprisonment, and made it form part of the minimum four year sentence. The Crown appealed and the Ontario Court of Appeal overturned the sentencing judge's ruling. Strict bail has a punitive aspect but it is not the equivalent of actual incarceration, said Justice MacPherson for the three judge majority. Thus, a sentencing judge does not have the discretion to consider time spent under pre-sentence bail as the equivalent of actual custody and use it as credit towards calculating the mandatory minimum. The two dissenting judges, on the other hand, concluded that "where a trial judge is satisfied that time spent under strict conditions of pre-sentence bail is, in substance, the equivalent of a period of actual custody, the trial judge does have the discretion to give some credit for that time towards the calculation of the mandatory minimum sentence."

GUN ADMITTED EVEN IF DETENTION ARBITRARY

The Ontario Court of Appeal did not exclude a gun found by police during a street check even if they violated the accused's *Charter* rights. In *R. v. Grant*, 2007 ONCA 26, the accused was convicted of possessing a firearm while prohibited and breach of probation. He had been stopped by police in a high crime neighbourhood where the police had been requested to attend by the community and the officer knew him, knew that he did not reside in the area, and knew about his prior criminal activity. The officer initially observed him with a woman, a known prostitute and crack user, and also observed the accused acting suspiciously. He was "blading", a police term for attempting to conceal a weapon. The officer asked the accused to walk to the police car for a C.P.I.C. check, at which point the officer noticed a bulge in the left side of the accused's pants. He was searched and found to be in possession of a sawed off shotgun. The accused appealed to the Ontario Court of appeal arguing he was unlawfully detained and searched, that his rights under the *Charter* were infringed, and that the evidence gathered should have been excluded under s.24(2) of the *Charter*. The Ontario

Court of Appeal concluded that even if the accused was arbitrary detained, the evidence was admissible. The detention was quite brief, the accused had a reduced expectation of privacy in a public area compared to his home, and questioning was minimally intrusive. And even though the police had prior knowledge of and dealings with the accused, they did not act in bad faith. Further, the Crown's case depended entirely on the gun. "The police did not grossly overstep the bounds of legitimate questioning, acted in good faith, used no force, and were patrolling one of Toronto's high-crime areas," said the Court. "The repute of the justice system would suffer if the evidence were excluded."

NEW BRUNSWICK

OWNER'S PERMISSION NEEDED TO BORROW GUN: THEFT MADE OUT

A locked gun is notice that it was not to be borrowed without its owner's permission. In R. v. Charters, 2007 NBCA 66, the accused was charged with several offences, including break and enter after he went into his parents' home and used a hacksaw to cut the chain on his father's Winchester rifle and take it. He was 29 years old, had not lived at home for about a year and did not have permission to go into the house that day or take the gun, but had often before used the gun during hunting season. At his trial he was acquitted of the break and enter and of the included offence of theft. The judge found a reasonable doubt about the accused's *mens rea* on the break and enter charge and theft did not apply because he did not take the gun—or fraudulently and without colour of right convert the gun to his own use—with intent to deprive his father temporarily of it. The Crown appealed to the New Brunswick Court of Appeal arguing the trial judge erred on the included offence of theft. The acquittal was overturned and a conviction of theft entered. The *actus reus* had been proven—the accused admitted to taking the gun without his father's permission. As for the *mens rea*, the accused did not assert a colour of right defence. Even if he had, there was no evidence he honestly believe that he had the right to cut the chain and remove the gun without his father's permission. Colour of right might have been a plausible defence for entering the home, however, it was not a defence for cutting a chain to remove a gun from a locked rack—which signaled notice to all that it was not to be borrowed without the key holder's permission.

LEGALLY SPEAKING:

Colour of Right

"The term "colour of right" generally, although not exclusively refers to a situation where there is an assertion of a proprietary or possessory right to the thing which is the subject matter of the alleged theft. One who is honestly asserting what he believes to be an honest claim cannot be said to act "without colour of right", even though it may be unfounded in law or in fact. The term "colour of right" is also used to denote an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done. The term when used in the latter sense is merely a particular application of the doctrine of mistake of fact." – Ontario Court of Appeal Justice Martin, *R. v. DeMarco*, (1973) 13 C.C.C. (2d) 369 (Ont.C.A.), references omitted.

YUKON

STAY NOT APPROPRIATE IN DESTROYED VIDEO

A new trial was ordered after a judge ordered a stay in a case where a police officer destroyed a VICS recording (video in car system) of an encounter with the accused. In R. v. Buyck, 2007 YKCA 11, the accused was charged with assaulting a peace officer, resisting arrest, assault with a weapon, and escaping lawful custody after a routine check. A police officer attempted to arrest the accused after stopping him in his vehicle, detecting a strong odour of marihuana and seeing a marihuana stub in the ashtray. As attempts to place handcuffs on the accused were made, he picked up a shovel in the box of his pickup, swung it at the officer, and then drove off, only to turn himself in the following day. About three months later the officer again stopped the accused, who was breaching his recognizance. The accused apparently apologized to the officer for his earlier behaviour but no notes were taken. The incident was recorded on an in car video system. Unfortunately, the officer did not connect the two incidents and the video was recorded over as per police policy. At his trial, the accused argued that the destruction of the video from the second encounter violated his right to disclosure and his ability to

make full answer and defence was affected. The judge found the officer's failure to preserve the video was "unacceptable and inexcusably negligent", violated the accused's right to full disclosure, and did irreparable prejudice to the integrity of the judicial system. He ordered a stay of proceedings which effectively ended the prosecution. The Crown's appeal to the Yukon Court of Appeal was allowed and a new trial was ordered. A judicial stay of proceedings will only be granted in the rarest of cases, where a stay is the only appropriate remedy. First, allowing the prosecution to continue in this case would not perpetuate or aggravate the police officer's conduct. Nor did ending the prosecution outweigh society's interest in getting a verdict on the merits of the case. Here, a stay was not an appropriate remedy for the breach of the accused's right to full disclosure ruled the Yukon Court of Appeal.

SAFETY SEARCH INCIDENT TO TRAFFIC STOP REASONABLE

R. v. Thibodeau, 2007 BCCA 489

A police officer saw the accused's vehicle driving on the wrong side of the road late at night. Eventually, the car veered back into its own lane and the officer sopped it and spoke to the accused, the driver. The officer asked the accused to produce her driver's license and registration. She produced the registration, but was unable to produce her driver's license after she looked in her wallet for some extended time. According to the officer, the accused appeared more nervous than most people who are simply being stopped for a *Motor Vehicle Act* infraction. She was wearing a fanny pack around her waist but avoided looking there for some time.

The accused turned her body away from the officer at which point he could no longer see her hands. This made him nervous and very concerned for his safety; he wondered whether she might be looking for a weapon. The accused handed him her driver's licence, but kept herself turned away so that the officer could not see her hands. He told her that he wanted to see the bag and her hands. After she said, "I don't think I have to do that", the officer responded, "I need to see your hands and your bag. I am concerned about what's in the bag." She then passed the bag towards him. He reached into the vehicle window and took control of the bag. The zipper on the smaller of two zippered pouches on the bag was open and the officer could plainly see a small baggie of crystal methamphetamine. The accused was arrested for possession of a controlled substance, escorted to the police vehicle, read her rights under s. 10 of the *Charter*, and given the police warning that she did not have to say anything. The vehicle was searched as an incident to lawful arrest and a yellow backpack on the backseat was searched; a larger quantity of drugs, a scale, cell phones and notebooks was found. The accused was then told she was under arrest for possession for the purpose of trafficking and again informed her of her rights.

During a *voir dire* in British Columbia Supreme Court the trial judge admitted the methamphetamine and drug paraphernalia. The trial judge found the accused's initial detention was not arbitrary because the officer had witnessed an infraction of the *Motor Vehicle Act*. The search of the accused's fanny pack was not a fishing expedition for evidence; the officer was looking for weapons, not drugs. Nor was the search unreasonable. The officer was justified in concluding, objectively, that the search was reasonably necessary to confirm that the accused was not looking for a weapon in her fanny pack. In the judge's view (1) the accused seemed more nervous than the circumstances, in the officer's opinion, would warrant, (2) she had turned her body away from him, (3) she had looked in her wallet for one or two minutes before starting to look in her fanny pack for her driver's licence, and (4) the officer could not see her hands and what she was doing with the fanny pack. As for the search of the backpack in the vehicle, it was proper as an incident to arrest. The accused was convicted.

The accused appealed to the British Columbia Court of Appeal arguing the trial judge erred in failing to consider the totality of the circumstances when the officer took the fanny pack. First, she argued that once she made her hands visible and gave him the fanny pack there was no need to search it because he would have no longer had a concern for his safety. Second, there was no suspicion of criminal activity, unlike the leading case on investigative detentions and searches in the Supreme Court of Canada decision *R. v. Mann*, [2004] 3 S.C.R. 59.

Justice Newbury, delivering the opinion of the unanimous British Columbia Court of Appeal, agreed

the search was reasonable. As for the first point she stated:

> [T]he constable was concerned for his safety, based on the four factors outlined … and … these constituted objective grounds for that concern. The request to see [the accused's] hands and fanny pack then began a course of steps – her bringing the fanny pack forward, making her hands visible, the officer's reaching and taking the fanny pack from her – that it would be unreasonable to try to divide such that at some point before he looked into the fanny pack with his flashlight, the legal situation suddenly changed, and the search became improper. In other words, it would be unreasonable in my view to require the officer to have suddenly said "Never mind" once he could see [the accused's] hands (if indeed he could, apart from the fanny pack). The factors listed by the trial judge still obtained throughout the few seconds this series of steps would have taken. [para. 9]

On the second point, Justice Newbury upheld the trial judge's ruling that the officer acted reasonable even though it was only a motor vehicle offence he was investigating, and not a criminal one.

> With respect to Mann, I am not persuaded … the Supreme Court's concern generally for balancing privacy expectations with concerns for officer safety, do not have application, or have very diminished application where only a Motor Vehicle Act offence is concerned. Certainly, the fact [the officer] was dealing with this type of offence as opposed to a murder or bank robbery is one of the circumstances to be considered as part of the "totality", but the fact remains that police officers may have valid safety concerns even where the offence is not a crime and even where the person detained seems polite and co-operative. [para. 10]

The search of the backpack was also valid as an incident to arrest.

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

JUDGE LACKS JURISDICTION TO ORDER RETURN OF VEHICLE

R. v. Peric, 2007 ONCA 738

The police had towed a tractor-trailer unit to a towing compound after it collided with a train. The accused was the lessee, not the driver of the unit, and was charged with criminal negligence and dangerous driving because of the vehicle's alleged unroadworthy condition. The tractor - trailer remained at the towing company's compound for over two years until the police and/or Crown released its control of it. In the meantime, however, the towing company disposed of the vehicle to recover the cost of storing it. The accused brought a pre-trial motion before the judge at his criminal trial in the Ontario Superior Court of Justice seeking an order under s.490 of the *Criminal Code* that the Crown return the tractor-trailer unit to him. The accused's motion was dismissed.

The accused appealed to the Ontario Court of Appeal submitting that the seizure and detention of the tractor-trailer was never authorized by any judicial authority. He argued that the procedures respecting the seizure and detention of property set out in ss.489, 489.1, and 490 of the *Criminal Code* were not followed. He claimed just restitution of value of the truck-trailer unit in the amount of $42,000. He also contended that the police were responsible for paying any costs of storing property they have detained for the purposes of their investigation. The Crown argued it was not responsible for the storage costs or for the vehicle.

The Ontario Court of Appeal dismissed the accused's appeal. Since the towing company had disposed of the vehicle the judge could not order the Crown to return it. The vehicle, whether properly seized or not, was no longer in the hands of the Crown. The accused's claim for just restitution of the value of the truck-trailer was a civil claim, over which the judge presiding at the criminal trial had no jurisdiction. The accused did not seek any of the remedies that were within the judge's authority—there was no prejudice to the fairness of the trial and no evidence obtained from the Crown's inspection of the vehicle was sought to be excluded. The issues of civil liability could be the subject of further litigation, but were not within the purview of the judge at the criminal trial.

Complete case available at www.ontariocourts.on.ca

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One World, One Voice, One Purpose

POLICE LEADERSHIP 2008 CONFERENCE

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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