

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 November 5, 2007 20-year-old RCMP Constable Douglas Scott was shot and killed after responding to a report of a drunk driver on the remote Baffin Island in Nunavut shortly before midnight. Dispatchers lost contact with Constable Scott after he radioed that he was responding to the incident.



A second constable arrived at the scene and located Constable Scott's body.



An RCMP Swat team was flown to the location and the suspect surrendered approximately four hours after the shooting.

Constable Scott had served with the RCMP for 1 year.

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



A MESSAGE FROM THE DIRECTOR



Let's face it; we live our professional lives in a fish bowl. Our jobs are getting more and more difficult each year. We have people, not in the ring, second-guessing our every decision, questioning our motives. However, I can say this unequivocally, the work you do in protecting and serving the community that you work in is valued by the vast majority of Canadians. Hold your head high for we belong to a noble profession and you are community leaders.

It is unfortunate but evident that Canadian society is getting less and less civil. Violence against police officers is becoming more commonplace. Unfortunately some of this violence results in the deaths of our colleagues. As we approach the holiday season I want to acknowledge the pain of loss that this has on our community. In particular, our collective thoughts and prayers are with the surviving family members of our slain comrades.

Finally, on behalf of all the Police Academy staff, I wish you a healthy, safe and happy holiday season.

Supt. Axel Hovbrender,
Director of the Police Academy,
Justice Institute of BC

"They are our heroes. We shall not forget them."

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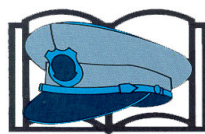
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'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"Would you please add me to your email list for the "In Service 10-8" publication. This is a wealth of information for the 21st century police officer. In today's policing you need to stay on top of the latest case law rulings, and to do that you need to read, read, and read some more! With more than 25 years now in policing and I still learn something new each and every day I come to work!" - Police Constable, Alberta



"Would you kindly add me to your electronic distribution list for the newsletter. I find it an outstanding tool and utilize it on parade all the time to review recent case law decisions. Keep up the excellent work." - Police Sergeant, Alberta



"I find the publication excellent for the case law especially !!! Thanks." - Police Sergeant, Major Crimes, Saskatchewan



"Thanks for the great publication. I enjoy reading the rulings and your analysis and explanations of them. Keep up the great work." - Police Constable, British Columbia



"Can you please put me on your distribution list for the 10-8 newsletter. I would like to keep in the loop of good operational police work!" - RCMP Corporal, Ontario



"Just wanted to say thanks for all your work on such a great publication. It continues to grow and is always useful and informative. While much of my duties are in the realm of Administrative law, there are occasions to keep in mind the Charter issues concerning detention, search and evidence collection. Please keep up the excellent work!" - Regional Investigative Specialist, British Columbia



"I would appreciate it if you could add me to your mailing list for the 10-8 bulletins. I enjoy reading them and find them very informative ... Great job!!!" - Police Superintendent, Ontario



"I wonder if you could be so kind to place me on your mailing list. I act for a Police Union in Western Australia and came across your publication whilst researching. The articles have relevance to situations WA police find themselves in." - **Reader, Western Australia**



"A fellow member brought my attention to your 10-8 Newsletter. I have enjoyed it and found the material very informative. Thanks!!" - **Police Constable, Saskatchewan**



"I am a police officer in Ontario ... I have been reading your 10-8 newsletter on a regular basis and its always been a great tool to learn the new case laws. Keep up the good work." - **Police Constable, Saskatchewan**



"I am a 6 year RCMP member and my partner had directed me to your web page. I have not read the whole thing yet, but I like what I see so far." - **RCMP Constable, British Columbia**



"Could you add me to the 10-8 newsletter distribution list? It is a great publication for street cops. I've been a long time reader and used many of the ideas and suggestions in my own investigations. Keep up the good work, with many thanks for a great service!" - **Police Sergeant, Alberta**



"This is a great read whether it be new material or just a review! Thanks." - **RCMP Constable, British Columbia**



"I was introduced to your publication by our detachment commander. Finally, I can actually say that I enjoy reading about case law. Some of the folks in our office think I'm nuts but obviously they have yet to discover your newsletter." - **Police Constable, Ontario**



"I received a copy of your newsletter from a co-worker and found it not only hard to put down, but informative, educational, and of great asset to my future employment enrolment in law enforcement. Keep up the good work." - **RCMP Auxiliary Police Constable, British Columbia**



IN-SERVICE LEGAL ROAD TEST



The "In Service" Legal Road Test is a simple multiple choice quiz designed to challenge your understanding of the law.

Each question is based on a case featured in this issue. See page 47 for the answers.

- Visitors entering a prison do not have a reduced "expectation of liberty" such that when they are subject to the rigours of the routine visitor screenings they are detained for *Charter* purposes.
 - True
 - False
- Belief on reasonable grounds most likely resembles which of the following standards?
 - Hunch
 - Reasonable suspicion
 - Reasonable probability
 - Prima facie case
 - Certainty
- A vehicle search incidental to arrest must always be performed on the heels of an arrest (within a short time after arrest) or it will be unreasonable.
 - True
 - False
- If circumstances are such that the accused can show on a balance of probabilities that their statement was obtained in violation of their right to silence, the Crown will be unable to prove voluntariness beyond a reasonable doubt.
 - True
 - False
- A police officer's experience is relevant when a court assesses whether the officer has reasonable grounds.
 - True
 - False
- In 2006, which province had the most Explosive Disposal Unit callouts to scenes involving the possible use of explosives?
 - British Columbia
 - Alberta
 - Ontario
 - Quebec

Legally Speaking:

Stare Decisis



In a nutshell, the rule of stare decisis is based on hierarchy. Lower courts are bound to follow decisions rendered by the courts that have the power to reverse them. Since an appellate court out of province has no such power, their decisions have no binding force within this province." British Columbia Court of Appeal, *R. v. Vu*, 2004 BCCA 230 at para. 27.

REASONABLE GROUNDS DOES NOT REQUIRE CERTAINTY

R. v. Mouland, 2007 SKCA 105



Police stopped the accused at 2:50 am after he was seen driving 80 km/h in a 100 km/h zone on the Trans Canada Highway. He stuck his head out the window and asked if there was a problem. An officer requested a driver's licence and registration, which was produced. The accused had an Alberta driver's licence and a British Columbia registration, consistent with the licence plates on the truck he was driving. The officer questioned the accused about where he was going and about the ownership of the vehicle. He indicated he was travelling to Oshawa, Ontario to see his children in a pediatric ward and produced a piece of paper with directions for the hospital in Oshawa, although Oshawa was spelled incorrectly. He indicated that he borrowed the vehicle from a friend four months prior.

After querying the information at hand, the police learned the vehicle was not reported stolen and that the owner appeared to match the registration. There were no outstanding warrants for the accused, but he had a criminal history involving "theft, violence, other *Criminal Code* offences, drugs, driving and failing to attend Court." The officer brought the accused to the backseat of his police vehicle where he was asked more about his possession of the truck. He said he was living in Calgary with the husband of the friend whose truck he borrowed. He offered to give the phone number of the owner of the vehicle to confirm he had authority to drive it, but the officer did not take

him up on this offer. He was then questioned about his previous convictions, asking him what his last offence had been. The accused advised that he had been convicted of the Australian lottery fraud, that he had been fined \$17,000 or \$18,000 and that he had paid \$7,500 of that amount. The officer then asked, "if I search your vehicle, am I going to find any other evidence of this Australian lottery fraud?" The accused said, "No, go ahead and have a look."

Police conducted a brief search of the cab of the truck. The police then noticed there appeared to be a false gas tank on the truck. The accused was immediately arrested for possession of a controlled drug for the purpose of trafficking, and it was confirmed the tank was false; a visual inspection underneath the vehicle noted there were no fuel lines coming to or from the tank. Subsequently, the tank was removed and a number of bags of marihuana was observed. There were 15 individual bags of marihuana retrieved from the tank weighing approximately seven and one-half pounds. The accused was charged with possession of marihuana for the purpose of trafficking.

At trial in the Saskatchewan Court of Queen's Bench the accused conceded that the initial stop and detention for the purpose of checking his driver's licence, vehicle registration, sobriety and mechanical fitness of the vehicle was lawful under the general authority afforded to police under Saskatchewan's *Highway Traffic Act*. However, the trial judge ruled that the continued detention about the Australian lottery scam after the initial questioning regarding licence and registration was unlawful. In his view, the original justification changed from highway traffic concerns to an investigative detention, for which there was no clear nexus between the accused and a recent or ongoing criminal offence. The continued detention was therefore arbitrary under s.9 of the *Charter* and not saved by s.1. The cursory search of the vehicle was unreasonable; it was warrantless, there were no reasonable grounds, and Crown had failed to establish valid consent.

The arrest was also unlawful, ruled the trial judge, because the police lacked the necessary reasonable grounds. Although the officer believed that reasonable grounds existed, the objective test had not been met. There was no smell of marihuana, any drugs or paraphernalia in plain view, nor could the

officer recall whether the accused was nervous. Instead, he formed his grounds because the accused was driving in the middle of the night; going less than the speed limit; put him in a defensive position immediately; told a story that was designed to draw sympathy; and there appeared to be a false gas tank on the truck. These "red flags" were not enough to justify the arrest. The search that revealed the marihuana could not be justified as an incident to arrest and was therefore unreasonable. The evidence was excluded and the accused was acquitted.

The Crown appealed to the Saskatchewan Court of Appeal arguing, in part, that the trial judge erred in holding the continued detention to enquire into the Australian lottery scam breached the accused's rights under s.9 and that the police lacked reasonable grounds to make the arrest, thereby negating the lawfulness of the search incidental thereto. Justice Smith, authoring the unanimous judgment for the Saskatchewan Court of Appeal upheld the trial judge's decision that the accused's s.9 rights were breached. She stated:

The police officers lacked reasonable ground to believe that any offence or any violation of The Highway Traffic Act had been committed. The initial stop was nonetheless not a violation of the [accused's] right to be free from arbitrary detention only because it was authorized by law and justified under s. 1 of the Charter...

However, the courts have made it clear that where an arbitrary stop is held to be justified under s. 1 of the Charter, the stop is authorized for the limited purpose of protecting highway safety, including checking for sobriety, licenses, ownership, insurance and mechanical fitness. If the police go beyond this limited purpose, and embark upon an unfounded general inquisition or an unreasonable search, the stop loses the protection afforded by s. 1, for it can no longer meet the requirement ... that it infringes the right of the individual as little as possible in order to achieve the accepted purpose. [references omitted, paras. 14-15]

"[T]he courts have made it clear that where an arbitrary stop is held to be justified under s. 1 of the Charter, the stop is authorized for the limited purpose of protecting highway safety, including checking for sobriety, licenses, ownership, insurance and mechanical fitness. If the police go beyond this limited purpose, and embark upon an unfounded general inquisition or an unreasonable search, the stop loses the protection afforded by s. 1..."

The request to search the vehicle was also far beyond a casual enquiry; it was not authorized by law and rendered the continued detention unconstitutional. The search was without warrant and without reasonable grounds. Valid consent was not obtained and the circumstances rendered the detention arbitrary and the search unreasonable.

The trial judge did, however, err in holding that the officer did not have reasonable grounds to make the arrest. Reasonable grounds does not require certainty or even a prima facie case. Rather, "it is only necessary that the circumstances known to the officer making the arrest objectively indicate the reasonable probability that the arrestee has committed the crime for which he is being arrested." In this case, Justice Smith ruled the trial judge imposed too high a standard in concluding the police objectively lacked reasonable grounds.

[T]he learned trial judge appeared to dismiss the reliance of the police on the other "red flags" they had noted on the grounds that these, in themselves, did not constitute reasonable and probable grounds for arrest and that, in any case, a number of the normal "red flags" indicated by the officers were not present in this case. She also indicated that she believed the officers improperly placed some weight on the fact that the vehicle was registered in British Columbia. These points, in my respectful view, were given undue emphasis.

The trial judge did not conclude that the officers discriminated by singling out British Columbia vehicles in relation to the initial stop. She thought only that this fact "may have played some part" in the arrest. There is, in my view, nothing inherently improper in an officer considering the origin of a vehicle as one factor among many in arriving at the conclusion that he has reasonable grounds to believe that the driver is transporting illegal drugs.

The so-called "red flags" were not argued to be, in themselves, sufficient to constitute reasonable and probable grounds for arrest. The fact that some factors were not present in this case,

however, is, in my view, irrelevant. The "red flags" were never suggested to be either necessary or sufficient for a conclusion that a crime was probably being committed. The trial judge ought to have considered whether any of these circumstances, added to the belief of the false gas tank, gave rise to reasonable and probable grounds for arrest. In this case, there were certainly circumstances which, coupled with the experience of the police officers, and their belief that the vehicle had a false gas tank, supported their belief that the [accused] was probably transporting illegal drugs. These included the unusual circumstance that the [accused] was not the registered owner of the vehicle and claimed to have had it on loan for four months, and the "sympathy story" that he was traveling to visit sick children in Ontario. The officers were entitled to rely upon their training and experience that taught them that these circumstances frequently accompanied illegal drug transports.

It is my conclusion that these circumstances, combined with the reasonable belief that the truck had a false gas tank, constituted objectively reasonable and probable grounds for the arrest and that the trial judge, relying upon an improperly high standard for the establishment of reasonable and probable grounds, erred in concluding otherwise. [paras. 24-27]

The accused's arrest was lawful and the search that resulted in the discovery of the evidence was valid as an incident to arrest.

Admissibility

Although the accused's continued detention after the initial stop to investigate the "Australian lottery fraud" and the initial search of the cab of the truck were breaches of the *Charter*, they were not causally related to the discovery of the evidence sought to be excluded. The false gas tank was apparent on cursory inspection and its discovery did not depend upon the extended detention. The evidence was obtained during a lawful search following a lawful arrest and was therefore admissible. The Crown's appeal was allowed, the accused's acquittal set aside, and a new trial was ordered.

Complete case available at www.canlii.org

www.10-8.ca

DELAY IN SEARCHING DID NOT RENDER INCIDENTAL SEARCH UNLAWFUL

R. v. Washington, 2007 BCCA 540



A Helijet employee suspected that a package shipped via Helijet from Vancouver to Victoria contained drugs and opened it for inspection. After seeing a white powder he believed to be cocaine, the employee re-sealed the package and called police. When police arrived the package was re-opened, a sample taken, and the powder was subsequently recognized to be methamphetamine in its crystal form.

Shortly thereafter, the package, which was addressed to "Nicole Washington", was picked up at the Helijet terminal by the accused Washington, who was accompanied to the terminal by co-accused Shepherd. The two women were arrested by the police as they got into a car to leave the terminal. The vehicle was towed to the police station and searched almost an hour later, rather than in front of the busy terminal. In it, police found more evidence including methamphetamine, cash, small baggies, cell phones, scales, and identification. Both women were jointly charged with possession of methamphetamine for the purpose of trafficking.

At trial in British Columbia Provincial Court the accuseds were convicted. The trial judge concluded that the Helijet employee was not an agent of the state and therefore his actions did not amount to a search. He found the search of the package was not unreasonable and this provided the police with proper grounds to make the arrest. The search of the vehicle was reasonable as it was incident to arrest; to ensure the protection of the police and to preserve and discover evidence. He concluded that there were no *Charter* breaches and, even if there were, he would not have excluded the evidence under s.24(2). The accuseds were thus convicted.

They then appealed to the British Columbia Court of Appeal arguing, among other things, that their rights under s.8 of the *Charter* were breached when police searched the package. They also submitted that the police did not have reasonable grounds to make the

arrest and that the search of their car was not incidental to arrest.

Police Search of the Package

The accuseds argued that they had a privacy interest in the package and retained that interest despite the Helijet employee opening it. Hence, when the police searched it without a warrant they breached s.8 of the *Charter*. The Crown, on the other hand, submitted that the accuseds lost any constitutionally protected privacy interest in the package once it was opened and inspected by the employee. Thus, the police actions did not violate s.8.

Justice Ryan, authoring the decision for the majority of the British Columbia Court of Appeal, ruled the accused maintained a privacy interest in the package when it was opened by the Helijet employee and re-sealed. By the time the police arrived at the terminal the powder had been returned to the package. When the police opened it and examined its contents without proper grounds and without a warrant, they breached the accuseds' rights to be secure against unreasonable search or seizure.

Justice Ryan then went on to consider whether the evidence was admissible as a result of the police searching the package. She found the evidence was non-convictive and therefore would not affect the fairness of the trial. As for the seriousness of the breach, the expectation of privacy in the package was not as high as that related to bodily integrity or a home or office. Although the police did not have sufficient grounds to get a warrant (until they opened the package) and there were not exigent circumstances, they did not act flagrantly or in bad faith. The evidence was crucial to the Crown's case and the charges were serious. The evidence was therefore admissible.

Reasonable Grounds

The accuseds contended that the police did not have objective grounds to arrest them for being in possession of the drugs because there was nothing to indicate they knew the package contained drugs. Justice Ryan disagreed. In her view, the police had grounds to believe the package contained methamphetamine when its contents were examined by police at the terminal. The consignee of the

package, Washington, arrived to pick it up shortly after it arrived and it was a reasonable inference that she likely knew it was being sent to her. At this point, the police had reasonable grounds to arrest her.

Her co-accused, Shepherd, was with Washington when she picked up the package. Rather than placing the package in the trunk or putting it on the back seat, Washington handed the package to Shepherd who was then in physical possession of it when arrested. There were reasonable grounds to arrest both of them.

Vehicle Search

Since the accuseds were lawfully arrested their vehicle could be searched as an incident to arrest. They argued however, that because the search was conducted almost an hour after the arrests, the search became unlawful. A search incidental to arrest will usually occur within a reasonable time after arrest. However, a substantial delay will not automatically render a search unlawful if there is a reasonable explanation for it. Here, the police said they towed the vehicle to the police station because there was traffic in front of the Helijet terminal. This was a sensible explanation accepted by the trial judge. The search, therefore, remained an incident of a lawful arrest.

A Minority View

Justice Rowles agreed with the majority that the accuseds' reasonable expectation of privacy was not interrupted when the employee opened the package and the police breached s.8 when they opened it. They did not have a warrant nor reasonable grounds to obtain one. Nor did security concerns prompt its opening. She did, however, disagree that the evidence was admissible. In her view the evidence should have been excluded, the appeals allowed, and the convictions set aside.

The accuseds appeals were dismissed.

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

Note-able Quote

"A judge is a law student who marks his own examination papers." - H.L. Mencken

GOOD AND BAD FAITH LIE ON A CONTINUUM

R. v. Nguyen, 2007 ONCA 645



The police were investigating out-of-area individuals and groups purchasing residential properties of patterned description for use as marijuana grow houses. Their investigation revealed that the accused had recently opened a hydro account and the average daily use of hydro was greater than that for similar houses. This was consistent with a house being used as a marijuana grow operation. A neighbour told police that no one had ever been seen outside the property, a gray van had been parked in the driveway, there was always a light on in the living room area, windows were always drawn, the mailbox was never checked, and garbage never put out. More police surveillance was conducted and a gray van with a non-functioning tail-light was stopped. The accused was the driver and she lied to the police about where she was coming from. A search warrant was obtained and executed.

The front entrance was locked so the lead officer instructed that the door be forced open with a battering ram. There was no knock and notice given before doing so. The search revealed that two of three bedrooms were being used to grow marijuana—one contained marijuana plants while the other was fitted with lights, fans and ventilation generally used in marijuana grow operations. The accused was located huddled in a corner of the basement and her purse contained keys for the gray van, as well as an address book with a list of fertilizers suitable for growing marijuana. She was charged with producing marijuana, possession, and possession for the purpose of trafficking. As well, she was charged with theft of electricity.

At trial in the Ontario Superior Court of Justice, the accused challenged the manner of the warrant's execution because of the police failure to knock and announce before breaching the front door and entering. The trial judge

"[Section 12 of the CDSA] permits the police to enter a home with a certain degree of force, without announcing their presence, in exigent circumstances, where there is a need for officers to act and enter without giving prior notice. These circumstances include when there is a fear for the safety of persons within the premises and concern for the destruction of evidence, as well as, at times, concern for the officer's own safety."

agreed that the failure to knock and seek permission breached s.8 of the *Charter*, but the evidence was admitted under s.24(2). The accused was convicted and sentenced to 15 months in jail, ordered to pay \$10,000 to Hydro One, placed on probation for one year, and given a weapons prohibition.

The accused then appealed to the Ontario Court of Appeal arguing, in part, the trial judge erred in admitting the evidence pursuant to s. 24(2). She contended that the trial judge erred in holding, among other considerations, that there was uncertainty in the law regarding the knock and notice rule when executing a search warrant and in assessing the seriousness of the breach; that it was not serious and whether the police acted in good faith.

Section 24(2) of the *Charter* requires a court weigh three factors in determining whether evidence should be excluded: (1) the admission of the evidence on the fairness of the trial, (2) the seriousness of the *Charter* violation, and (3) the effect of excluding the evidence on the administration of justice. Justice LaForme, writing the opinion of the Ontario Court of Appeal, upheld the trial judge's ruling.

Before addressing the accused's submissions, Justice LaForme briefly reviewed the "knock and notice" principle. Under the common law police officers must make an announcement before entry, except in exigent circumstances. In the ordinary case police officers, before forcing entry, should give notice of presence (by knocking or ringing the doorbell), notice of authority (by identifying themselves as law enforcement officers) and notice of purpose (by stating a lawful reason for entry). This common law principle has become known as the "knock and notice" rule. In drug cases, the knock and notice rule has since been supplemented by s. 12 of the *Controlled Drugs and Substances Act*, which states that a peace officer may use as much force as is necessary in the circumstances when exercising any of the powers

described in s.11. Justice LaForme described this provision as follows:

This section permits the police to enter a home with a certain degree of force, without announcing their presence, in exigent circumstances, where there is a need for officers to act and enter without giving prior notice. These circumstances include when there is a fear for the safety of persons within the premises and concern for the destruction of evidence, as well as, at times, concern for the officer's own safety. [para. 22]

Uncertainty in the Law

In this case, the trial judge did not hold that there was uncertainty in the law surrounding the knock and notice rule. Rather than adopting a rule that would result in the automatic exclusion of evidence in the circumstances of failure to knock and announce, the trial judge "merely observed that if evidence gathered in violation of the 'knock and notice' rule were always excluded, then this would conflict with the recognized fact that s. 24(2) jurisprudence is 'uncertain' in that there are no 'bright lines' to warn the police about how to act in a given situation." The trial judge's comment about "uncertainty in the law" came from cases referred to concerning searches based on a formal police policy holding there was no breach or, if a breach, it was not serious enough to justify excluding the evidence.

The trial judge found that if she were to rely on the accused's submission that automatic exclusion of evidence should follow a breach of the knock and notice rule, then only one fact would determine the multi-faceted fact-driven analysis under s. 24(2). A court must "consider all of the circumstances rather than focus on the knock and notice rule to the exclusion of everything else." The trial judge made no error.

Seriousness of the Breach

In deciding whether a breach is serious, a number of factors are examined, including the obtrusiveness of the search, the individual's expectation of privacy in the area searched, the existence of reasonable grounds, and whether the breach was committed in good or bad faith. In this case the trial judge did not specifically find the police acted in neither good faith nor bad faith.

Her reasons, however, strongly suggested that she viewed the police conduct as amounting to good faith.

The accused submitted that in cases involving a dwelling house, the absence of "knock and notice" and exigent circumstances must result in an absence of good faith. This, by itself, would mean that the breach is so serious as to require its exclusion. Justice LaForme did not agree. He described police misconduct as being a continuum, ranging from a good faith error to a blatant disregard for constitutional rights.

In this case, the trial judge viewed the police conduct as falling nearer to the good faith end of the continuum. And even if she did make a mistake about the good faith of the police, it is only one factor to consider in the 24(2) analysis. Her assessment of the seriousness of the breach also included:

- a reasonable belief by police that the premise was not being used as a dwelling at the time the warrant was executed;
- the decision to enter without knock and notice was based on a genuinely held belief that it was safer to do so in the circumstances and based on the officer's fear of the unknown in the context of a drug bust and the dangers he knew sometimes occur;
- the officer has employed knock and notice in other instances where he knew enough about the persons or circumstances within to alleviate the concern for a violent greeting if persons inside had the time to organize it;
- the ultimate decision to enter without knock and notice was not made exclusively on the basis of a police policy;
- when the officer later came to have clear legal direction regarding "knock and notice", he thereafter complied with the direction;
- the otherwise reasonable manner in which the warrant was executed, which included the fact that uniformed officers announced their presence as police several times, and the fact that officers holstered their weapons as soon as they realized that the accused and another occupant, who would not present themselves upon command and were hiding in the basement, were not a threat; and
- the fact that the officers operated under a lawfully issued judicial authorization to search.

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

Complete case available at www.ontariocourts.on.ca

NO CHARTER BREACH IN AMBULANCE RIDE WITH IMPAIRED DRIVER

R. v. LaChappelle, 2007 ONCA 655



At about 9:45 p.m. the accused's vehicle crossed the centre line and collided with an oncoming vehicle, killing its driver and injuring the passenger. The accused, an off duty police officer, was also injured. Some witnesses at the scene, including another off-duty police officer, noted that the accused had been drinking and told the responding sergeant that he thought the accused had alcohol on his breath. Once it was suspected that the accused had been drinking, an officer was assigned to stay with him. The officer rode with the accused in the ambulance and noted an odour of alcohol and that he was answering the paramedics' questions with one-word answers and hand gestures as if he was attempting to avoid talking. The officer did not speak to the accused while he was in the ambulance.

The officer stayed at his side for some of the time at the hospital, again noting the accused was trying to avoid talking, instead using gestures or one-word answers. About thirty minutes after they arrived at the hospital, the officer saw the accused put some gum in his mouth and told him he should not be eating anything. At this time, the accused recognized the officer from Police College and addressed her by name. The officer noted that his speech was slurred, his eyes were red and bloodshot, and he still had an odour of alcohol around him.

On orders from a physician, a nurse took five vials of blood for medical purposes, to which the accused did not object. The vials remained in the officer's sight until a detective arrived at the hospital. The detective watched the vials until they were placed in a laboratory refrigerator. At that time, he placed Centre of Forensic Sciences seals on the remaining vials.

Forty-five minutes after the hospital blood samples were taken, the accused went for X-rays. The officer did not accompany him but concluded she had grounds to arrest him for impaired driving.

Accordingly, when the accused returned, he was arrested, read his rights under s. 10(b) of the *Charter*, and given a breath demand. He said he understood the demand and would comply. He then said he wished to speak to duty counsel and he had a fifteen minute private conversation. After the call, the officer told the accused that the charge would now be impaired driving causing death and asked him if he still wanted to provide breath samples. He agreed and the samples were taken about four hours after the collision. The officer's presence did not interfere with any treatment and the ambulance and hospital staff consented to her presence. At no time did the accused object to the officer's presence. Two days later, the detective called the hospital and confirmed the existence of a blood chemistry report. He then obtained a search warrant to seize the vials and the report, which contained a blood/alcohol analysis.

At trial in the Ontario Superior Court of Justice, the Crown led evidence of drinking and tendered evidence of the results of the breath tests performed by police and the analysis of the blood samples taken at the hospital for medical purposes. A hospital technician testified that if further medical tests had been needed, she could have broken the seals and used the vials. She also testified that vials of blood that are not necessary for medical purposes are ordinarily destroyed. An expert testified that the accused's blood would have been somewhere between 130 and 210mg% at the time of the collision. He was convicted of impaired driving causing death and impaired driving causing bodily harm and sentenced to a total of 21 months imprisonment and banned from driving for five years.

The accused appealed his conviction to the Ontario Court of Appeal arguing, among other grounds, (i) that the officer's presence in the ambulance violated his privacy rights, (ii) the taking of blood samples without consent by hospital personnel and the placement of seals on the vials of blood that had been taken for medical purposes violated s. 8 of the *Charter*, (iii) he was detained while in the ambulance and the hospital and therefore his rights under ss. 9 and 10 of the *Charter* were violated, and (iv) the breath demand was not lawful because it was not made as soon as practicable.

Justice Rosenberg, authoring the unanimous opinion of the Court of Appeal, dismissed the appeal and upheld the conviction.

The Ambulance Ride

The accused contended that the officer violated his right to privacy and seized information from him by observing his interaction with the ambulance personnel when she remained with him in the ambulance while he was transported to the hospital. This information was later used by the officer to form her grounds for the breath demand and may have been some of the information used by the detective to obtain the search warrant. The trial judge found that the officer's non-intrusive presence with the consent of the ambulance personnel did not breach the accused's reasonable expectation of privacy. Accordingly, there was no violation of the accused's s. 8 rights in the ambulance.

Justice Rosenberg upheld the trial judge's reasoning. He stated:

In my view, the mere fact that [the officer] accompanied the [accused] in the ambulance did not violate his s. 8 rights, even if the [accused] had a reasonable expectation of privacy with respect to the ambulance. Section 8 is only engaged if there is a search or seizure. In this case, the [accused] claims that information was seized by [the officer] because she was able to observe his interaction with the ambulance attendants. The Supreme Court has dealt with informational privacy in several cases.

.....
In my view, when the [factors respecting informational privacy] are considered, the [accused] did not make out a violation of his s. 8 rights. The information about which the [accused] complains was [the officer's] observations that the [accused] was communicating using one-word answers or gestures. She inferred from this conduct that the [accused] was attempting not to speak. This kind of information was not of a highly confidential nature. [The officer] was able to

"In my view, the mere fact that [the officer] accompanied the [accused] in the ambulance did not violate his s. 8 rights, even if the [accused] had a reasonable expectation of privacy with respect to the ambulance. Section 8 is only engaged if there is a search or seizure."

make the same observations later at the hospital. There is no suggestion that the words or the gestures conveyed any kind of confidential information. [The officer] did not question the [accused] in the ambulance or attempt in any other way to obtain incriminatory evidence from the [accused]; she was merely making observations.

As to the place where the information was obtained, the [accused] had no property interest in the ambulance and no control over who rode in it. The trial judge found that the people who did have control over the ambulance, the ambulance personnel, impliedly consented to [the officer] being present. [The officer's] presence did not in any way interfere with the [accused's] medical care. The [accused] did not testify that he was inhibited by [the officer's] presence in the ambulance.

Finally, the offence under investigation was a most serious one. The acts of [the officer] in passively observing the [accused] in the ambulance were wholly proportionate to the seriousness of the situation. [paras. 34-38]

In applying the contextual approach, Justice Rosenberg concluded that the accused's rights under s. 8 of the *Charter* were not violated.

Hospital Blood Samples

There was absolutely no evidence that the physician who ordered the blood samples taken or the nurse who took them were acting as agents of the state or that they took the samples with the intention of sharing the blood or the results of any analysis with the police. The hospital personnel took blood samples only for medical reasons and, accordingly, s. 8 of the *Charter* was not engaged.

Sealing the Blood Samples

The act of the detective placing seals on the vials of blood that had originally been taken for medical purposes did not constitute an unreasonable seizure in violation of s. 8 of the *Charter*. Even though the blood samples would undoubtedly have been destroyed before the police could have lawfully obtained the evidence through a search warrant, sealing vials of blood that remained under the

control of the hospital in the event they were needed for medical purposes until a search warrant could be obtained was not an unreasonable seizure.

Detention

The accused's submission that the officer detained him in the ambulance and at the hospital violated his rights under ss. 9 and 10 of the *Charter* had no merit. The officer did nothing to detain him. She did not make any demand or give any direction that resulted in his physical or psychological detention. Rather, he was "detained" by his injuries from the collision.

As Soon As Practicable

The accused argued that the officer intentionally delayed arresting him and demanding the breath sample and had already formulated the grounds for making the breath demand before the blood samples were taken. Had she acted expeditiously, he would have spoken to counsel and learned that he could withhold his consent to the taking of the blood samples. But the trial judge concluded the demand was made as soon as practicable. The question of when the officer formed her grounds for arrest and giving the breath demand was a factual issue and there was no basis for interfering with the trial judge's conclusion.

Complete case available at www.ontariocourts.on.ca

LACK OF SUBJECTIVE BELIEF FATAL TO REASONABLE GROUNDS

R. v. LeBlanc, 2007 NBCA 24



Police investigators obtained information from several confidential sources. On the basis of this information, a search warrant was obtained allowing officers to enter and search the vehicles, the out-houses and the dwelling house occupied/utilized by the accused. Anticipating receipt of a search warrant, police officers undertook surveillance of the premises. One of the officers involved in the surveillance, a 24-year officer had earlier read the information to obtain and the "search warrant" that was being sought. He had personal knowledge relating to the accused, having had previous dealings with him for

drug related matters over the years and other *Criminal Code* investigations. Furthermore, the officer's own reliable and confidential sources had recently informed him that the accused had been known, at different times, to leave his residence and make drug transactions with vehicle occupants outside the house or on the sidewalk, and also that he had been known to leave the residence whether on foot or by vehicle and that he would be carrying drugs with him at that time.

In the course of the surveillance, the officer observed the accused leave his residence, briefly return to the house, then enter a motor vehicle and drive off. The officer followed him directly to a post office and observed him enter it and about 10 minutes later, leave the building while talking on his cell phone. At that point, the officer approached the accused, identified himself, and arrested him for trafficking in narcotics. He was handcuffed, , searched, and cocaine was found on his person. Oxycodone and marihuana was also found in his room at his residence. As a result, the accused was charged with possessing cocaine for the purpose of trafficking, possessing oxycodone for the purpose of trafficking, and possessing marihuana.

At trial in New Brunswick Provincial Court the judge found the search warrant invalid. The officer arresting the accused testified that he proceeded with the arrest based on his own personal knowledge of the accused and the information he read that was filed with the search warrant. The trial judge noted that the "*Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. And as well, the arrest must be justifiable from an objective point of view." Here, the trial judge ruled that there was not enough of a precise pattern established to say that there were reasonable grounds to arrest. Since the arrest was unlawful it breached s.9 of the *Charter* and the search of the accused was also invalid because it was not incidental to a lawful arrest. The evidence was excluded under s.24(2) and the accused was acquitted.

The Crown appealed the acquittal to the New Brunswick Court of Appeal arguing the judge erred in finding the accused's rights under s.9 were violated. The Crown submitted that the wrong test

was applied in assessing the existence of objective reasonable grounds and in finding the search unreasonable under s.8. The Crown also contended that the evidence should have been admitted under s.24(2) in the event of the *Charter* breaches.

Under s.495 of the *Criminal Code*, the officer was empowered to arrest the accused if he believed, on reasonable grounds, that he committed the offence of trafficking. Not only must the officer personally believe that the accused trafficked in a controlled substance, but it had to be objectively established that those grounds did in fact exist. In this case, Justice Richard, for the unanimous New Brunswick Court of Appeal, found it was unnecessary to determine whether the objective test had been met. In his view, the trial judge foreclosed the existence of reasonable grounds by holding that the officer did not possess the requisite subjective belief. He stated:

In my view, the trial judge's conclusion on the subjective component of the reasonable grounds requirement was neither unreasonable nor unsupported by the evidence. In the course of a voir dire conducted for the very purpose of determining whether items seized from [the accused] should be excluded at trial, and where the lawfulness of the arrest was a key issue, [the officer] was unable to clearly articulate his reasons for arresting [the accused]. In direct testimony, he said that he "placed him under arrest for trafficking in narcotics." In cross-examination, he initially agreed that he "arrested him for possession for the purpose of trafficking" but then, when confronted with a contradiction between his testimony and his notes, he backtracked and admitted that he arrested him for "trafficking in narcotics" and not for "possession for the purpose of trafficking." Moreover, despite testifying that he had read the ITO and the search warrant, that he was personally aware of [the accused's] criminal background and that he had personal information from his own confidential and reliable sources, [the officer] did not identify any particular transaction that formed the basis for the arrest. [The officer] testified that he told [the accused] that he was under arrest for trafficking but again did not identify any particular transaction that constituted the indictable offence for which he should have had reasonable grounds to arrest. Under cross-examination, [the officer] acknowledged that the information he had

received from his own sources could have been "over a period of a few weeks, a few months."

A review of the record leaves a lingering air of uncertainty as to the precise offence and transaction that could have been contemplated by the officer when he arrested [the accused].

Considering the vague nature of [the officer's] testimony in the course of a voir dire held for the very purpose of determining whether items seized in the course of a search incidental to the arrest should be excluded, and where the lawfulness of the arrest played a pivotal role, it is not surprising that the trial judge concluded that she was "not satisfied that there has been a precise enough pattern established to say that there are reasonable and probable grounds for arrest[ing the accused] for trafficking." ... I understand her words in that regard to apply as much to the subjective component as to the objective component of the reasonable grounds requirement. In my view, her conclusion in this regard is neither unreasonable nor unsupported by the evidence. [paras. 23-25]

Since the trial judge was not satisfied the officer had the necessary subjective belief required for reasonable grounds, the arrest was, for that reason, unlawful. Whether or not the objective test was satisfied was irrelevant. The trial judge's ruling that the arrest constituted a s.9 *Charter* violation, which led to a s.8 breach was proper.

As for the exclusion of evidence, the trial judge applied the three stage test under s.24(2) and her conclusions were not unreasonable. The accused's appeal was dismissed.

Complete case available at www.canlii.org

LEGALLY SPEAKING:

Reasonable Grounds



"First, the arresting officer must believe that he or she has [reasonable] grounds to arrest the accused. This is the subjective requirement. Second, there must be objectively discernible facts which give the arresting officer reasonable cause to believe that the accused is criminally involved in the matter for which he is arrested. This is the objective component of the [reasonable] grounds requirement." - Ontario Court of Appeal Justice Osborne, *R. v. Hall* (1995) 22 O.R. (3d) 289 (Ont.C.A.)

REDUCED EXPECTATION OF 'LIBERTY' WHEN ENTERING PRISON

R. v. Vandenbosch, 2007 MBCA 113



The accused attended a federal penitentiary to visit an inmate for the fifth time. Upon entering the penitentiary grounds, there were several signs posted as prescribed by s.62 of the *Corrections and Conditional Release Act (CCRA)*. There was a large sign posted advising that all "persons on this property may be searched" and that certain items (such as non-prescription drugs and illegal narcotics) "may be confiscated and criminal charges laid against the person bringing them onto the property." Immediately behind that sign, there was another one that stated all persons "are subject to search." Finally, at the visitor control point in the main lobby, there was another sign stating, "Authorized security measures are being taken to observe and inspect visitors to this institution. No visitors are obliged to submit to a search of their person, or personal belongings if they choose not to visit."

Once past the main entrance, the accused (like all visitors) was subject to a visual inspection, asked to sign in, told to store personal property not allowed in the penitentiary in a locker, directed to walk through a metal detector and an x-ray machine, and instructed to submit two pieces of personal identification for an Ionscan test. This last check was used to detect the residual presence of certain drugs on the identification.

The Ionscan test indicated a positive reading. It did not mean the accused was carrying drugs, but simply indicated the piece of identification submitted had been in contact with drugs. She was asked to follow two corrections officers into an interview room, where an assessment to determine the risk associated with a visit (the visitor-risk assessment) was conducted. The purpose of this assessment was to determine the type of visit, if any, that would be permitted. It is conducted every time Ionscan results are positive.

In this case, the visitor risk assessment lasted approximately ten minutes. The corrections officers

explained their interest in keeping drugs out of the penitentiary and told the accused, in light of the positive reading generated by the Ionscan detector, that they were going to conduct the visitor-risk assessment. The accused was told of the possible outcomes of such an assessment: an open visit, a visit under observation, a security booth visit or a denial of a visit altogether. When asked if she had any drugs on her she denied she was carrying any. The corrections officers then said they knew she had been asked to make a delivery of drugs to one of the inmates (even though they had not actually received such information). She was given factual information regarding the prospect of detention and police involvement. After she was asked a third time, she admitted that she had secreted drugs on her person.

It was at that point that the corrections officers determined they had reasonable grounds to believe that the accused was carrying drugs. She was advised she would be detained and searched. She met privately with two female corrections officers and produced a condom, containing 21 grams of marijuana and nine morphine pills, which she had hidden in her vagina. A corrections officer then read her right to counsel pursuant to s. 60(4)(b) *CCRA*. The police were called and the accused was charged with two counts of possession for the purpose of trafficking.

At trial in the Manitoba Court of Queen's Bench, the judge found the accused was free to leave the penitentiary at any time and was aware that she was subject to search upon entering. The judge ruled the accused's statement that she possessed drugs voluntary and that she was not detained during the visitor-risk assessment; it was a relatively brief routine administrative process. Only after admitting she had drugs was she sufficiently detained to engage her *Charter* rights. However, failing to advise the accused about her right to counsel before the search was conducted rendered the search unreasonable. The evidence was nonetheless admitted under s.24(2) of the *Charter*. She was convicted on both counts and sentenced to a total of four months in jail followed by two years probation.

The accused appealed to the Manitoba Court of Appeal arguing she was sufficiently detained to trigger her s.9 and/or 10(b) *Charter* rights. She

suggested that she was detained when she was directed to enter the interview room by the correctional officers, escorted through two locked doors, and then questioned in a manner that amounted to an interrogation designed to elicit an incriminating statement. As well, she insisted that she was psychologically detained because she reasonably believed she had no choice but to comply—she was never told she had the option of leaving. As well, because she had not yet intermingled with the prisoner population, she argued she did not have a reduced expectation of privacy. Finally, she said the corrections officers did not comply with the *CCRA* requiring them to inform a person they have the right to leave when reasonably suspected of carrying drugs.

The Crown, on the other hand, argued that there is a reduced expectation of privacy in prisons for public policy reasons and that this reduced expectation has relevance to ss.9 and 10(b) of the *Charter*.

The visitor-risk assessment is a routine administrative process, similar to border processes, and does not result in a *Charter* detention. The Crown also contended that the *CCRA* requires officers to tell a person they may leave prior to being strip searched, not when they form the reasonable suspicion the individual has drugs.

Detention?

Justice Chartier, in writing the opinion of the Manitoba Court of Appeal on the issue of detention, first noted that detentions are highly fact-driven. The totality of the circumstances must be evaluated with regard to "what is said and done, in what manner, in what location and for what purpose." And unless there is a finding of detention the constitutional protections afforded by ss.9 and 10(b) of the *Charter* are not triggered.

After reviewing several cases respecting detentions of visitors in a prison setting, Justice Chartier noted the following propositions:

- 1) when an individual visits a prison, there is a reduced expectation of privacy;

- 2) *Charter* concerns will generally be engaged when prison officials single-out an individual and step outside the routine administrative search processes by pre-arranging a plan to detain and search that person; and
- 3) *Charter* concerns will generally not engage unless the purpose of the intervention by prison officials has changed from a preventative objective (preventing drugs and weapons from entering the prison) to one of law enforcement (arrest and charge).

"When it comes to detention issues in a prison setting, individuals seeking to visit inmates fully expect to be subjected to the rigours of security processes which necessarily require a certain degree of restraint of liberty. This reduced expectation of liberty is very real for all individuals wanting to visit anyone in a prison."

In answering the question whether a visitor-risk assessment in a prison was sufficient to amount to a constitutional detention, Justice Chartier concluded that not only is there a reduced expectation with respect to privacy when one visits a prison but also there is a reduced expectation of liberty, similar to the restraints and investigative processes when one enters Canada and is subjected to customs and immigration inspection. He stated:

It is well recognized that there is a real need to ensure that individuals who are entering a prison environment do not bring with them weapons or drugs. The courts have recognized this legitimate purpose by acknowledging that in a prison environment there is a reduced expectation of privacy when it comes to searches. Individuals do not expect to be able to enter a prison free from scrutiny.

When it comes to detention issues in a prison setting, individuals seeking to visit inmates fully expect to be subjected to the rigours of security processes which necessarily require a certain degree of restraint of liberty. This reduced expectation of liberty is very real for all individuals wanting to visit anyone in a prison. There are secured barriers (doors and gates automatically lock after entrance), restricted admission (not being able to visit unless permission is granted), escorted travel (being under the direct and constant control of corrections officers), surrender of personal belongings (parting with most personal effects upon entering the building), and non-intrusive searches (metal detectors, x-ray machines and

Ionscan tests). These restraints of liberty and investigative processes would not be expected and accepted with respect to almost all other dealings with state authorities. [paras. 32-33]

In customs jurisprudence there are three categories of search; (1) routine questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing (2) a strip or skin search conducted in a private room, after a secondary examination and with the permission of a customs officer in authority and (3) a body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means. Under the first category of search, no *Charter* issues arise.

The trial judge used these categories, by analogy, to the prison setting.

In this case, the questioning that occurred was simply a routine part of the general screening process for persons seeking entrance to a prison to visit an inmate. The referral to the visitor-risk assessment (similar to a secondary referral in a customs context) did not change the character or nature of the examination and it remained in the first category. Justice Chartier wrote:

When the detention factors are examined in the case at hand, such as the precise language used when requesting the accused to follow the corrections officers, that she was escorted to the interview room, that the interview room was locked, and that the questions were pointed, it would appear that, had the accused not been in a prison setting, constitutional detention principles may have been engaged.

The accused, however, was not in the same situation as a pedestrian on the street stopped by police. She voluntarily chose to place herself in the prison environment where there is a reduced expectation of liberty and privacy. Parliament enacted legislation requiring each penitentiary to post "conspicuous" warning signs that persons are subject to search (s. 62). It also authorized prison officials to conduct non-intrusive searches, which "must be limited to what is reasonably required for security purposes" (s. 59).

"[A] prison setting ... is a secure facility and where temporary interruptions of an individual's otherwise unencumbered liberty are not only expected but required."

The detention factors mentioned above have to be placed in the context of a prison setting, which is a secure facility and where temporary interruptions of an individual's otherwise unencumbered liberty are not only expected but required. The fact that she was escorted through locked doors from one place to another by corrections officers, subjected to non-intrusive searches and questioned for a brief period of time is predictable and necessary when one enters a prison.

The accused's knowledge and familiarity with respect to prison procedures is also an important contextual factor. She knew, having visited the penitentiary on four prior occasions, that there would be scrutiny upon entering the premises. There was even a sign posted at the main entrance that stated, "No visitors are obliged to submit to a search of their person, or personal belongings if they choose not to visit." To say that she was taken by surprise by the procedures followed is simply implausible.

Another significant factor that was taken into account by the trial judge was the fact that the corrections officers would not have prevented the accused from leaving had she attempted to do so. They also testified that had the accused refused to answer their questions they would have asked her to leave the penitentiary immediately without the benefit of a visit. ...

As long as the reason for the intervention by prison officials is limited to the valid purpose of preventing drugs and weapons from entering the prison, it will generally not attract constitutional obligations. Questions regarding whether an individual is carrying drugs or weapons fall within that valid purpose. Until the intervention crosses from a preventative object (preventing drugs and weapons from entering the prison) into the realm of law enforcement (arrest and charge), *Charter* protection and concerns will generally not be engaged.

I must comment on the corrections officers' use of trickery, when they provided the accused with false information (that they knew that she was carrying drugs). This is a law enforcement technique. It is used regularly by police authorities when investigating and solving crimes. Though it did not in this case, when combined and considered with other factors, it could have taken the intervention outside the legitimate object of

preventing drugs and weapons from entering the penitentiary.

In the totality of the circumstances, I am of the view that the trial judge did not err when she found that the corrections officers' intervention did not constitute an arbitrary detention contrary to s. 9 or one that was sufficient to engage a s. 10(b) right to counsel. The visitor-risk assessment falls in the first category described in [customs jurisprudence] and, while it is a detention, it does not trigger constitutional protection. [paras. 46-53]

The Court found the visitor-risk assessment undertaken by corrections officers was part of a routine administrative process and not a detention (psychologically or otherwise) in violation of the *Charter*. If the Court were to accept the argument she was psychologically detained, her subjective belief was not determinative of the issue. There is an objective component to the test—the belief must be a reasonable one, which in this case was not. She voluntarily attended a prison, where there is a reduced expectation of privacy and liberty, and she was aware she could be searched.

Failure To Tell About Leaving

Finally, the Manitoba Court of Appeal rejected the accused's argument that the corrections officers did not follow the provisions of s. 60(2) *CCRA*, by failing to advise her that she could leave the penitentiary once the Ionscan came back positive. She suggested that the corrections officers had, at that point, reasonable grounds to suspect that she was carrying drugs, so she should have been told explicitly that she could leave.

Before there is a requirement that the corrections officers advise an individual that they may leave the institution, they must suspect on reasonable grounds that an individual has contraband and they must believe that a strip search is necessary to find the contraband. In this case, Justice Chartier held, "the evidence shows that the corrections officers did not believe that a strip search was necessary until after the accused admitted to carrying drugs; not before." Therefore, s. 60(2) had not yet been triggered.

The accused's conviction appeal was dismissed.

Complete case available at www.canlii.org

ONLY 'DESIGNATED' OFFICER MAY GIVE DEMAND

R. v. Thibeault, 2007 NBCA 67



A customs officer working at a border crossing conducted a search of the accused's motor vehicle. After finding an alcoholic beverage and detecting a smell of alcohol on his breath, the customs officer ordered the accused to provide a breath sample for screening by means of an ASD. The accused blew into the device four times before providing a suitable sample. A positive reading resulted. Breath samples for a breathalyzer analysis were demanded in order to determine the amount of alcohol in his blood and whether it exceeded the legal limit. The local police force was called upon to obtain the required breath samples. Two breath samples were obtained and an analysis showed that the accused's blood alcohol level exceeded the legal limit. A qualified technician's certificate setting out the results of this analysis was admitted into evidence and was the sole item of proof showing that the accused's blood alcohol level exceeded the legal limit. He was charged with over 80mg%.

At trial in New Brunswick Provincial Court the border officer testified he was a customs officer and, consequently, a "peace officer" for the purposes of the *Criminal Code*. He did not, however, claim to be a "designated" customs officer under s.163.4(1) of the *Customs Act* nor did Crown attempt to establish that he was. The trial judge found the border officer was a "peace officer" under s.254 of the *Criminal Code* even if he wasn't a designated customs officer. The certificate of analysis was admissible and the accused was convicted. An appeal by the accused to the New Brunswick Court of Queen's Bench was unsuccessful.

The accused then appealed to the New Brunswick Court of Appeal. In a unanimous judgment, the appeal court found the lower courts erred in their interpretation of the definition of a "peace officer" found in s.2 of the *Criminal Code*.

A customs officer is a "peace officer" under the *Criminal Code* when performing any duty in the administration of the *Customs Act*. However, ss.163.4 and 163.5 of the *Customs Act* were added in 1998 to "confer upon 'designated' officers certain

duties and powers which the Customs Act did not attribute to regular officers." Justice Drapeau stated:

[Section] 163.5(2) provides that an officer designated under s. 163.4(1) has, in performing the normal duties of a customs officer at a customs office, the powers of a "peace officer" under section 254 of the Criminal Code. Section 163.5(2) also provides that a designated officer "may, on demanding samples of a person's [...] breath under subsection 254(3) [of the Criminal Code], require that the person accompany the officer, or a peace officer referred to in paragraph (c) of the definition of "peace officer" in section 2 of [the Criminal Code], for the purpose of taking the samples".

If customs officers who have not been designated under s. 163.4 had the powers of a "peace officer" under s. 254 to demand that a person provide breath samples for screening purposes, s. 163.5(2) of the Customs Act would be completely redundant. [paras. 17-18]

A certificate of analysis is admissible if the Crown establishes that the breath samples were provided pursuant to a valid demand under s.254(3) made by a "peace officer" upon reasonable and probable grounds. And only "designated" customs officers are "peace officers" for the purpose of s.254 having the power to make such a demand. This also applies to both ASD and breathalyzer demands under s.254(2).

Since the Crown did not establish that the customs officer was a "designated" officer, the accused's breath samples were not provided pursuant to a valid demand. The Court of Appeal found the officer's statement he was a customs officer did not presumptively make him a peace officer for the purpose of giving breath demands. The certificate of analysis was inadmissible. The accused's appeal was allowed and an acquittal entered.

Complete case available at www.canlii.org

BY THE BOOK:

Peace Officer



"Peace officer" under s.2 of the *Criminal Code* includes "an officer within the meaning of the *Customs Act* ... when performing any duty in the administration of any of those Acts."

FORMAL INTERVIEW NOT NECESSARILY DETENTION

R. v. Lee, 2007 ABCA 337



The accused was interviewed by police as follow up to a drug investigation. Her son and his girlfriend were allegedly part of a drug conspiracy and wiretaps of private communications indicated that the girlfriend discussed turning money over to the accused. The police had some circumstantial evidence that she did receive the money and turned it over to her son. The investigating officer did not believe he had reasonable grounds to arrest the accused but wanted to find out about her involvement with the money and was hoping for self-incriminatory evidence. The investigator contacted the accused and left her with the impression that he wished to interview her about her son's charges and he proposed that they meet at a police station. She decided to meet him at police headquarters.

The accused arrived at the police station with her husband. She voluntarily went into the secure area of the building without her husband, to a small "hard" interview room equipped for video recording, but she was not told the conversation would be videotaped. The investigator told her about the wiretaps which indicated that she had handled the money and that was the reason she was there, thus ending the pretext of discussing her son's case. There was general discussion about irrelevant family and background details and the investigator advised her about her right to remain silent and that anything she said could be used in evidence. At no time during the interview was she told she could, or could not, leave.

The investigator asked her if she wished to discuss the wiretapped phone calls. She replied, "Ask it. I'll decide whether I want to." The officer replied, "That sounds fair." The accused asserted that she had "nothing to hide". The interview was steered back to the cash, but the accused did not answer directly. When asked if she had received the money from her son's girlfriend, she replied, "I'm not going to sit here and incriminate myself." The officer persevered with questions and conversation and the accused eventually indirectly acknowledged

receiving the money. She was told that the money was likely the proceeds of crime and what occurred was technically a breach of the law, but that the investigator was not sure if charging her was appropriate and said that he wanted input from the Crown. It was after that point where the accused spoke the most on topic but even that ended quickly. So did the conversation which concluded with discussion of getting a lawyer involved.

After the police interview, the investigator thanked the accused for coming in, asked her if she had any questions, gave her his card, and then escorted her back to the public area of the building and she left with her husband.

At trial in the Alberta Court of Queen's Bench the accused was convicted of possessing proceeds of crime under s.355(a) of the *Criminal Code*. She testified she felt she was under compulsion during the interview, and argued she was detained and her right to counsel under s.10(b) of the *Charter* was violated. In her view, her statement to police was inadmissible under s.24(2). The trial judge, however, found the accused was not detained. He considered a number of factors in deciding whether she was detained or not. The trial judge found that she came voluntarily to the police station in response to a request, not a demand, because she expected to find out information about her son—she was a free participant.

Even though she did not know the interview would be videotaped, her lack of awareness was irrelevant to subjective detention. It had nothing to do with whether she thought she was detained. Further, advising the accused about her right to silence and that anything she said could be used as evidence "dispelled any doubts that this was an informal chitchat, and made it clear that this was a business meeting". The questions were general, open-ended and non-confrontational. The accused was not confronted with accusations of guilt and told to explain her innocence. The police did not have reasonable grounds to charge her before, or after, the interview. She

was more than a mere witness but the investigator had no fixed mind set. The police were not oppressive or domineering and the accused came and left by her own means. Finally, the trial judge rejected her suggestion that she felt compelled to answer because she was in a secure area, in a small room, far from the entrance, with the door closed.

The accused appealed to the Alberta Court of Appeal arguing, in part, that the trial judge erred in finding there was no detention. She suggested that the trial judge found she should have asked to be let go and have her request refused before she could be considered detained. In rejecting this argument, the Court noted that the trial judge merely took into account that there was no indication she could not leave when assessing her claim she was psychologically detained. Further, the Court said:

Presently, the law does not command the police to tell every interview subject before questioning that such person has the right to leave their presence. Even if it might be wise for the police to do so in some instances, failure to do so does not violate an established general legal obligation of the police towards interview subjects. [The investigator] did not need the informed consent of this [accused] to remain with him to avoid the interview being characterized as detention. We are not persuaded that the mere fact that the [accused] was being formally interviewed by a police officer - who told her she was suspected of an offence - itself constitutes detention without regard to the factors considered in *Moran*. No authority for this proposition was given to us. [para. 25]

The fact the accused said she did not plan to sit in the interview and incriminate herself and that she

"[T]he law does not command the police to tell every interview subject before questioning that such person has the right to leave their presence. Even if it might be wise for the police to do so in some instances, failure to do so does not violate an established general legal obligation of the police towards interview subjects."

would decide whether she would answer the questions was also relevant to her submissive state of mind. Her ability to chose was not "sapped" by police and replaced by a reasonable belief her liberty was being restrained under police power. Nor did the fact police regarded her as a suspect and

had a motive to acquire evidence from her render the encounter a detention:

...The fourth and fifth criteria in *Moran* refer to the "stage of the investigation" and "whether the police had reasonable and probable grounds". ...[T]he first factor in *Moran*, referring to the basis on which she was asked to attend at police headquarters, did not bespeak detention, nor did the second, since the [accused] came by her own means with her husband, nor did the third, since she left afterwards the same way.

The trial judge was also entitled to find it relevant that even if the police surprised the [accused] with advice about her potential legal jeopardy and with advisement about her right to silence, what followed was a polite and non-threatening discussion in which she expressed and effectively exercised her rights.

The [accused] would have us virtually abandon the balancing multi-factorial test in *Moran* and adopt instead a fixed rule to the effect that if a person being interviewed is believed by the police to be guilty, and if the police are close to reasonable and probable grounds, and if the police are seeking to gather self-incriminatory evidence, then the interview amounts to a legal detention, regardless of the *Moran* factors. As noted above, no authority for this new rule was provided to us....[paras. 30-32]

The trial judge properly weighed the evidence, including the videotape, and found the accused was neither objectively nor subjectively detained. The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

LEGALLY SPEAKING:

Detention Factors



In *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont.C.A.) the Ontario Court of Appeal made reference to a non-exhaustive list of considerations relevant to whether or not a detention has taken place. These factors have been considered and referred to by many appellate courts across Canada. Here they are:

1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home;
2. Whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;
3. Whether the accused left at the conclusion of the interview or whether he or she was arrested;
4. The stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;
5. Whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;
6. The nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;
7. The subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.

It must be remembered though, that no single factor or combination of factors, or an absence of any of these is necessarily determinative of the issue.

BRITISH COLUMBIA: CANADA'S MOST EXPLOSIVE PROVINCE



According to data recently released by the Canadian Data Centre, Canada had a total of 194 explosive incidents in 2006. British Columbia ranked first among incidents, bombings, attempted bombings, improvised explosive device recoveries, explosive thefts, and explosives recoveries.

The following definitions will help explain the incidents reported in the table below.

Incidents - The number of times Explosives Disposal Units were called to scenes involving the possible use of explosives.

Bombings - Explosions of devices created for non-authorized or criminal use that occurred at incidents attended by Explosives Disposal Units.

Attempted Bombings - Incidents attended by Explosives Disposal Units involving the use of one or more improvised explosive devices that failed to function because of an unintentional defect in design or assembly.

Hoax Devices - Incidents attended by Explosives Disposal Units where devices constructed from inert or non-explosive components were intended to resemble actual bombs.

Improvised Explosive Device (IED) - A bomb created for non-authorized use.

Recovered IEDs - Number of IEDs, that were recovered by Explosives Disposal Units. At one incident, one or more IEDs can be recovered.

Explosive Theft - Incidents attended by Explosives Disposal Units that involved reporting stolen explosives materials, the flammable component bombs.

Explosive Recoveries - Incidents where Explosives Disposal Units recovered explosive materials that were armed, dumped, stolen or suspected to be connected with unlawful activities.

Province / Territory	Incidents	Bombings	Attempted Bombings	Hoax Devices	Recovered IEDs	Explosive Thefts	Explosive Recoveries
British Columbia	75	11	5	6	22	2	29
Alberta	16	-	-	1	2	-	13
Saskatchewan	3	1	-	1	1	-	-
Manitoba	3	-	-	1	-	-	2
Ontario	28	3	1	7	7	-	9
Quebec	34	4	1	7	8	-	14
New Brunswick	6	1	1	-	2	-	2
Nova Scotia	29	-	-	8	1	-	20
Prince Edward Island	-	-	-	-	-	-	-
Newfoundland	-	-	-	-	-	-	-
North West Territories	-	-	-	-	-	-	-
Yukon	-	-	-	-	-	-	-
Nunavut	-	-	-	-	-	-	-
Canada	194	20	8	31	43	2	89

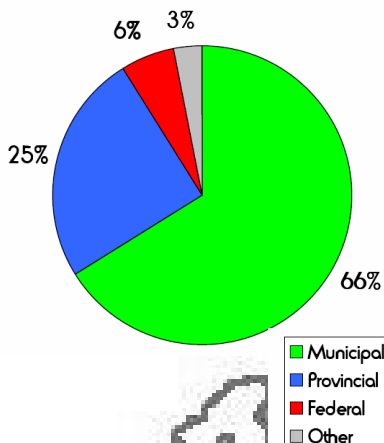
Source: Canadian Bomb Data Centre available at www.rcmp-grc.gc.ca/techops/cbdc/crim_use_expl_e.htm (accessed October 31, 2007).

POLICING NUMBERS ACROSS THE NATION



According to a 2007 report released by Statistics Canada there were 64,134 police officers across Canada last year, up 1,673 (2.7%) from the previous year. Ontario had the most officers (23,759) while the Yukon had the least (116) (see map below for all provincial/territorial numbers). With a population of 32,852,800, Canada's average cop per pop ratio was 195 police officers per 100,000 residents.

The report included all levels of policing:



Source: Statistics Canada, 2007, Police Resources in Canada, Catalogue No:85-225-XIE

CANADA: By the Numbers



In 2006, the total expenditures on policing was **\$9,877,071,000**

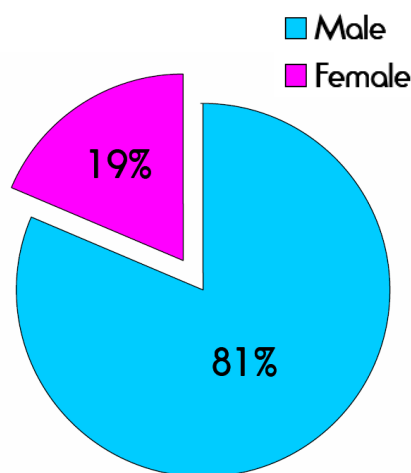
federal, provincial/territorial, municipal, and First Nations. In terms of percentages, municipal policing accounted for 66% of the officers, provincial policing 25%, federal policing 6% and other (such as the RCMP HQ and Training Academy) 3%.

Canada's Largest Municipal Police Services 2007

Service	Officers	% Female
Toronto, ON	5,558	16%
Montreal, QU	4,406	28%
Peel Regional, ON	1,686	15%
Calgary, AB	1,604	14%
Edmonton, AB	1,364	16%
Vancouver, BC	1,309	20%
Winnipeg, MN	1,275	16%
York Regional, ON	1,260	16%
Ottawa, ON	1,210	21%

Gender

There were 11,853 female officers accounting for 18.5% overall. British Columbia had the greatest percentage of female officers (22%) while Nunavut had the lowest (11%). Female officers accounted for 7% of senior officers, 12% of non-commissioned officers, and 21% of constables.



Area	% Female
BC	21.9%
QU	20.8%
SK	18.2%
NF	17.3%
ON	17.2%
AB	16.7%
NWT	16.6%
MN	15.9%
YK	15.1%
NB	15.0%
NS	14.8%
PEI	14.1%
NU	11.4%

RCMP



The RCMP had the largest presence in British Columbia with 5,743 officers, followed by Alberta (2,396), Ontario (1,341) and Saskatchewan (1,142).

Canada's Largest Municipal RCMP Detachments 2007		
Service	Officers	% Female
Surrey, BC	477	22%
Richmond, BC	306	26%
Burnaby, BC	228	28%
Kelowna, BC	143	26%
Prince George, BC	128	21%
Langley Township, BC	126	30%
Coquitlam, BC	123	28%
Nanaimo, BC	121	23%
Kamloops, BC	111	27%
Red Deer, AB	107	23%

REASONABLE GROUNDS INCLUDES OFFICER'S EXPERIENCES

R. v. Tran, 2007 BCCA 491



Police were conducting surveillance of a habitual drug-user. When not in jail, he was known to support his ongoing addiction through daily crimes of breaking and entering homes and theft of automobiles. The police received information from his relative that he had recently been released from jail and was engaging in drug use and property crimes. The police watched him and another person go from house to house in a residential neighbourhood, carrying a crowbar obtained that morning from a hardware store. The police saw them attempt to break into a house, but they apparently became aware of the surveillance and fled back to the drug-user's relative's residence from which they had come.

A few minutes later, the police saw the drug user come into the lane behind the house. A vehicle pulled up, the user got in, and knelt on the front passenger seat. A police officer could see that the user was in close proximity to the driver (the accused). She could see his upper body but not his hands. After about 15 seconds, the user got out of the car and it drove away. The police followed the vehicle, stopped it, and arrested the accused for trafficking in a controlled substance. The vehicle was searched and a black pouch containing 11 flaps of cocaine (totaling 3.7 grams) and 19 flaps of heroin (totaling 3.8 grams) was located in a pocket or compartment on the driver's side door. The officer also recovered a can of dog repellent from the same compartment. The accused was searched and \$136 cash and a cell phone which rang constantly (but was not answered by the police) was found. Meanwhile, another surveillance team member chased two other men into the residence, where he found and arrested the user and recovered one package believed to contain drugs.

At trial in the Supreme Court of British Columbia the accused argued his right to be secure from unreasonable search and seizure under s.8 of the *Charter* was breached. In his view, the officer did not objectively have reasonable grounds to make the

arrest and therefore the search that followed was unreasonable. The trial judge disagreed, holding that the officer's observations combined with her knowledge of the user were sufficient to provide reasonable grounds that the driver of the car had drugs. The officer testified that she had reasonable grounds, which included the user's background as a drug addict known to support his habit through property crime, his suspicious behaviour during the surveillance, his actions in kneeling down inside the vehicle in a very brief meeting, and his body language while in the vehicle. The accused was convicted of possessing cocaine for the purpose of trafficking and possessing heroin for the purpose of trafficking.

The accused then appealed to the British Columbia Court of Appeal submitting his rights under ss.8 and 9 of the *Charter* were breached. He again contended that the police, although perhaps having sufficient grounds to detain, did not have objective reasonable grounds for the arrest and therefore the searches that followed were not valid as an incident to arrest. Further, he argued that the experience of the officer was not relevant to the assessment as to whether objective reasonable grounds existed. In his view, the test for reasonableness is what a reasonable lay person would conclude in the circumstances.

Justice Lavine, giving the opinion of the British Columbia Court of Appeal, confirmed that a search incident to arrest will be valid if the arrest is valid. An arrest will be valid if the officer has reasonable grounds upon which to base it. This includes both a subjective and objective component. Subjectively the officer must believe they have reasonable grounds and those grounds must be objectively reasonable. As well, "the objective reasonableness of the arresting officer's grounds must be assessed from the standpoint of the reasonable person 'standing in the shoes of the police officer'", not through the lens of a lay person.

In this case there was no dispute the arresting officer subjectively had reasonable grounds. As for the objective grounds the officer did not see an actual exchange between the user and the accused. However, looking at the "entire picture", objective grounds did exist. The officer had ten years of experience, including five years on the property

crime surveillance team. She had seen in excess of 100 drug transactions and testified the encounter between the user and the accused fit the pattern of a "dial-a-dope" transaction. The trial judge properly considered the following factors to infer that the encounter in the vehicle was a drug transaction:

- The knowledge of the user's drug addiction, and his penchant for property crimes to support his habit;
- The information from the user's relative that he had been released from jail and was using drugs and committing crimes;
- The observations of the user "casing the neighbourhood" and attempting to break and enter into a residence;
- The encounter between the user and the accused in the vehicle, which the officer believed, based on her experience, was consistent with a "dial-a-dope" transaction.

The test for determining reasonable grounds is not to view each item of evidence separately, but to view them cumulatively using the "totality of the circumstances" analysis.

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

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

LEGALLY SPEAKING:

Right to Silence



"[The individual's right to *remain* silent] does not mean, however, that a person has the right *not to be spoken to* by state authorities. The importance of police questioning in the fulfillment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident. Therefore, the common law also recognizes the importance of police interrogation in the investigation of crime." - Supreme Court of Canada Justice Charron, *R. v. Singh*, 2007 SCC

COMPARING CRIME: CANUCKS v. YANKEES

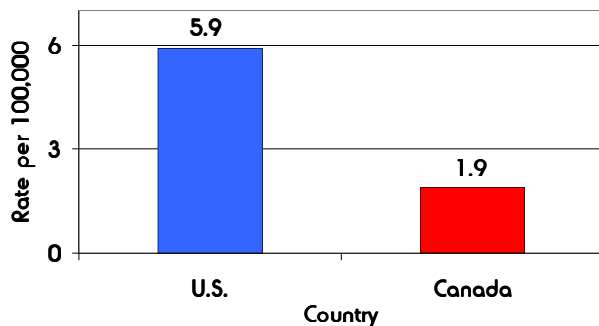


Have you ever considered how the crime rate in Canada compares to that of the United States? Three crime rates—homicide, break and enter, and motor vehicle theft—were chosen for comparison. All US statistics were obtained from the Federal Bureau of Investigation's *"Crime in the United States, 2006"* report while Canadian statistics were obtained from Statistics Canada's *"Juristat: Canadian Crime Statistics, 2006, Vol. 27, no. 5"*.

Murder/Homicide

The US murder rate was 5.9 "per 100,000 inhabitants." In Canada, the homicide rate "per 100,000 population" was 1.9.

2006 Murder/Homicide



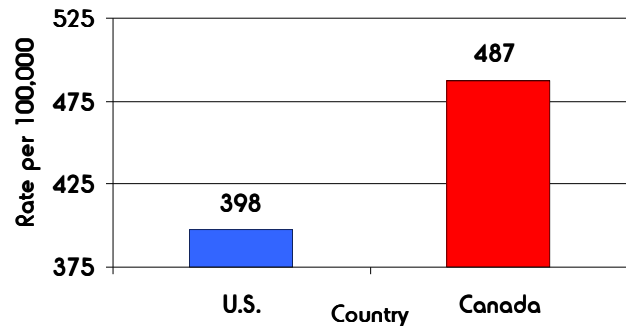
The District of Columbia had the highest murder rate at 29.1 per 100,000, followed by Louisiana (12.4), Maryland (9.7) and Nevada (9.0). Canada's top homicide rate was Nunavut at 6.5, followed by Saskatchewan (4.1), Manitoba (3.3) and Alberta (2.8).

Motor Vehicle Theft

The US motor vehicle theft rate was 398 per 100,000 inhabitants, while in Canada that rate increases to 487. The jurisdiction with the highest motor vehicle theft rate was Manitoba at 1,376, followed by District of Columbia (1,259), Nevada (1,080), North West Territories (927), Arizona (890), Alberta (725), Washington (718), British

Columbia (682), California (666) and Saskatchewan (633).

2006 Motor Vehicle Theft



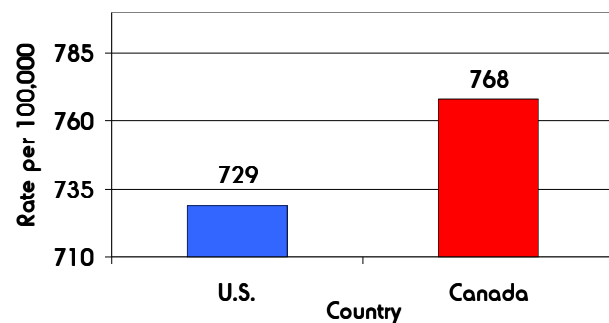
Burglary/Break & Enter

In the US, the crime of break and enter is known as burglary. Burglary is defined as the unlawful entry of a structure to commit a felony or theft. To classify an offense as a burglary, using force to gain entry need not occur. The US rate was 729 burglaries per 100,000 inhabitants. In Canada, the average break and enter rate was 768 per 100,000 population.

2006 Burglary/B&E
Top Ten Jurisdictions

Jurisdiction	Rate per 100,000
North West Territories	2,332
Nunavut	1,965
Yukon	1,467
Saskatchewan	1,228
North Carolina	1,213
Arkansas	1,140
British Columbia	1,088
Manitoba	1,074
New Mexico	1,070

2006 Burglary/Break & Enter



Note-able Quote

"Think globally. Act locally." - author unknown

MENTAL CONDITIONING

Insp. Kelly Keith, Atlantic Police Academy

Have you ever been running or cycling and talked yourself into being tired? In any sport or training atmosphere, your mind can be your biggest asset or your worst enemy. How you think and what you think about can and will affect the way you feel during your exercise. In fact there is no doubt that what you think about can make the difference between winning or losing, enjoying or hating your training, and have a big impact on your decision to stay with an exercise program.

You can use either the association or disassociation technique. When you use the association technique you are focusing on body sensations and monitoring any changes. When you are using the dissociation technique you direct your attention away from bodily sensations. So which is best?

Many endurance athletes tend to favour dissociation during training and association during competition. Dissociation can reduce the sense of effort, fatigue, and pain while training. However, association is generally believed to be linked to faster competition times. By being aware of the two techniques you can use them to compliment a longer endurance workout. When you start feeling tired or sluggish dissociate from these feelings and concentrate on what you are doing and finishing harder. You can always come back into the association technique when these feelings pass. I believe it is best to try using the association technique as much as possible. In fact, if you can visualize an opponent or visualize your baton swings, hand strikes, kicks, etc. along with the association technique, your training will reach an entirely new level.

I re-call a war story that I tell most of my classes. I was in full police uniform at bar closing speaking with the manager when approximately 35 feet in front of me I saw two males approaching each other. There was no doubt that these two were going to fight. I started making my way through the crowd but before I could make it (all of 15 seconds) they clashed. Male # 1 went to grab male # 2 at which point male # 2 absolutely exploded with fists that were faster than I have ever seen fists fly. And I've been around the fight game for a long time. Male # 1 fell to the ground unconscious. After I had settled

this call which was easy because neither wanted anything to do with me, and time allowed, I took the time to visualize the "what if" I had been male # 1 and the fists started coming at me that fast. It is a fact that we do not want to be in the "inside position" of any suspect, however reality shows us that it does happen on occasion. So to this day in "my mind" I have been in this situation many times and come out successful which is a critical component of success. Should it happen to me I will default to what was successful, drop down and do a double leg takedown rather than trying to evade, block or move off the line of attack from fists that were unbelievably fast!

Athletes use visualization, focus and other mental conditioning exercises to be successful. When visualizing, it is important that you visualize a skill at normal speed. If you continually visualize a skill at slower speeds it can be a detriment rather than a benefit. When the skill turns to real time your brain may be better at executing the action, however it is conditioned to deal with the skill at a slower speed and thus will not react in real time speed. Visualize in a quiet spot and visualize yourself doing the skill in various states of fatigue. Visualize yourself being successful in lifting the required amount of weight that you are attempting to lift. With control tactics, visualization is a powerful tool that will increase confidence, decrease re-action time, and, when needed, your body will feel like you have been there done that! Visualization needs to be in your "tool-box" of control tactics and exercises.

Most people have pictures of their partners or families on the inside of their lockers. I recall a cop who had his locker beside mine. He had a picture of a thug on the inside of his locker. Of course I had to ask why he had the picture. His answer was awesome! This thug had assaulted him. The reason my fellow officer believed he had won this confrontation was due to his hard workouts. Before he went out for his workout he took a look at the picture to remind him why he should give 100% effort in his workout before shift.

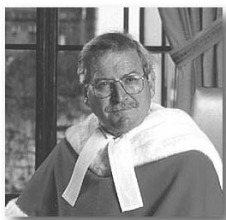
Another great way to bring yourself into the right mental state is to have a task relevant cue-word if you find your mental state getting off track. My favourite is "go-time", which in my mind puts me back in the state that I need to be. A great method I

believe should be added to our tool-box of tricks to ensure that we go home at the end of every shift.

When the going gets tough some people quit, others fight harder. What better way to train mental toughness than pushing yourself to the limit while working out and then pushing yourself a little bit further. With good physical conditioning and skill on your side it is easier to have a winning mind set. Mental fitness is about performance enhancement!

About the Author - Insp. Kelly Keith is a 20 year veteran of law enforcement and presently teaches 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

FORMER SUPREME COURT CHIEF JUSTICE DIES



The Right Honourable Antonio Lamer, formerly a justice and Chief Justice of the Supreme Court of Canada, passed away in Ottawa on November 24, 2007 after a prolonged illness. Born in Montreal, Quebec, Chief Justice

Lamer served in the Royal Canadian Artillery and in the Canadian Intelligence Corps. In 1956, he graduated in law from the Université de Montréal. He was appointed to the Quebec Superior Court in 1969, the Quebec Court of Appeal in 1978 and the Supreme Court of Canada in 1980. In 1990 he was named the 16th Chief Justice of Canada, retiring in 2000.

Chief Justice Beverley McLachlin, on behalf of the members of the Supreme Court of Canada, mourned Chief Justice Lamer's passing. "Antonio Lamer was an eminent jurist, and a fierce defender of the independence of the judiciary. He served as a justice of the Supreme Court of Canada and as Chief Justice of Canada during an important period of Canadian history. He was a forceful advocate for the rights enshrined in the Canadian Charter of Rights and Freedoms. His decisions left an indelible mark on both the law and Canadian society. His presence and passion for the law will be sorely missed."

CONFESSIONS RULE & RIGHT TO SILENCE INQUIRY FUNCTIONALLY EQUIVALENT

R. v. Singh, 2007 SCC 48



The accused was arrested for second degree murder after an innocent bystander was killed by a stray bullet while standing inside the door of a pub.

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

The accused was interviewed twice by police following his arrest. Both interviews were video and audio taped. The first interview in the evening lasted 70 minutes while a second interview the following morning lasted 47 minutes. Before the first interview the accused was given a *Charter* warning and spoke to a lawyer twice; once by telephone and again in a meeting. During the first interview the accused tried to end the interview 18 times by saying he did not want to talk about the incident or didn't know anything about the incident and by asking to be returned to his cell. Each time the investigator continued to talk, outlining what the police knew about the shooting and inviting comment. The accused did not confess to the crime, but made incriminating statements, admitting he had been to the pub and identifying himself as one of the persons seen in the pub video. The accused did not confess to the crime and the interview ended shortly afterwards.

At trial in British Columbia Supreme Court the accused argued the statements he made to police were involuntary and violated his right to remain silent under s.7 of the *Charter*. Although the tactics of the investigator caused him some concern, the trial judge admitted edited versions of the

statements. In his view, the accused's right to talk or to remain silent was not undermined or overborne by the investigator's admitted dedication to put part of the police case against the accused in an effort to get him to confess. The accused's admission that he was the person in the video was freely made and did not result from the police breaking down his desire to maintain his silence. As the trial judge noted, the investigator's persuasion did not deny the accused the right to choose to speak to police or deprive him of an operating mind. The Crown tendered only the first statement made to police to the jury and the accused was convicted of second degree murder.

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

Justice Mackenzie, writing the opinion of the British Columbia Court of Appeal, first found that "the police are not precluded from using reasonable persuasion to encourage a detained person to break his silence after his right to silence has been asserted following the exercise of the right to counsel." In this case, "the officer used a sophisticated technique of persuasion but the [accused] knew he was talking to a police officer and he was not under any misapprehension of his position." This is different than a situation where the police introduce an undercover police officer into a cell in the guise of a fellow prisoner to trick the detainee into thinking he was talking to another prisoner and not the police. This was an investigative interview where the accused was aware he was in the presence of a police officer. As for the "stratagem" employed by the investigator, he was trying to persuade the accused to talk despite his resistance for the most part. His right to choose was not overborne. The Court also ruled there was no utility in a double-barrelled test for admissibility. In other words, there was no need to analyze both the common law confessions rule and the right to silence

when determining whether a statement was admissible.

The accused then appealed to the Supreme Court of Canada. Although he conceded his statements were voluntary (obtained in conformity with the common law confessions rule), he contended, among other arguments, that the police breached his s.7 *Charter* right to silence by not refraining from questioning him when he stated he did not want to speak to police. He suggested that if the police were to proceed as they did, they would need a signed waiver. In other words, once a detainee asserts the right to silence, the police have a correlative duty to stop questioning them.

In a 5:4 judgment, the Supreme Court of Canada dismissed the accused's appeal. Justice Charron, authoring the majority judgment, concluded that the right to silence under s.7 and the common law confessions rule are so closely related that "where a statement has survived a thorough inquiry into voluntariness, the accused's *Charter* application alleging that the statement was obtained in violation of the pre-trial right to silence under s. 7 cannot succeed". And further, "if circumstances are such that the accused can show on a balance of probabilities that the statement was obtained in violation of his or her constitutional right to remain silent, the Crown will be unable to prove voluntariness beyond a reasonable doubt."

Interplay Between Confessions Rule & Right to Silence

The common law confessions rule requires the Crown prove beyond a reasonable doubt that a statement made to a person in authority was voluntary before it is admitted. For if a statement is not voluntary, it could be false. Thus, the primary reason for the confessions rule is the concern with the reliability of the confession. The rule counters the dangers created by improper interrogation techniques that could produce a false confession. This is very important because a confession can, in and of itself, ground a conviction.

Voluntariness includes an individual's freedom to choose whether to give information to the police or answer questions, or not. This applies to suspects whether or not they are in detention. However, after

detention the detainee is more vulnerable, they cannot simply walk away but are instead under control of the police. Detention can have a significant impact on the detainee and cause them to feel compelled to give a statement. A police caution about providing a statement informs the suspect of their right to remain silent and can be an important factor in determining voluntariness.

In assessing whether a statement was voluntary, a court will consider all of the circumstances including the following factors; threats or promises, oppression, operating mind, or police trickery. Thus, the question of voluntariness focuses on the conduct of the police and its effect on the suspect's ability to exercise their free will. The test is objective, but the individual characteristics of an accused will be relevant. In holding that the test for voluntariness at common law concerning a statement made by a person under detention and the *Charter* right to silence are functionally equivalent, Justice Charron stated:

[V]oluntariness, as it is understood today, requires that the court scrutinize whether the accused was denied his or her right to silence. The right to silence is defined in accordance with constitutional principles. A finding of voluntariness will therefore be determinative of the s. 7 issue. In other words, if the Crown proves voluntariness beyond a reasonable doubt, there can be no finding of a *Charter* violation of the right to silence in respect of the same statement. The converse holds true as well. If the circumstances are such that an accused is able to show on a balance of probabilities a breach of his or her right to silence, the Crown will not be in a position to meet the voluntariness test. [para. 37]

The majority was careful to point out that the confessions rule does not always subsume the constitutional right to silence. For example, a cell plant (undercover police officer or agent) actively eliciting a statement from a detainee can breach s.7 yet the common law confessions rule would not apply

because the statement was not made to a person perceived to be in authority.

As for the constitutional right to silence protected under s.7 of the *Charter*, there is a balance to be struck between an individual's freedom of choice and the state's interest in the effective investigation of crime. A suspect may be the most fruitful source of

information and the police may attempt to tap this source provided they do not deprive them of their right to choose to talk to the authorities. In achieving this balance, the police are not prohibited from questioning an accused. "Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence."

In this case, the trial judge reviewed all of the relevant

circumstances and concluded the accused's right to choose to talk, or remain silent, was not undermined or overborne by the interrogator. Although "the number of times an accused asserts his or her right to silence is part of the assessment of all of the circumstances" it is not in itself determinative of the issue. The test is whether the accused exercised free will by choosing to make a statement.

A Different View

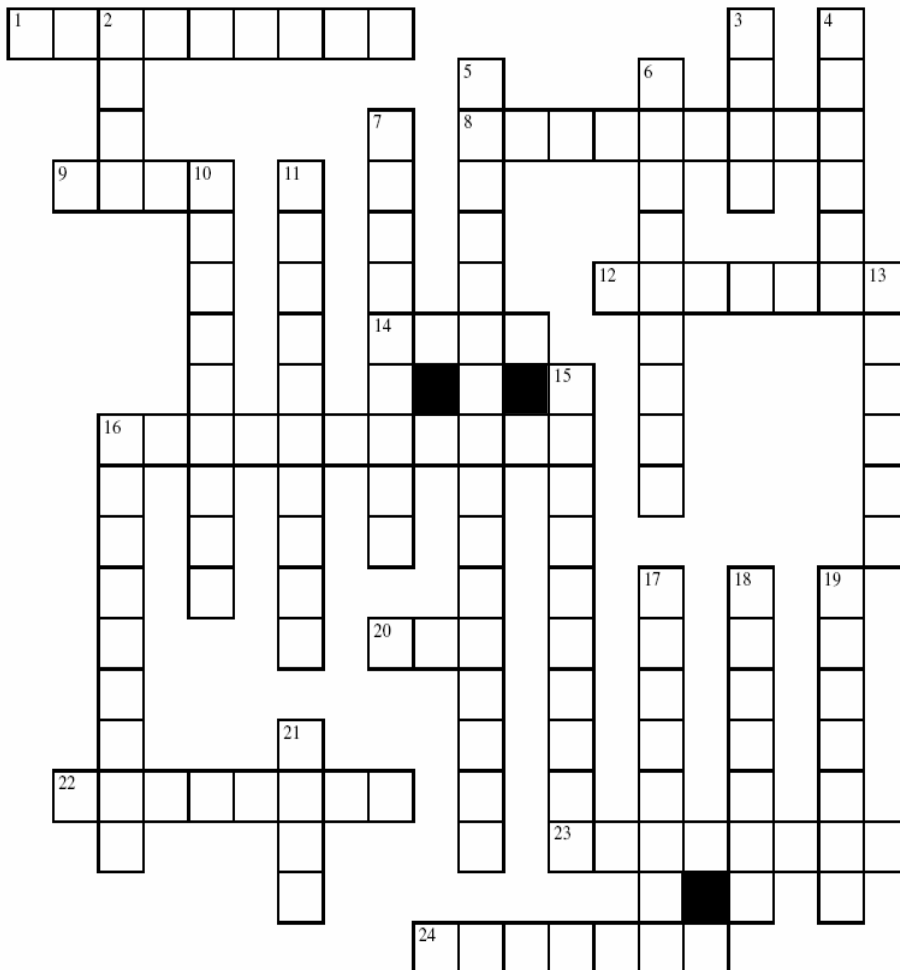
The minority found that the accused's statements were obtained in breach of his s.7 right to silence and collaterally of his right to counsel, by being told to forsake his counsel's advice. "Detainees left alone to face interrogators who persistently ignore their assertions of the right to silence and their pleas for respite are bound to feel that their constitutional right to silence has no practical effect and that they in fact have no choice but to answer," said Justice Fish. In the minority's view the statements should have been excluded under s.24(2), the appeal allowed, and a new trial ordered.

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

RIGHT TO SILENCE & CONFESSIONS RULE GRID

	Right to Silence (s.7 Charter)	Confessions Rule (common law)
Burden of Proof?	Accused	Crown
What's the Burden?	Balance of Probabilities	Beyond a Reasonable Doubt
Application?	Triggered on and during detention "Detained statements"	Statements made to a person in authority (in or out of detention)
Remedy?	Court's Discretion: Subject to s.24(2) <i>Charter</i> analysis	Always warrants exclusion

LEGAL WORD SEARCH



ACROSS

- 1 _____ detention (s.9 Charter).
- 8 Person swearing an application for a search warrant.
- 9 Guilty or not guilty.
- 12 Latin for guilty mind.
- 14 Burden of proof.
- 16 _____ cause justifying detention.
- 20 Knowingly assist the commission of a crime.
- 22 Unable to agree on verdict.
- 23 Proof of an allegation.
- 24 Right to _____ (s.10(b) Charter).

DOWN

- 2 Judicial interim release.
- 3 Judge stops charges.
- 4 Reason person committed a crime.
- 5 Closing one's mind to later claim ignorance.
- 6 A court decision that binds future decisions on the same issue.
- 7 Legal rules established through judicial decisions.
- 10 Found not guilty.
- 11 A guilty verdict.
- 13 Take a suspect into custody.
- 15 _____ grounds for arrest.
- 16 Latin for criminal act.
- 17 Trial within a trial.
- 18 Person charged with a crime.
- 19 Protected by s.8 Charter.
- 21 Group of 12 chosen for a criminal trial.

For answers log on to www.10-8.ca

HOMICIDE BY THE NUMBERS



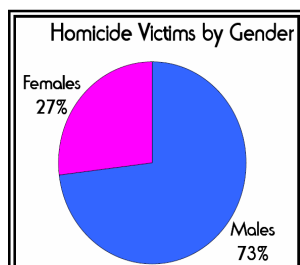
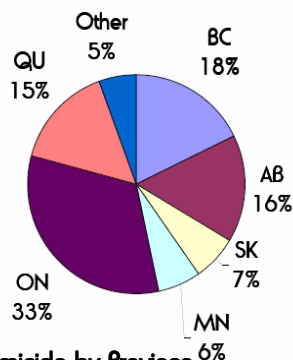
According to a recently released Statistics Canada report, "Homicide in Canada, 2006", there were 58 fewer homicides last year than the year before

(2005). This accounts for a 10% decrease in homicides. All provinces reported a decrease with the exception of British Columbia and Prince Edward Island. BC's homicide rate rose by almost 6% last year while PEI had one homicide, up from none the year previous. Ontario had the most homicides with 196 while both the Yukon and the North West Territories had none. Seventeen percent, about one in six homicides, were gang related.

Homicides by Province/Territory

Area	Homicides	Homicide Rate
British Columbia	108	2.51
Alberta	96	2.84
Saskatchewan	40	4.06
Manitoba	39	3.31
Ontario	196	1.54
Quebec	93	1.22
Newfoundland	7	1.37
Nova Scotia	16	1.71
New Brunswick	7	0.93
Prince Edward Island	1	0.72
Yukon	0	0.00
North West Territories	0	0.00
Nunavut	2	6.50
Canada	605	1.85

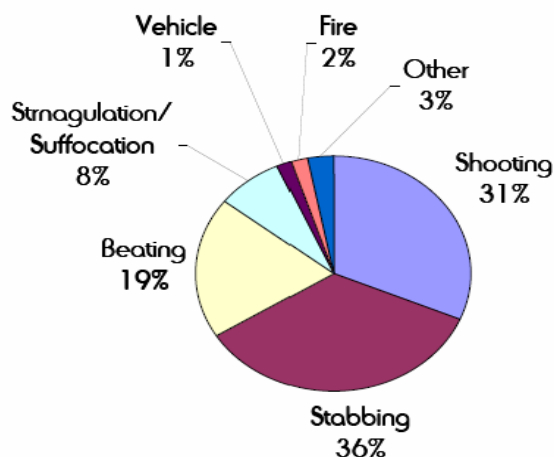
Canada Homicide 2006



Methods

The most popular method used to commit homicide was the knife, followed by the gun. Other methods included beating, strangulation/suffocation, fire, poisoning, shaken baby syndrome, vehicle, and unknown causes.





Homicide by Methods



Guns

Of the 190 homicides involving firearms, the weapon of choice was a handgun.

Homicides Involving Firearms

Firearm Type	Number of Victims	%
Handgun 	108	56.8%
Rifle/Shotgun 	36	18.9%
Fully Automatic Firearm 	2	1.1%
Sawed-off Rifle/Shotgun 	24	12.6%
Firearm-like Weapons	2	1.1%
Unknown Type	18	9.5%

Source: Statistics Canada, 2007, "Homicide in Canada, 2006", catalogue no. 85-002-XIE, Vol. 27, no.8

GARBAGE SEARCH OK

R. v. Patrick, 2007 ABCA 308



The police suspected that the accused was operating an ecstasy lab in his home. On six occasions they conducted a search of his garbage, which involved seizing opaque garbage bags located inside garbage cans that were placed in the receptacle at the back of his property. The bags were readily accessible to the public, since the garbage cans had no lids and the receptacle did not have any doors to cover the opening into the alleyway. Nonetheless, the officers did have to reach over the property line in order to retrieve the garbage bags. The police identified items within at least four of the bags that were indicative of an ecstasy lab. These items, along with other information garnered from their investigation, were used to obtain a search warrant for the accused's residence.

The search warrant was executed by officers wearing protective suits due to the risk of explosion, fire, or chemical contamination from using certain chemicals in the manufacture of ecstasy. The police officer in possession of the warrant remained outside until he was advised that the home was secure and that it was safe to enter. He then entered the residence and assisted in placing the accused under arrest. The officer then placed the accused into a police car outside the residence, re-entered the residence, and placed the warrant on the kitchen table. He did not show the warrant to the accused at any time.

At trial in Alberta Provincial Court the accused argued that his rights under s.8 of the *Charter* were violated because the police searched his garbage without a warrant and failed to show him the warrant when it was executed. The trial judge ruled that the accused did not have a reasonable expectation of privacy over the items seized from his garbage and that the search of his home was lawful. He rejected the accused's evidence that he had asked to see the warrant. The accused was convicted of unlawfully producing, possessing and trafficking in ecstasy contrary to the *Controlled Drugs and Substances Act*.

The accused appealed to the Alberta Court of Appeal arguing the evidence adduced at trial was obtained in violation of his rights under the *Charter* and ought to have been excluded. He submitted, in part, that the trial judge erred in concluding the warrantless searches of his garbage and the failure of police to show him the warrant did not breach his s.8 rights. In his view, the trial judge focused on his informational privacy, when the predominant privacy interest was territorial—the police trespassed over his property line.

In a 2:1 majority, the Alberta Court of Appeal upheld the trial judges ruling. Section 8 of the *Charter* guarantees everyone the right to be secure against unreasonable search or seizure. Justice Ritter continued:

Section 8 is intended to protect people, not places...Section 8 does not protect against every search or seizure, and requires a balance between a citizen's reasonable expectation in maintaining privacy over one's personal activities with the need of police officers to effectively investigate criminal activity. The critical question is whether

"Section 8 does not protect against every search or seizure, and requires a balance between a citizen's reasonable expectation in maintaining privacy over one's personal activities with the need of police officers to effectively investigate criminal activity"

a reasonable expectation of privacy exists over the monitored activity. The requisite analysis involves a principled, non-categorical approach that focusses on the totality of the circumstances. Certain factors have been identified to assist in this analysis, which include, but are not limited to, the accused's presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the

property or item, ability to regulate access, existence of a subjective expectation of privacy, and the objective reasonableness of the expectation. [references omitted, para. 11]

In this case, the majority found the accused abandoned any privacy interest he may have had in garbage that he placed in opaque green garbage bags and deposited into the garbage receptacle at the back of his property for pickup by city garbage personnel. Without a constitutionally protected privacy interest, there was no s.8 breach. In so holding, Justice Ritter examined several factors:

- Presence/Absence of Accused—There was no evidence the accused was present during the search of the garbage. The Court presumed that the officers who reached into the receptacle were careful to ensure that he was not present at the time, since they even took steps on the first occasion to substitute garbage bags so that the accused would not be aware of the police presence.
- Control Over the Property—The accused enjoyed little or no control over the garbage at the time of the searches. While technically still within the boundaries of his property, the accused relinquished control over his garbage, in a practical sense, by placing it into the garbage receptacle to be picked up by the garbage collectors. Anyone living in a major metropolitan area knows that once garbage is left for pickup, it may be subject to disturbance by bottle collectors and others looking for discarded treasures, as well birds, dogs, and vermin. Anyone placing garbage in an open receptacle enjoys virtually no control over it.
- Ownership of the Property—Whether the accused was the owner of the contents of the garbage bags depends on whether placement of the garbage bags in a receptacle designed for garbage pickup constitutes an abandonment of that garbage. After reviewing several cases, the majority was of the view that garbage is abandoned property and the source of the garbage did not enjoy a reasonable expectation of privacy in it. In assessing abandonment, the intention to part with what is in the bag is important, not where it is put. Some of the cases reviewed involved garbage left on public lands adjacent to the resident's property while others dealt with garbage on the resident's land but placed for pickup.

And citizens do not expect that garbage placed in opaque bags is entrusted to garbage collectors. Justice Ritter wrote:

In some cases...all household garbage goes to a sorting facility where all bags are opened and sorted so that compostables go to a composting facility, recyclable items are taken to a recycling facility, and the

remaining garbage ends up in a landfill. This sorting process, which is carried out by individuals who can see what is in every garbage bag, demonstrates that any expectation of privacy is eliminated in the disposal of garbage. In other cases, much of the household garbage generated by an entire city is transported to disposal sites across great distances. Citizens could hardly expect that the trucks transporting garbage would never be involved in collisions compromising the load, or never lose a single item from their loads during a trip of literally hundreds of kilometres. One need only follow a garbage truck a short distance to realize that not all of its contents remain in the truck. Persons to whom garbage is entrusted have neither the obligation nor the means to protect the privacy of its donor.

In effect, methods of garbage disposal are as varied as there are municipal jurisdictions. In virtually every jurisdiction, disposal is far from secure. This fact is demonstrated by the "not in my back yard" phenomenon that surrounds any attempt to establish a new disposal site anywhere. One invariable concern expressed by those living in the vicinity of a proposed disposal site is that refuse from the site will end up on their property. [paras. 26-27]

- Historical Use of the Property—Although the items contained in garbage cover the totality of human activity, ranging from the personal to the manifestly impersonal, and from items that disclose practically nothing about the person who is the source of the garbage, to items that may disclose intimate personal details about that person, the fact it is discarded indicates that it is unwanted and has no historical use at all. All garbage has one thing in common — it is no longer wanted. Often what may have historically been used for personal or intimate functions are discarded when it is irreparably broken or broken to a point where repair is uneconomical. There was nothing in the historical use of garbage to demonstrate that the accused maintained an expectation of privacy in it.
- Ability to Regulate Access—The accused gave up all ability to regulate the use of the garbage.

The receptacle was open to anyone who wandered by the back of his property. Visually, the receptacle is hidden from view from inside the property but wide open from the outside. If the accused had been sitting on a lawn chair in his backyard, animals, bottle pickers, nosey neighbours, persons making use of his receptacle for their garbage, and the police might well inspect his garbage without him knowing that it was going on. For all practical purposes, his ability to regulate the use of the garbage was virtually nonexistent. Once the garbage was picked up, the accused lost what minimal ability he had to regulate access while it was in the receptacle. Although he argued that he would expect that it would be transported to a disposal site and be placed there exactly as it left the receptacle, citizens do not regard the garbage disposal system as a secure means of ensuring privacy.

- Existence of a Subjective Expectation of Privacy—The accused did not have a subjective expectation of privacy in his abandoned garbage. Although he argued that garbage can reveal and expose intimate details of his lifestyle or core biographical data, such as lifestyle choices, DNA, and personal and financial choices, he did not testify on this issue and it was unknown what items were in his garbage that would have had this effect. "The only items that are specifically identified are those used by the police to obtain the warrant, and these items reveal that [he] was involved in criminal activity and little else," said Justice Ritter. "They cannot constitute intimate details of lifestyle or core biographical details to which privacy protection ought to be extended." Moreover, the fact that garbage, by its nature, can include items that expose intimate details or core biographical data about the person who generated the garbage does not alone lead to a presumption that the accused's garbage would have included such information. Even if it did, any presumption is undermined by the reality that putting items in garbage bags and then leaving them for pickup in a publicly accessible receptacle amounts to an abandonment of those items, and any information that may derive from those items.

- Objective Reasonableness of the Expectation—Alberta's *Petty Trespass Act* makes it an offence for anyone to enter on land that is surrounded by a fence. The accused's garbage receptacle was built into the fence along his property line and the bags were either directly on the property line, or within garbage cans located on his property. Although the indentation faces the alley, the garbage receptacle belonged to him. Even if the police committed a trespass, it was of a *de minimis* nature. Furthermore, arguments that provincial statutes or municipal bylaws provide householders with any assurance that their garbage will be treated with confidence must always be tested against what actually happens in society. In this case the accused placed the garbage in the receptacle for pickup and had to expect that it would be removed by garbage personnel. He would also expect that living in a major metropolitan area, his garbage would potentially be subject to investigation by persons other than garbage personnel. Although the placement of garbage into a readily accessible receptacle does not, in law, amount to a licence to the public to inspect, it does serve to greatly reduce the viability of his assertion he expected his garbage was so sacrosanct that no one would ever lay their eyes on its content. Reasonable persons would not expect that garbage is secure and private, and would conclude that garbage is not obviously private in nature.

The place searched was, at most, a garbage receptacle. It was not the accused's house or garage or backpack or automobile. It was a place that raises minimum reaction in any assessment of the hierarchy of places that one would normally expect to be private. Finally, the trial judge did not err in considering that the place searched was the air space within the receptacle inside the fence line.

Since there was no expectation of privacy, there was no *Charter* breach and the police tactic in examining the garbage was constitutional.

Complete case available at www.albertacourts.ab.ca

www.10-8.ca

DUTY COUNSEL SYSTEM FAILED ARRESTEE:

s.10(b) BREACH MADE OUT

R. v. Osmond, 2007 BCCA 470



The body of 13-year-old girl was found in a shallow grave in a wooded area directly behind her home in a small community. She was naked below the waist and had sustained significant bodily injury. Scrap lumber and greenery had been thrown over her in an effort to conceal her. A forensic pathologist determined the girl's death was caused by blows to the head, strangulation, and stab wounds. She also had an acute laceration and contusions to her vagina. In the days immediately following the murder, many people observed a long scratch down the front of the accused's neck. He was a 21-year-old man who lived nearby. A DNA analysis of the girl's fingernail clippings matched the accused's DNA and he was arrested for the first degree murder.

On arrival at the detachment, the accused was asked if he knew a lawyer. He mentioned one who represented him on a youth matter several years prior but wasn't sure if he needed one. One of the officers involved in the arrest knew of the lawyer the accused was referring to and where he practiced, but did nothing to help locate him. He was warned and given the appropriate 10(b) *Charter* advisory but thought he would find out what the police had on him so he could discuss it with a lawyer after the weekend. He was urged to make a call to duty counsel.

A call was placed to a toll-free answering service which paged the on call (Brydges) lawyer, who returned the call. The call was transferred to a room where the accused was alone. The duty counsel lawyer spoke to the accused for about two minutes, telling him about his right to silence. He told the accused not to say anything to the police or to anyone in cells. The duty counsel lawyer did not recommend any local lawyers who could attend to the accused before police questioning nor did he know any criminal lawyers in the area. The accused had no access to a

phone book or list of legal aid lawyers, nor did the police assist him in contacting his former lawyer or let him visit his father or girlfriend who could have arranged for a lawyer. The accused then spoke to the police and in the course of two lengthy interviews he confessed to killing the girl and disposing of her body in the woods behind her residence.

At trial in British Columbia Supreme Court the accused challenged the admissibility of his confessions on the basis that they were not voluntary and that his right to counsel under s.10(b) of the *Charter* was violated. The trial judge disagreed and admitted the statements. He was convicted of first degree murder.

The accused appealed his conviction to the British Columbia Court of Appeal arguing he was denied his right to counsel under s.10(b). Justice Donald, writing the opinion for the three member Court of Appeal agreed. The privilege against self incrimination at common law is found in s.7 of the *Charter* as a principle of fundamental justice and is closely linked to the right to silence and the right to counsel under s.10(b). The right to silence gives the detainee the right to choose whether to speak to the authorities or not (by remaining silent). Section 10(b) requires the police to advise a detainee of their right to consult counsel and give them an opportunity to do so without delay. One of the most important pieces of legal advice one gets from exercising their s.10(b) right is understanding their right to silence. This includes both confirming the existence of the right to remain silent and also getting advice on how to exercise it.

In this case, the British Columbia Court of Appeal concluded the duty counsel call was entirely inadequate. The accused was 21 years old, immature, over-confident, had not completed high school and was obviously unsophisticated. He was a labourer from a remote, tiny, resource based community on the west coast of Vancouver Island. He foolishly thought he could talk his way out of the situation he

found himself in. As Justice Donald noted, "he did not have the *savoir faire* to know he was hopelessly outmatched by a trained R.C.M.P. officer

FAMILIAR FRENCH PHRASES:

"savoir faire" – tact; know how; ready knowledge of what to do or say, and of when and how to do or say it; capacity for appropriate action.

from the Serious Crimes Unit." The accused was isolated and faced interrogation after a two minute phone call from a remote stranger with no local knowledge. His Friday arrest meant access to a lawyer was problematic. He would be held in police cells over the weekend and could be readily accessed by police. He was denied contact with his father and girlfriend until after interrogation. In holding the accused's right to counsel had been breached, Justice Donald stated:

When the call [with duty counsel] was over, the interrogation began. The [accused] obviously did not appreciate his position. He did not know that he needed to have a more detailed discussion about how to handle the interview so as to protect himself. He carried on in an attempt to find out what the police had as evidence against him. Had he discussed this approach with a lawyer with more time and interest in his case, he would have been told that he should not try to persuade the police that he is innocent, and that he should let a lawyer gather particulars from the police.

The [accused] tried to argue his case with the police. He took the line that if he committed the murder, why would he have volunteered a DNA sample, how could he have forgotten such a thing or behaved normally, as he did for the several intervening weeks? He eventually gave in to the constable's stratagem that he needed to know what happened to assure the [accused's] father, girlfriend, and his community that this was an unplanned event and that he was not a predator.

Stepping back from these circumstances and assessing them from a fair treatment perspective, here is a young, unsophisticated accused in custody with the benefit of a two-minute phone call, put against a skilled interrogator lawfully entitled to persuade him to ignore the lawyer's advice and to employ a range of techniques within the generous ambit permitted by *R. v. Oickle* ... 2000 SCC 38, and more recently, *R. v. Spencer* ... 2007 SCC 11. If that is all that s. 10(b) provides in a case of first degree murder, the Charter protection is largely illusory.

To summarize, a detainee under arrest has the right to remain silent. This integrates with the privilege against self-incrimination: s. 7. He is entitled to timely and effective access to counsel prior to police interrogation: s. 10(b).

Immediate advice of counsel addresses not only the right to remain silent but also how to exercise that right. Police are obliged to facilitate access to counsel within reason - the implementational duty.

These rights serve the principle of fair treatment of an individual under the control of the state. The Brydges [duty counsel] line system failed in this case to meet the needs of the [accused's] situation. It did not constitute access to counsel and since the police did not implement access in any other form, the [accused's] s. 10(b) rights were denied. [paras. 51-56]

The statements were conscriptive, excluded under s. 24(2) of the *Charter*, and a new trial was ordered.

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

FIREARM USE REQUIRES GUN IN PHYSICAL POSSESSION OR READILY AT HAND

R. v. Steele, 2007 SCC 36



The accused and three accomplices broke and entered a home expecting to find a grow operation and no one there.

They picked the wrong house and three occupants were sleeping. The occupants were awoken and one of the intruders warned a female resident not to move while adding, "We have a gun". The female also noted he had something in his hand about the size of a gun. Another female resident heard a second intruder tell an accomplice twice to "Get the gun." She then saw one of the intruders pull a dark metal object from inside his jacket. A third resident heard one of the intruders say, "Get the gun out." All four suspects fled the home within five minutes of their arrival.

About four minutes after a 911 call was received, the police stopped a vehicle matching the description of the getaway car. Four individuals, including the accused, were found inside the vehicle and they were all arrested. The police searched the car and found several weapons, including a loaded handgun under the driver's seat.

At trial in British Columbia Supreme Court the accused was convicted of several offences, including

s.85(1) of the *Criminal Code* for using a firearm while committing break and enter. His appeal to the British Columbia Court of Appeal was unsuccessful. The Appeal Court held that "possession of a firearm becomes use under s.85(1) of the *Criminal Code* when its use is threatened." The loaded handgun that was found in the car was either in the physical possession of one of the intruders while in the house or in the car immediately outside, making it sufficiently available to carry out the implicit threats respecting the gun by the intruders inside the residence. The firearm was "proximate for future use." The trial judge's guilty verdict for the s.85(1) offence was therefore supported by the evidence.

The accused then unsuccessfully appealed his conviction to the Supreme Court of Canada. In a unanimous judgment Canada's highest court upheld the conviction. Section 85(1) creates an offence for using a firearm while committing an indictable offence (such as break and enter), while attempting to commit an indictable offence, or during flight after committing or attempting to commit an indictable offence, whether or not the person causes or means to cause bodily harm. A conviction for this offence carries a minimum sentence of one year in prison, to be served consecutively to the sentence for the predicate offence.

Justice Fish, writing the opinion for the court, examined case law surrounding the meaning of using a firearm. He stated:

"Use" has been held to include discharging a firearm, pointing a firearm, "pulling out a firearm which the offender has upon his person and holding it in his hand to intimidate another", and displaying a firearm for the purpose of intimidation. ... "[U]se of firearm" may include revealing its presence by word or deed.

It is thus settled law that use and mere possession (or "being armed") are not synonymous. But courts have almost invariably determined on a case-by-case basis whether the

"I would therefore hold that an offender "uses" a firearm, within the meaning of s. 85(1), where, to facilitate the commission of an offence or for purposes of escape, the offender reveals by words or conduct the actual presence or immediate availability of a firearm. The weapon must then be in the physical possession of the offender or readily at hand."

conduct alleged in each instance amounted to use of the firearm in question. They cannot be said to have articulated a principled test that fully captures the type of conduct that rises to the level of "use" within the meaning of s. 85(1). [references omitted, paras. 27-28]

Then after reviewing dictionary definitions of the word "use, he said:

In the absence of a statutory definition, I would therefore hold that an offender "uses" a firearm, within the meaning of s. 85(1), where, to facilitate the commission of an offence or for purposes of escape, the offender reveals by words or conduct the actual presence or immediate availability of a firearm. The weapon must then be in the physical possession of the offender or readily at hand.

Where two or more offenders are acting in concert, the usual rules of complicity apply. It will therefore be sufficient, where one of the offenders is in physical possession of a firearm or has immediate access to it, for another to utter the firearm-related threat.

.....
I take care to add that this test does not bring within s. 85(1) of the *Criminal Code* any threat — including an idle threat — that refers to a firearm. Use, at least in this regard, is a matter of fact, not fiction. Section 85(1) does not capture the threatened use of a non-existent firearm. However effective and objectionable, it is the threat in that case that is "used", and not a firearm. Moreover, had Parliament intended to capture idle threats under s. 85(1), it would have said so expressly, as it did in ss. 267 and 272 of the *Criminal Code*. [references omitted, paras. 32-35]

Justice Fish, however, rejected the British Columbia Court of Appeal's approach that "use" of a firearm under s.85(1) could be satisfied on evidence that the weapon was "proximate for future use". He held that this test did not provide any real measure or indication of the degree of proximity required—how near to in space or time the weapon must be to the predicate offence. It also would cast too wide a net. Rather than being concerned with future use, s.85(1) is concerned with present use.

In this case, the trial judge was satisfied the firearm seized from the getaway car was brought into the home by one of the intruders and remained within the physical possession of that intruder or another, during the break and enter. From the facts and circumstances it was not unreasonable to infer that the intruders brought the gun into the home and that it was in the physical possession of one of them, to the knowledge of all, during the break in. Section 21 of the *Criminal Code* (parties to the offence) applies to s.85(1) and it wasn't necessary for the trial judge to find that the accused personally brought the gun inside the home or physically possessed it or even personally uttered the threats. Several intruders, including the accused, were acting in concert making him a party to the s.85(1) offence. And even if the firearm was not brought into the house Justice Fish concluded with this observation:

We are dealing in this case with a break and enter committed by several intruders acting in concert. Even if they had left their charged firearm in the getaway car when they entered the Reid home, any one of them could easily have slipped away momentarily to retrieve it from the car, parked just outside, without interrupting the commission of the offence.

In these circumstances, applying the test I have set out, the trial judge could have properly concluded that the intruders used the firearm, within the meaning of s. 85(1) of the *Criminal Code*, even if they did not have it in their physical possession while in the Reid home. [paras. 55-56]

Complete case available at www.scc-csc.ca

POLICE MUST TELL YOUTH THAT CONSULTED ADULT MUST BE PRESENT

R. v. S.S., 2007 ONCA 481



After receiving an anonymous tip, a police officer in charge of a convenience store robbery investigation contacted the 17 year old accused about his possible involvement. The accused was told he had been named as a suspect and agreed to an interview at the police station. The next day the police investigator picked up the accused at his home and drove him to the police station. The

interview was videotaped and the officer reviewed a Statement of a Young Person form with him. He told the accused he was investigating a robbery, but that he was not under arrest, and that he was under no obligation to make a statement and that any statement he did make could be used as evidence. He was also advised he could consult a lawyer, about the availability of legal aid, and about his right to consult with an adult, which included the right to have the adult present when giving a statement. However, the officer did not explain that any statement was required to be made in the presence of any consulted third party. At the end of an hour long interview in which the officer used skilled interview techniques (expressing empathy, interest in his personal life, implying DNA and video evidence, and personal appeals), the accused provided a statement and was arrested and charged.

At trial in the Ontario Court of Justice the judge found that the police informed the accused about his right to have a lawyer or other adult present when he gave a statement, but failed to tell him that the statement must be taken in the presence of the person(s) consulted. Thus, the statement was not taken in accordance with s.146(2)(b)(iv) of the *Youth Criminal Justice Act* (YCJA). The statement was therefore inadmissible and the accused was acquitted.

The Crown appealed to the Ontario Court of Appeal arguing, in part, that there was no difference in substance between a "right" to have the consulted third party present and the "requirement" that they be present. And even if there was a difference, the Crown submitted that the critical information required by s.146(2)(b)(iv) was substantially complied with because the information was conveyed to the accused and understood by him. The accused, on the other hand, contended that there was a significant difference between being told about the right to have the consulted third party present and being told the statement is required to be made in the presence of the third party.

Justice Lang for the unanimous Ontario Court of Appeal, first recognized that there were three areas of law that governed the admissibility of statements made by a young person to a person in authority:

1. the common law rule of voluntariness (confessions rule);
2. the *Charter*; and
3. the statutory safeguards provided by the *YCJA*.

In terms of s.146(2)(b)(iv), Justice Lang stated:

...s. 146(2)(b)(iv) is an enhanced procedural protection that Parliament deemed important, among other purposes, to provide reasonable protection for a young person confronted by police officers seeking a statement. As the Supreme Court of Canada has explained, this protection is important because, no matter how well-intentioned the officer, young persons are susceptible to feeling intimidated by the police, whom they consider to be persons of significant authority and power. In addition, young persons may lack the maturity to consider the consequences of unburdening themselves of their misdeeds, particularly when encouraged to do so by an apparently understanding (or, alternatively, formidable) police officer.

As for whether s.146(2)(b)(iv) was merely a right of a young person or imposed an obligation on the police to tell them about the requirement, the Court looked at the context and parliamentary purpose of the enhanced procedural protections of the *YCJA* stating:

...in my view, the failure to tell the [accused] about the requirement on the police was a breach of s. 146(2)(b)(iv). That breach denied the young person important information that would have enabled him to decide whether to consult a third party.

I reach this conclusion because, on a plain reading of the legislation, there is an important distinction drawn between a "right" of a young person on the one hand and a "requirement" put on the police on the other. That this distinction was intentional is apparent from a consideration of the structure of s. 146(2)(b). While s. 146(2)(b)(iii) refers to a young person's "right" to consult counsel, in contrast, s. 146(2)(b)(iv) expressly places an obligation on the police. Thus, it is clear that Parliament deliberately distinguished between information about a young person's right and about an obligation on the police.

The distinction is consistent with the purpose of protecting young people in light of their lack of maturity and their susceptibility to yield to authority. If a young person is informed that, if they consult a third party, that person must be present during the taking of a statement, the young person will be alerted by that information to the significance of any statement he or she may provide and, importantly, will be in a better position to make an informed decision about whether to consult a lawyer or an adult. In other words, information that any statement must be made in the presence of any consulted third party is critical so that the young person can make an informed decision about whether to consult a lawyer or an adult in the first place. Thus, in my view, the "requirement" provides important information that is essential to the enhanced procedural protection provided by s. 146(2).

Further, s. 146(2)(b) required [the investigating officer] to "clearly" explain the information set out in that subsection. It cannot be a "clear" explanation if the police fail to tell the young person that counsel and any other consulted third party must be present during the taking of any statement. As I have said, only after the police obligations have been "clearly explained" to the young person, and he or she has been given all the required information, can the young person provide an informed answer to the question of whether he or she "desires otherwise".

The importance of providing the young person with the tools necessary to make an informed decision is particularly important because the *YCJA* does not require any notice to parents (or parental equivalents or substitutes) when the police want to interview a young person. No notice is required until the young person is arrested and detained in custody or until a summons or appearance notice is issued. The absence of parental notification when a young person is taken for questioning underscores the importance of ensuring that the young person is fully informed of his or her procedural protections before he or she makes a decision.

This interpretation of s. 146(2)(b)(iv) is consistent with the objectives and principles of the *YCJA*. In addition, it does not place an undue burden on the police. It is not difficult to tell the young person about the requirements

of the section. It is apparent that a uniform form that correctly addresses all of the procedural protections would facilitate uniform compliance with s. 146(2) and, more importantly, would ensure that a young person had his or her rights, and the obligations of the police, clearly explained. [paras. 32-37]

The police must, therefore, make it clear to the young person that the person consulted must be present when their statement is made. It is not enough just to advise them of their right to have the person consulted present. And "since the [accused] was deprived of a substantial informational component of s. 146(2)(b)(iv), the breach cannot be considered a "technical irregularity" of the kind to invoke a consideration of s. 146(6)."

Complete case available at www.ontariocourts.on.ca

DETENTION NOT AUTOMATIC WHEN POLICE APPROACH AND TALK

R. v. L.B., 2007 ONCA 596



In the early afternoon two plainclothes detectives driving an unmarked police car noticed a young male partially seated on the railing of a walkway leading up to the grounds of a high school. They saw the youth turn his head and look up towards the top of the stairs where they saw a second young male, the accused, seated on the school grounds, just inside a fence at the upper end of the walkway. The officers continued for a short distance and then turned around and watched the youth at the bottom of the staircase. He was glancing around and looking up in the general direction of the accused and appeared to be speaking to him. This led the officers to believe that although the two youths (both 15 years old) were physically separated, they were in fact "together". Their conduct aroused the suspicions of the officers.

After several minutes, the officers decided to speak to the two youths to find out what they were doing. They parked their police car in the lane opposite to the natural flow of traffic, got out of the car, and an officer looked over the roof of the car at the youths, displayed his police badge and warrant card and called out "Toronto Police". At that point, one of

the officers got a better look at the accused, who was seated at the top of the slope on school property. He was crouched with his knees in the air, and he had a black bag or satchel in his right hand. He stood up immediately and held the bag low behind his right thigh. He then crossed the top of the walkway and passed a pole attached to a chain-link fence, before proceeding down the stairs towards the two officers. The accused's actions caught the officers somewhat off-guard. While it was their intention to speak to both youths, the accused walked directly up to an officer without being summoned or directed to do so. The officer struck up a casual conversation with the accused while his partner casually conversed with the other youth.

Both youths were asked for their names and date of births. They were checked on CPIC and one was recognized as someone dealt with three weeks earlier on robbery charges. It was also noticed that the accused was not carrying the black bag that he had been holding at the top of the walkway. Accordingly, an officer walked up the stairs to the area where the accused had been seated and started to look around. At this point, the accused began showing signs of nervousness—he was fidgety, pacing, and looking around. In light of this behaviour, the police had safety concerns and prevented the youth from communicating with each other by interrupting their conversations verbally with more casual conversation. At the top of the stairs, the black bag was quickly located on the grass with some litter. The officer called down to the youth, who were at the bottom of the stairs and asked, "whose bag is this". The accused replied "I don't know" while the other youth did not respond. Because of the accused's response and the fact that he had distanced himself physically from the bag, the officer treated the bag as abandoned property and opened it. Inside, he located school work with the accused's name on it along with a loaded .22 calibre handgun. Both youth were then arrested at gunpoint and the accused was subsequently charged with possessing a loaded restricted firearm and several other gun charges.

At trial in the Ontario Court of Justice, both officers agreed that they had no cause to detain the youths and if either youth had chosen to walk away or stop answering questions, he could have done so with impunity. They testified their encounter with

the youths was brief, between one and three minutes, and that no physical contact occurred until the arrest. The accused argued his rights under ss. 8, 9 and 10(b) of the *Charter* had been violated and that the gun's admission into evidence would bring the administration of justice into disrepute and should therefore be excluded under s.24(2).

The trial judge concluded that the accused was detained by the police when he was asked for identification and waited for the CPIC results. Although the officers did not physically restrain the accused, nor assume control over his movement by a direction or demand, the accused was psychologically detained. The police, however, did not have justification for the detention and it was therefore arbitrary and violated s.9. The police also failed to advise the accused of his right to counsel under s.10(b) before questioning him about the ownership of the knapsack. And finally, the police breached s.8 when they searched the knapsack without lawful authority. The gun was excluded as evidence and the accused was acquitted of all charges.

The Crown appealed to the Ontario Court of Appeal arguing the trial judge erred in holding that the accused was detained when he was asked about the ownership of the knapsack. Justice Moldaver, authoring the judgment of the Court, ruled that the trial judge came to the wrong conclusion in finding a detention. In the Court of Appeal's view, the accused had not been detained when he was asked about the knapsack nor at any time leading up to his arrest.

There is no simple test that can be applied in deciding whether a psychological detention has occurred. Each case will be fact-specific. Whether or not a detention has occurred does not depend on whether there is reasonable grounds to detain (formerly known as articulable cause). Although the existence of reasonable grounds to detain allows the police to lawfully detain a person for a brief period of time it does not assist in determining whether a

detention has occurred in the first place. As Justice Moldaver noted:

The fact that the police may have reasonable grounds to detain someone does not mean that detention will automatically occur when the police approach and start talking to that person; the same holds true when the police do not have reasonable grounds to detain. To repeat, we have not yet reached the point that compulsion to comply will be inferred whenever a police officer requests information. [para. 56]

In this case, the accused "bore the onus of establishing, on a balance of probabilities, that he was psychologically detained." It did not help his cause that he failed to testify. The evidence of the officers, on the other hand, undermined his assertion that he was detained. The Court stated:

According to the officers, they did not demand anything of the [accused], nor did they direct him to do anything. On the contrary, it was the [accused] who cast aside the black bag and, without prompting, walked down the stairs and approached the officers. He did so of his own volition. His conduct actually caught the officers off-guard, and in my view, it speaks volumes against his position that he was psychologically detained.

The [accused's] conduct in approaching the officers hardly fits the image of a frightened youth who felt psychologically compelled to submit to the police in deprivation of his liberty. On the contrary, it speaks to a street-wise teenager who quickly sized up the situation and determined that his best defence in the circumstances was a strong offence. Put simply, this was not a case of psychological compulsion exerted by the police; it was a case of psychological control attempted by the [accused].

And when the [accused] realized that his ploy was not working, he began to panic. That explains his nervous behaviour when [the officer] walked up the stairs and began to search for the black knapsack. ... At the very least, the evidence is as consistent with [the fear of being caught] as it is with the scenario urged by the [accused] (feeling compelled to respond to the police).

I do not suggest that the [accused] did not feel some stress in the situation. No doubt, he felt somewhat intimidated by the police given the

"The fact that the police may have reasonable grounds to detain someone does not mean that detention will automatically occur when the police approach and start talking to that person; the same holds true when the police do not have reasonable grounds to detain."

obvious power imbalance that existed. He may also have felt some anxiety by reason of the positioning of the police car, the fact that both officers got out of the car and the manner in which [the officer] attempted to prevent him and [his companion] from communicating with each other. The trial judge quite properly took those factors into account in assessing the issue of detention. But respectfully, he went wrong on the legal test. In my view, had he applied the correct legal test to the uncontradicted evidence of the officers and placed the onus on the [accused], where it belonged, he would have found that psychological compulsion had not been made out, at least not on a balance of probabilities. In the circumstances, evidence from the [accused] was a virtual must, and it was not forthcoming.

In assessing whether the [accused] was detained, the trial judge took into account other factors that in my respectful view, he should not have. Specifically, I do not consider it relevant that one of the officers "had had dealings with one of the males [his companion] only weeks earlier". [The accused's companion's] detention was not in issue and nothing in the record indicates that [the accused] was even aware of [his companion's] prior difficulties with the police.

Nor do I consider it relevant that the police "drove by and returned to question the accused", rather than simply "driv[ing] up and stop[ping]". With respect, I am not at all sure that I understand the difference. Regardless, there is no evidence that [the accused] saw the police drive by and no evidence that this had any impact on him if he did.

Finally, I fail to see how "the running of CPIC checks" was significant in the circumstances of this case. [The accused] did not testify and there is no evidence he knew that [the officer] was doing a CPIC check on him when he used his hand-held radio, or if he did, that it had any impact on him. [paras. 61-67]

If the trial judge had applied the proper legal principles he would have concluded there was virtually nothing to substantiate a finding of psychological detention. Since there was no detention, there was no requirement that the officer advise the accused of his right to counsel before questioning him about the bag. His response was therefore admissible and the officer could rely on it in deciding the bag had been abandoned. The accused had disclaimed any privacy interest in the bag and could not rely on s.8 to challenge the

lawfulness of the officers search. The police did not breach the accused's rights and there was no reason to turn to s.24(2) of the *Charter*.

In any event, even if the accused's *Charter* rights were breached, the evidence of the gun should be admissible under s.24(2). The officers acted in good faith and would have inadvertently "crossed the 'murky' line between legitimate questioning and arbitrary detention." There was no evidence the police were motivated by racial profiling or harassment. Further, the offences for which the accused was charged were very serious:

This case involves a loaded handgun in the possession of a student on school property. Conduct of that nature is unacceptable without exception. It is something that Canadians will not tolerate. It conjures up images of horror and anguish the likes of which few could have imagined twenty-five years ago when the *Charter* first came to being. Sadly, in recent times, such images have become all too common - children left dead and dying; families overcome by grief and sorrow; communities left reeling in shock and disbelief.

That is the backdrop of this case and in my view, it provides the context within which the conduct of the police should be measured, for purposes of s. 24(2), in deciding whether we should be excluding completely reliable evidence (here, the gun) and freeing potentially dangerous people without a trial on the merits.

Viewed that way, I believe that absent egregious conduct on the part of the police, most Canadians would find it unconscionable for [the accused] to be set free without a trial on the merits. By egregious conduct, I have in mind conduct that the community simply would not countenance, even if this meant allowing a potentially violent criminal to escape punishment. Without being specific, it would involve conduct that showed disdain for the rights and freedoms guaranteed by the *Charter* and that struck at the core values those rights and freedoms were meant to protect. No such conduct (or anything close to it) exists in this case. It follows, in my view, that the gun should have been admitted into evidence under s. 24(2). [para. 80-82]

The appeal was allowed, the accused's acquittals set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

PSYCHOLOGICAL DETENTION REQUIRES COMPULSION

R. v. Anthony, 2007 ONCA 609



A police officer arrived at the scene of a suspicious sudden death at the accused's apartment. He was told by another investigator to get a statement from him. The officer went into the apartment and saw the female victim lying nude with a lot of blood around her hips. He believed that foul play was a possibility and that the situation appeared a "little suspicious", but he did not have reasonable grounds to believe an offence had been committed. The officer approached the accused and said that police "needed" to take a statement from him. They walked to the police cruiser and the accused asked to sit in the front seat, but the officer asked him to sit in the back. The officer again said that the police "needed" his help. He did not caution the accused about his right to counsel or his right to silence.

The accused disclosed that he had "normal sex" twice with the victim when she was either unconscious or dead. He said that after he penetrated her with his fist, he washed his hands and came back and had normal sex. He then said that much later in the morning after he woke up he got angry with the victim. She would not wake up so he thought she was passed out drunk. He then went back into bed with her and had normal sex. The victim had bled to death from massive internal injuries. The accused was charged with first degree murder under s.235(5)(b) of the *Criminal Code*—causing death while committing sexual assault.

At trial in the Ontario Superior Court of Justice the accused was convicted of murder. Experts testified that the accused's fist thrusts into the victim's vagina and anus would have caused such excruciating pain that no one could have tolerated them or consented to that level of injury. As for his statement to the officer on scene, the trial judge found that

"At the heart of a detention – in this case an alleged psychological detention – is compulsion. An individual acquiesces to a demand by the police because the individual reasonably believes there is no choice but to comply."

he was not detained when he made it and that it was voluntary. He was sentenced to life in prison without parole eligibility for 25 years.

The accused appealed his conviction to the Ontario Court of Appeal submitting, among other grounds, that the trial judge erred in holding that he was not detained and therefore was not entitled to be advised of his right to counsel. The Ontario Court of Appeal unanimously dismissed the accused's appeal on this issue. Justice Laskin pointed out that if the accused was detained when he gave his statement to the officer at the scene, he was entitled to be advised of his right to counsel. However, the trial judge ruled he was not, a decision well supported by the evidence. Justice Laskin stated:

At the heart of a detention – in this case an alleged psychological detention – is compulsion. An individual acquiesces to a demand by the police because the individual reasonably believes there is no choice but to comply.

In [the officer's] interview of [the accused], the trial judge found no compulsion. The following evidence reasonably supports his finding:

- The trial judge characterized [the officer's] "need" for a statement as a request, not a demand. This characterization was reasonable. As the trial judge held, this request was not "imbued with the psychological compulsion that the courts are vigilant for."
- [The officer] interviewed [the accused] for over an hour, but his questions did not contribute to an atmosphere of oppression or compulsion. Indeed, he asked few questions, and those he asked were mainly "tell me what happened." [The accused] was eager to tell his story. [The officer] listened and took notes.
- The location for the interview did not create an atmosphere of oppression or compulsion. The back of the police cruiser was selected for its convenience and privacy. Although the door was closed, [the accused] was allowed to leave, and did so to get a glass of water and smoke a cigarette.
- When the interview took place, [the officer] did not believe that [the accused] had committed a criminal offence. He certainly

did not have reasonable and probable grounds to arrest him. He was simply inquiring into a suspicious death.

- The police did not know that [the victim's] death resulted from a crime until the delivery of the autopsy report the following day. The report concluded that [the victim] could not have consented to the acts that caused her death. [The officer] did not know this critical piece of information when he interviewed [the accused].
- As [the accused] did not testify on the voir dire, there was no evidence from him that he felt compelled to comply with [the officer's] request for a statement.

Without a finding of detention, there was no need to advise the accused of his right to counsel under s.10(b). The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

VEHICLE PASSENGER'S ID REQUEST BREACHES CHARTER

R. v. Harris, 2007 ONCA 574



A police officer stopped a van after watching it make a left turn without signaling. He found three people in it; the driver, the accused (seated in the front passenger seat without his seatbelt on), and a woman sitting in the back. The officer was concerned with his safety after he saw the accused lean forward with his left hand down the small of his back. All the occupants were ordered to keep their hands in view.

The driver produced his licence, ownership, and insurance documents when asked, and the accused and female passenger were asked to identify themselves. They did so and their names were run through CPIC. The accused was arrested after it was learned he was on bail, with a curfew that he was breaching. During a search, a large bulge was detected protruding from his lower back, tucked into the waistband of his underwear. It turned out to be a package containing 17 grams of cocaine. The accused was then arrested for

possessing cocaine and advised of his right to counsel. The other two occupants were released without charge, but the accused was charged with possessing cocaine for the purpose of trafficking.

At trial in the Ontario Court of Justice, the trial judge found the officer was entitled to stop the vehicle under Ontario's *Highway Traffic Act (HTA)* for the apparent violation. However, she held the officer's request for identification from the accused was not related to the seatbelt infraction, but was merely made out of routine, to check on CPIC. Because the request for identification had nothing to do with the enforcement of the *HTA*, the detention changed from a lawful stop to an arbitrary one, thus breaching the accused's rights under s.9 of the *Charter*. The judge also found that the accused was denied his right to counsel under s.10(b) and was subject to an unconstitutional search when he was asked to identify himself. The cocaine seized was held inadmissible under s.24(2) and the accused was acquitted.

The Crown appealed to the Ontario Court of Appeal arguing that there were no *Charter* breaches and that even if there were, the evidence should not have been excluded under s.24(2). The Ontario Court of Appeal allowed the Crown's appeal and admitted the evidence despite a finding the police violated the accused's rights.

The Detention

Determining whether or not a person is detained involves a fact-specific inquiry. The Court described detention as follows:

A person is detained when physically restrained by the police. Psychological restraint will also constitute detention. A person who complies with a police direction or command reasonably believing that he or she has no choice is detained for the purposes of ss. 9 and 10 of the *Charter*. [references omitted, para. 17]

"Psychological restraint will also constitute detention. A person who complies with a police direction or command reasonably believing that he or she has no choice is detained for the purposes of ss. 9 and 10 of the Charter."

Justice Doherty, writing the majority opinion of the Court, declined to decide whether the accused, a passenger in the vehicle, was detained the moment the vehicle was pulled

over. He did, however, hold a psychological detention of the accused occurred when he was ordered to keep his hands in open view. He would have reasonably understood that he was not free to leave the vehicle at that point. He therefore was detained during the remaining encounter with the officer and was detained when asked to identify himself.

The detention, however, was not arbitrary as ruled by the trial judge. The officer was entitled to pull the vehicle over for the traffic violation under the *HTA* and was acting lawfully when he took control of the movement of the passengers in the vehicle as he approached it. In overruling the trial judge on finding the detention arbitrary, Justice Doherty stated:

I cannot agree that the request of [the accused] for identification for purposes unrelated to the Highway Traffic Act altered the constitutionality of his detention. [He] was detained by virtue of the lawful stopping of the vehicle, the ongoing investigation of the Highway Traffic Act violation, and [the officer's] lawful assuming of control over the movements of the passengers in the vehicle. On the trial judge's factual findings, [the officer's] request for identification did not prolong or alter the nature of [the accused's] detention. He remained in exactly the same position he would have been in had [the officer] questioned only the driver.

[The accused's] detention, that is the limitation on his personal physical freedom imposed by [the officer's] actions, was not arbitrary in the sense that it was random or without individualized cause. The detention flowed from the officer's observations of the vehicle, his decision to pursue the Highway Traffic Act investigation, and the reasonable steps he took to assume control of the occupants of the vehicle. As the trial judge observed, these observations gave [the officer] proper grounds to detain the passengers in the vehicle during the Highway Traffic Act investigation. In my view, the request that [the accused] identify himself, even though improper for the reasons set out below, did not render [the accused's] detention arbitrary. [paras. 26-27]

"Where the subject of the questioning is under police detention and reasonably believes that he or she is compelled to provide the information sought in the questions, I do not think it distorts the concept of a seizure to describe the receipt of the information by the police as a non-consensual taking of that information from the detained person."

Although the majority concluded the detention was not arbitrary, it rejected the Crown's submission that the lawful detention of the driver and passengers in the vehicle gave the police the authority to question the driver and passengers for legitimate police purposes unconnected to the *HTA* investigation. In this case, there was no lawful authority for questioning the accused. He was a passenger in a vehicle in which the driver was being investigated for making an improper turn. He was not asked for identification in relation to any potential *HTA* violation. The officer wanted the information to conduct a CPIC query for any outstanding court orders and to record information about his movements. Had the officer had the authority to ask the accused for identification, the information could be used for other purposes, like checking CPIC or more general intelligence gathering purposes. However, this improper questioning did not render the accused's detention as an incident to the *HTA* stop and investigation arbitrary or unlawful.

The Seizure

Justice Doherty ruled that the accused's s.8 *Charter* right was breached when the officer asked him to identify himself:

Section 8 of the Charter protects against unreasonable searches or seizures. A seizure is a non-consensual taking by a state agent of anything in which the person asserting a s. 8 right has a reasonable expectation of privacy. The thing taken may be tangible or intangible. Information can be seized. At its most fundamental, s. 8 preserves an individual zone of privacy against state intrusion. The state can enter into that zone if the intrusion meets a reasonableness standard.

Answers to police questions may or may not give rise to a s. 8 claim. As with other aspects of the s. 8 inquiry, a fact-specific examination of the circumstances is necessary. Where the subject of the questioning is under police detention and reasonably believes that he or she is compelled to provide the information sought in the questions, I do

not think it distorts the concept of a seizure to describe the receipt of the information by the police as a non-consensual taking of that information from the detained person. [references omitted, paras. 33-34]

In this case, the seizure of the identification information was unreasonable. Justice Doherty found the request for identification and running it through CPIC was the functional equivalent of asking the accused "a series of questions about his criminal past, his bail status, and the terms of any bail" he might be under. The majority continued:

A person under police detention who is being asked to incriminate himself has more than a reasonable expectation of privacy with respect to the answers to any questions that are put to him by the police. That person has a right to silence unless he or she makes an informed decision to waive that right and provide the requested information to the police. In the circumstances, [the accused's] identification in response to the officer's question constitutes a seizure and attracts s. 8 protection.

The seizure was unreasonable. ...[The officer] had no reason to suspect [the accused] of anything when he questioned him and requested his identification. The purpose for the stop and the consequential detention of [the accused] and the other occupants of the vehicle had nothing to do with the request for [the accused's] identification. The purpose of the stop did not justify an at large inquiry into [the accused's] background or his status in the criminal justice system. That was the effect of the request for identification. ...[The officer] expanded a Highway Traffic Act stop into a broader and unrelated inquiry. [The accused's] identification of himself provided the entrée into that broader and unrelated inquiry.

... If, as in this case, a request for identification is made in circumstances of detention in which the detained individual reasonably feels compelled to answer the request for identification, then the question assumes a coercive quality in the nature of a demand, which suggests a state seizure of the response. [references omitted, paras. 40-42]

"A person under police detention who is being asked to incriminate himself has more than a reasonable expectation of privacy with respect to the answers to any questions that are put to him by the police."

The seizure of the identification information was warrantless and without reasonable cause and therefore breached s.8 of the *Charter*. It should be noted, that under the s.24(2) analysis Justice Doherty said that had the officer decided to give the accused a ticket for not wearing his seatbelt, he was entitled to ask for identification so he

could issue the ticket. Further, he would have been entitled to conduct a CPIC inquiry using that identification. And had this occurred, the same results would have followed. In this case, however, the officer testified that his reason for asking for identification was part of his routine procedure. He did not understand that he needed a specific reason for requesting identification from the passenger nor advert his mind to the seatbelt violation. In other words, the officer had a lawful means to obtain identification (for the purpose of ticketing) and do exactly what he did. The officer, however, was wrong in proceeding on the basis he could ask for identification as part of his routine procedure in identifying passengers of stopped vehicles.

Right to Counsel

The accused conceded that the police are not required to give s.10(b) rights during a brief lawful *HTA* roadside stop. Since the accused "was lawfully detained as part of a *HTA* brief roadside detention" it flowed that this detention did not trigger the rights set out in s. 10(b) of the *Charter*. Thus, the police did not offend s. 10(b) when the officer did not advise the accused of his right to counsel before asking him for identification. The absence of any advice about the right to counsel before asking for identification or whether he could refuse to provide identification, however, did further confirm that the officer's request for identification was more of a demand for identification, which constituted a seizure.

Admissibility

The majority found the trial judge erred in excluding the cocaine as evidence. The admission of the evidence would not affect the fairness of the trial. Nor was the breach serious enough to warrant

exclusion of the crucial and reliable evidence of a serious crime. Its admission would not bring the administration of justice into disrepute.

A Different Opinion

Justice O'Connor wrote a dissenting opinion. In his view there were no *Charter* breaches. He agreed that the officer had grounds to stop the vehicle and ask the driver for identification and also acted properly in directing the occupants to keep their hands where they could be seen. The officer had seen the accused moving his hands towards the small of his back and was understandably concerned about safety. However, unlike the majority, Justice O'Connor ruled that there was no s.8 violation.

When asked for identification, nothing of a personal or confidential nature was revealed. Nor did it touch on a biographical core of personal information or disclose intimate details of lifestyle and personal choices. Justice O'Connor stated:

[The accused] had little, if any, expectation of privacy in his name. People routinely identify themselves in a wide range of contexts and situations. Generally, an individual's identity is broadly known within his or her community and can be easily ascertained by others. In this case, for example, [the officer] might have asked the driver or the other passenger for [the accused's] name.

To date, courts have not held that a person's identity is constitutionally protected under s. 8 of the Charter....[paras. 90-91]

As for the CPIC check and what it revealed, Justice O'Connor went on to say:

[The officer] did not conduct an unreasonable search and seizure by obtaining the information about [the accused] contained in the CPIC system. This information, which included the details of a bail order, had been entered into the system on an earlier date. As a national repository of police information, CPIC is a vital shared resource within Canada law enforcement. As such, maintaining the CPIC system is a normal law enforcement function. There is nothing improper for law enforcement agencies to maintain these types of records. Rather, doing so is an essential and important part of legitimate law enforcement activities. The information that is in issue on this

appeal, information about a bail order, originated in a public court process and as such, would be available in the court files. The bail order is the paper record of the court reflecting the order made in a public courtroom. Once entered in the CPIC system, this information was to be made available to law enforcement officers who had access to that system.

In my view, an individual such as [the accused], does not have a reasonable expectation of privacy with respect to information in CPIC, at least insofar as police officers are concerned. A reasonable and prudent individual would assume that information about him or her emanating from a public court process will be available to police officers through an information data system such as CPIC. [paras. 93-94]

Justice O'Connor concluded that the question asking the accused to identify himself and the follow-up CPIC enquiry did not breach his privacy interest. Even if the accused felt compelled to identify himself, it did not turn what was otherwise constitutional into a s.8 *Charter* breach.

The Crown's appeal was allowed, the evidence was admissible, the acquittals set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **False**—see *R. v. Vandenbosch* (at p. 14 of this publication).
2. (c) **Reasonable probability**—see *R. v. Mouland* (at p. 4 of this publication).
3. (b) **False**—see *R. v. Washington* (at p. 6 of this publication).
4. (a) **True**—see *R. v. Singh* (at p. 27 of this publication).
5. (a) **True**—see *R. v. Tran* (at p. 23 of this publication).
6. (a) **British Columbia**—see *British Columbia: Canada's Most Explosive Province* (at p. 21 of the publication)

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One World, One Voice, One Purpose



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